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Strategies concerning the choice of forum and applicable law

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Choice of non-EU / Swiss forum & effects on goodwill indemnity claims

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Interplay in the EU and Switzerland between the choice of forum and applicable law

- **Choice of forum**: "***harmonized***"
  - Between **EU** states: Regulation 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) (**Brussels I Recast**)
  - In relation to **Switzerland**: Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters of 30 October 2017 (**Lugano Convention**, corresponds to old Brussels Regulation 44/2001)
- **Applicable law**: "***not harmonized***"
  - In **EU** states: Regulation 593/2008 on the law applicable to contractual obligations (**Rome I Regulation**)
  - In **Switzerland**: Federal Act on Private International Law of 18 December 1987 (**PILA**)

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Choice of forum under the Lugano Convention

- **Choice of exclusive jurisdiction of Swiss courts should be accepted by all EU and EFTA* courts** (Art. 23 (1)), including the courts at the place where the agent or distributor operates
  - Lugano Convention contains *no* specific mandatory provisions applicable to agency or distribution agreements
- **Courts in other "Lugano states"** *should* declare that they have **no jurisdiction** (Art. 26 (1))
- **Swiss judgments should be recognized and enforced in all EU/EFTA states** (Art. 33 (1), 38 (1); limited grounds for non-recognition; Art. 34 et seq.)

* excluding Liechtenstein

Applicable law under Rome I Regulation and Swiss PILA

EU (Rome I Regulation):		**Switzerland (PILA):**
• Law chosen by the parties (Art. 3)	=	• Law chosen by the parties (Art. 116 (1))
• *Absence of choice*: Law of country where franchisee/ distributor has habitual residence (Art. 4 (1) (e)-(f))	=	• *Absence of choice*: Law of state of habitual residence of party performing characteristic obligation (Art. 117)
• Overriding mandatory provisions (Art. 9) [cf. CJEU INGMAR & UNAMAR]	≠	• Mandatory provisions of foreign law (Art. 19)

«Overriding mandatory provisions»: the Swiss way

- Swiss court practice is **reluctant to apply foreign overriding mandatory provisions** based on Art. 19 PILA
- PILA: «*… may be taken into consideration …*» | Rome I Regulation: «*Effect may be given to…*»

- ***Unlikely* that foreign goodwill indemnity provisions qualify as «overriding mandatory provisions»** in terms of Art. 19 PILA
  - Switzerland provides for goodwill indemnity entitlement as well (**Art. 418u** of the Swiss Code of Obligations (**CO**)),
  - *but* subject to certain statutory differences and
  - the Swiss court practice is reluctant when applying Art. 418u CO.

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Goodwill indemnity in Switzerland: Article 418u Code of Obligations

(1) Where the agent's activities have resulted in a ***substantial expansion of the principal's clientele*** *and* ***considerable benefits accrue even after the end of the agency relationship*** *to the principal or his legal successor* ***from his business relations with clients acquired by the agent****, the agent or his heirs have an inalienable claim for adequate compensation, provided this is* ***not inequitable****.*

(2) The amount of such claim must not exceed the agent's ***net annual earnings*** *from the agency relationship calculated as the average for the last five years or, where shorter, the average over the entire duration of the contract.*

(3) No claim exists where the agency relationship has been ***dissolved for a reason attributable to the agent****.*

Key differences between Art. 418u CO & Art. 17 (2) Commercial Agents Directive 86/653/EEC:

- **Net** annual earnings vs. average annual remuneration
- Swiss courts stricter regarding **(in)equitability** of entitlement to goodwill indemnity (e.g., entitlement often inequitable in case of long contractual relationships)
- Swiss courts strict regarding **application** of Art. 418u CO **by analogy to (exclusive) distributors**
- …

Conclusion

- The choice of exclusive jurisdiction of Swiss courts and Swiss law is an **attractive strategy** from the principal's/supplier's perspective and **reduces risks associated with goodwill indemnity claims**.

- The **effectiveness** of the strategy primarily depends on the (strict) application of the Lugano Convention by non-Swiss courts, especially at the places where the commercial agent/distributor operates.

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France Cases

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- In French Law, once the franchising or distribution contract is terminated, the distributor or the franchisee **has no right to a goodwill compensation.**

- Indeed, if the contract is lawfully terminated, the franchisee or the distributor **has no right to an indemnity**, whatever the importance of the goodwill created by him.

- However, according to Article L. 442-1, II of the French Commercial Code, to terminate the commercial relationship, the franchisor or the supplier **has to give a reasonable notice**, taking into account notably the duration of the commercial relationship (even if he simply decides not to renew the franchising or distribution contract at the end of its term).

- In case of an absence of notice period or insufficient notice period, in most cases, the loss of the franchisee or distributor **is assessed in consideration of its expected margin**, during the notice period that has not been executed.

- In an international relationship (where the franchisee or distributor is in France), in order to avoid the application of Article L. 442-1, II, **one possible strategy** is indeed to choose forum clause in favour of a court based outside France and foreign law.

- However, this strategy **may not be efficient**, particularly as the French Minister of the Economy has the power to take action against one of the parties on the basis of Article L. 442-1, II.

- In recent years, the question of the applicability of Article L. 442-1, II in an international context has given rise to:
  - **Numerous decisions** by the Paris Court of Appeal, the French Supreme Court (Cour de Cassation) and even a recent ruling by the European Court of Justice (December 22, 2022, C-98/22, Eurelec Trading).
  - **New Article L. 444-1 A of the French Commercial Code** : "*Chapters I, II and III of this Title shall apply to any agreement between a supplier and a buyer where the products or services concerned are marketed on French territory.* ***These provisions are of public policy****. Any dispute relating to the application of these provisions shall fall within the exclusive jurisdiction of the French courts, subject to compliance with European Union law and international treaties ratified or approved by France and without excluding arbitration*".

- With regard to jurisdiction, in summary, it can be seen that :
  - **For disputes between the parties**, the Brussels I bis Regulation continues to apply. Therefore, the clause providing for the jurisdiction of foreign courts is therefore applicable in principle (subject, however, that the clause is drafted in such a way as to include disputes relating to the termination of the commercial relationship).
  - **For disputes against one of the parties initiated by the Minister of the Economy following investigations carried out by the French Administration**, the Brussels I bis Regulation does not apply. Therefore, the clause providing for the jurisdiction of foreign courts is not applicable in principle.

- With regard to governing law, in summary, it can be seen that :
  - **For disputes between the parties**, Article L. 442-1, II could not be qualified as a police act, as only the private interests of the parties are affected. Therefore, the clause providing for the application of a foreign law is applicable in principle.
  - **For disputes against one of the parties initiated by the Minister of the Economy**, Article L. 442-1, II could be qualified as a police act, as the Minister's action is intended to defend the state's economic public policy. Therefore, the clause providing for the application of a foreign law is not applicable in principle.

Decision of the Paris Court of Appeal, June 21, 2017, n°15/18784 :

The article L. 442-6 of the Commercial Code is a public policy law and has no equivalent in English law. It is therefore, in any event, applicable to the dispute according to the public policy of the forum of articles 21 of the Rome I Regulation and 26 of the Rome II Regulation.

Decision of the Paris Court of Appeal, June 21, 2017, n°15/18784 :

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Decision of the Paris Court of Appeal, January 9, 2019 - n°18/09522 :

The provisions of Article L. 442-6, I, 5° of the French Commercial Code are applicable from a territorial connection, as soon as the contractual products or services are intended for the French market or are intended to be distributed in France. It is therefore a police act that is binding on the court of the forum, even if the applicable law is a foreign law.

The judges believe it is a police act for several reasons :

- Firstly, compliance with Article L. 442-6, I, 5° of the French Commercial Code was deemed crucial by the legislator to safeguard the economic organization of France.
- Secondly, the civil penalty incurred by the perpetrators of the practices also demonstrates the crucial nature of these rules.
- Finally, in a decision dated March 3, 2009 (07-16.527), the Court of Cassation accepted that Article L. 441-6 of the French Commercial Code, which concerns transparency rules, was based on "particularly imperative public policy considerations", a term which allows the qualification of this provision as a police law. The fate of article L. 442-6, which lists civilly sanctioned conduct cannot be different.

Decision of Court of Cassation - Commercial Chamber - July 8, 2020 - n° 17-31.536 :

According to the Court of Cassation, article L. 442-6, I, 2° and article L. 442-6, II, d) of the Commercial Code provide for mandatory provisions, compliance with which is considered crucial for the preservation of a certain equality of arms and fairness between economic partners. They are indispensable for economic and social organization. They are therefore police act that are binding on the court of the forum, even if the of the forum, even if the applicable law is a foreign law.

Decision of the Paris Court of Appeal, June 2, 2021, n°17/16997 :

The Court of Appeal concerning the claimants' request for compensation for the brutal termination of commercial relations recalled that it was necessary to determine whether Article L.442-6, I, 5 of the Commercial Code was applicable under the police act.

In this respect, the Court specified that even supposing that Article L. 442-6, I, 5° of the Commercial Code is a police act, the Court must determine whether there is a connection between the transaction and France about the objective of protection pursued by the text. This text guarantees any French company established in France sufficient notice when its partner, whether French or foreign, decides to break off the established relationship.

Decision of the Paris Court of Appeal, February 23, 2022, n°20/07566 :

The Paris Court of Appeal recalled the public policy nature of the rules of specialized jurisdiction in the context of the application of a jurisdiction clause.

Indeed, when the jurisdiction clause is compatible with the public policy provisions of Articles L 442-6 and D 442-3 of the Commercial Code, then the clause in question intended to be applied if it is drafted in a sufficiently broad and comprehensive manner to refer to disputes arising not only from the contractual relationship but also from the brutal breach.

Decision of the Paris Court of Appeal, September 28, 2022, 22/04847 :

The articles L. 442-4, III and D. 442-3 of the French Commercial Code are intended to adapt the jurisdiction and procedures of the courts to the technical nature of litigation concerning restrictive competition practices, but not to reserve it for the state courts. Consequently, the Court specifies that recourse to arbitration is not excluded by the mere fact that mandatory provisions, even if they constitute a police act, are applicable to the substance of the dispute.

Newarticle L. 444-1 A of the Commercial Code (Descrozaille law)

“Chapters I, II and III of this Title shall apply to any agreement between a supplier and a buyer where the products or services concerned are marketed on French territory. **These provisions are of public policy**. Any dispute relating to the application of **these provisions shall fall within the exclusive jurisdiction of the French courts**, subject to compliance with European Union law and international treaties ratified or approved by France and **without excluding arbitration**”.

The texts referred to in the article include the rules on transparency in commercial relations (commercial negotiation, invoicing, payment deadlines, etc.), the provisions specific to agricultural products and foodstuffs, but also all practices restricting competition, including significant imbalance and the brutal rupture of established commercial relations.

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Colombia

Choice of Forum and Choice of Law - Strategy to Overcome Good Will

Compensation in Agency Contracts

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I. **Rule of Law**

- **Special Protection for the Agent upon Contract Termination**
- **Applicable Law for Agency Contracts Executed in Colombia**
- **International Arbitration Rules**
  - **International Treaties**
  - **Arbitration Law**

II. **Choice of Forum (International Arbitration) and Choice of Law (Foreign Law) as a Strategy to Overcome Good Will Compensation**

- **Arguments Against / Arguments in Favor**
- **Case Law - Supreme Court Decision SC8453-2016, June 24, 2016 – HTM LLC v Fomento de Catalizadores Foca SAS**

III. **Conclusions**

I. Rule of Law - Colombia

Special Protection for the Agent upon Contract Termination

Article 1324 Commercial Statute. *The commercial agency contract is subject to the same justifications for termination as the "mandate" (general agency contract).* ***Justified termination obligates the principal to pay the agent, for each year of contract duration, an amount equal to one-twelfth (1/12) of the average commission of remuneration received during the previous 3 years of the contract (or the yearly average of everything received if the contract duration is shorter than 3 years).***

In addition to the payments provided in the previous paragraph, ***if the principal terminates the contract without justification, the agent is entitled to indemnification for his efforts in promoting the goodwill of the principal's business.*** *This shall be determined by expert appraisers on the basis of the duration, importance and volume of the business handled during the contractual relationship.*

If the contract is terminated due to the agent's fault, the agent shall not be entitled to receive any indemnification or payment.

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Applicable Law for Agency Contracts Executed in Colombia

Commercial Statute. Article 1328. *All agency contracts executed in Colombia are subject to the laws of Colombia. Any provision to the contrary is null and void.*

Arbitration Statute (Law 1563 Of 2012). Section 3 International Arbitration. Article 101. Rules Applicable to the Substance of the Litigation. *The arbitral tribunal will decide in accordance with the rules of law chosen by the parties. The indication of the law or legal system of a State shall be understood to refer, unless otherwise stated, to the substantive law of said State and not to its rules of conflict of laws.*

If the parties do not indicate the rule, the arbitral tribunal will apply those rules of law that it deems pertinent.

The arbitral tribunal will decide ex aequo et bono only if the parties have authorized it. In any case, the arbitral tribunal will decide in accordance with the stipulations of the contract and taking into account the commercial uses applicable to the case.

International Arbitration Rules

International Treaties

- New York Arbitration Convention – The Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958
- Panama Convention – Inter-American Convention on International Commercial Arbitration. 1975
- Montevideo Convention - Inter-American Convention on Extraterritorial Validity of Foreign Judgments and Arbitral Awards (1979)

Arbitration Statute

- Law 1563 of 2012 (Art. 62)

Criteria for International Arbitration

Article 62 Arbitration Statute. *(…) Arbitration is understood to be international when: a) The parties to an arbitration agreement have, at the time the agreement is entered into, their domiciles in different States; or b) The place of performance of a substantial part of the obligations or the place with which the object of the dispute has the closest relationship, is situated outside the State in which the parties have their domiciles, or c) The controversy submitted to an arbitral decision affects the interests of international trade.*

For the purposes of this article: 1. If any of the parties has more than one address, the address will be the one that is most closely related to the arbitration agreement. 2. If a party does not have any domicile, their habitual residence will be taken into account. (…)

I.

II. Choice of Forum and Choice of Law as a Strategy to Overcome Good Will Compensation

For Agency Contracts Executed in Colombia

Foreign Court/ Foreign Law	Domestic Arbitration/ Foreign Law	International Arbitration/ Foreign Law
Not posible Article 1328 Commercial Statute	Not posible Article 1328 Commercial Statute	Possible, but still an ongoing discussion Article 1328 Commercial Statute Article 101 of Arbitration Statute Case law.

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International Arbitration / Foreign Law
A Valid Option to Overcome Indemnity Compensation For Agency Contracts Executed in Colombia

Arguments Against	Arguments In Favor
Article 1328 providing appliance of Colombian law prevails because: - It is a mandatory, domestic public policy rule. - It is a special rule for “agency”, over a general rule for “arbitration”. - It cannot be overruled by the parties in any case, even if international arbitration is agreed.	Article 101 of Arbitration Statute prevails because: - It was enacted after Article 1328 of Commercial Statute. - Arbitration Statute allows the parties to choose aplicable law in all contracts with international arbitration clauses. - Principle of freedom of choice is essential for the international trade and the international arbitration. - Article 1328 is not an international public policy rule. - Case law arguments.

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Supreme Court Decision SC8453-2016, June 24, 2016 – HTM LLC v Fomento de Catalizadores Foca SAS

The Supreme Court recognized a foreign partial final international arbitral award in a case of an agency contract executed in Colombia, with foreign arbitration (seat in Texas, US) and foreign law (Texas law).

It applied the principle of kompetenz kompetenz (arbitral tribunals have jurisdiction to decide their own jurisdiction without interference of the local judge).

Article 1328 does not challenge the objective arbitrability of the matter.

Article 1328 is not a matter of Colombian international public policy, so it cannot be alleged to prevent the recognition of the international arbitral award.

Article 1328 is a “protective” domestic public policy rule (protects a specific sector, the agents, and do not represent the most fundamental principles of a state), not a “directive” public policy rule (encompasses the most fundamental principles of a judicial structure). Only violation of “directive” public policy rules is relevant to the international public policy, to prevent the enforceability of the foreign arbitral award.

Article 1328 did not grant the Colombian courts exclusive jurisdiction.

International arbitral awards are recognized through a simplified proceeding, which requires compliance with a number of formal requirements and can only be denied under specific legal grounds, not present in this case.

III. Conclusions

There are solid arguments, supported by the 2016 Supreme Court decision, to sustain that in the case of international arbitration the parties can also agree on a rule of law that does not include the good will compensation for the agent upon contract termination, as an effective strategy to overcome the special protection granted to the agent by the Commercial Code.

This is not exempt, however, from the risk that the Supreme Court changes its position and denies the recognition of these arbitral awards, and therefore the risk that they are not enforceable in Colombia.

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The New Commercial Agency Law in the United Arab Emirates

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I. UAE Law

II. Courts in the UAE

III. Why choose Arbitration and not Courts?

IV. Mandatory Rules in CALV.

V. Enforcement of Arbitral Awards under the New York Convention

VII. Strategic Steps to better position principals vis-à-vis UAE agents

I. UAE Law

- New Federal Law No. 3/2022 on Commercial Agencies (**"CAL"**) will come into effect on **15 June 2023.** Existing agencies under the Old Law will not be subject to the newly introduced termination terms until 15 June 2025. The grace period extends to 10 years in the event that the agent invested more than DHS 100 Mil. (USD 27 Mil.), or if 10 years lapsed since the registration of the agency under their name, so not before 15 June 2033

- Federal Law No. 18 of 1993 ("**Commercial Code**") and Federal Law No. 5/1985 (**"Civil Code"**) are gap-filling laws.

- The CAL only applies to commercial agents/distributors who have been formally registered in the Commercial Agencies Registry at the Ministry of Economy (Article 3 CAL).

- In practice, many suppliers appointed commercial agents/distributors on a non-registration basis, and historically, unregistered agency contracts were considered valid, but only subject to the Commercial Code and Civil Codes.

II. Courts in the UAE

- Under the Old CAL, courts maintained exclusive jurisdiction regarding the validity, existence, termination of the contract (controversial exception: Case 362/2019 Commercial Cassation, which confirmed the dismissal of a case in court based on an arbitration agreement). Under Old CAL, arbitration clauses in agency contracts were considered invalid by UAE courts.

- Article 5 (2) CAL: UAE courts maintain default jurisdiction. Article 26 CAL: arbitration clauses in agency contracts are now recognized.

- No dispute may be heard in court, before it is referred to the 'Commercial Agencies Committee'. The Committee is bound to issue a decision (practically an advisory opinion) within 120 days. The decision becomes binding only after the lapse of 60 days from the date of notice thereof, if a claim is not filed in court.

III. Why choose Arbitration and not Courts?

- Arbitration is now recognized in CAL; however, party autonomy-based jurisdiction of foreign courts is not expressly stated. Claims before the Committee or courts before the date of CAL publication may not be arbitrated.

- Jurisdiction of UAE courts should be avoided because:
  - Courts are precluded from applying any other law but **UAE law**, regardless of any parties' choice of law – New CAL provides strong protections to the agent (Art.5 CAL).
  - Any dispute must first be referred to Commercial Agencies Committee (Art.24 New CAL); this mandatory prerequisite procedure will **delay** the finality of disputes. Yet to be seen whether arbitration requires the same.
  - A reasonable chance to avoid compensation payments that could be awarded by courts. Party autonomy may prevail in arbitration.

- Open Question: Will UAE courts uphold arbitration clauses in cases where the relevant contract is not in line with mandatory UAE law? Probably yes, separability.

IV. Mandatory Rules in CAL

- Statutory protections afforded to a registered agent under CAL are considered mandatory, such as:

  - **Exclusivity** in the designated territory (Article 7 CAL).
  - **Commission** for any transactions, including those executed by the foreign principal themselves or through intermediaries within the exclusive Territory (Art.8 CAL).
  - In case of any dispute, agent may request competent authorities to **seize the goods** (i.e., import ban) until the ongoing dispute is resolved (Art. 20 CAL). Removal requires Ministerial approval.
  - **Compensation for** harm (forgone profit included) caused to agent upon non-renewal of expired contract, unless expressly excluded in contract (Art.11 (a) CAL), and the same goes for a unilateral termination based on contract terms and conditions (Art.11 (b) CAL).
  - **Minimum notice period for non-renewal** is one year or half of the contract's term, whichever shorter.

V. Enforcement of Arbitral Awards under the New York Convention

- The UAE joined the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 in 2006.
- UAE Courts are obliged to recognize arbitration clauses, unless the dispute is not arbitrable under UAE law. This was the case under the Old CAL.
- Now, the agent cannot commence court proceedings to claim compensation until the arbitral award is rendered. If a foreign governing law is chosen by the parties, the award will be unenforceable in UAE courts.
- UAE courts are likely to follow the principles established by the Egyptian Court of Cassation in relation to *ordre public international*, i.e., the arbitral award will be rendered unenforceable if it violates established mandatory international norms.

VII. Strategic Steps to better position principals vis-à-vis UAE agents

Risk mitigation strategies for the foreign principal include:

1. Agreement on arbitration.
2. Agreement on a foreign governing law – available only in arbitration.
3. Avoidance of catch-all and general non-compensation clauses (other than for non-renewal). Likely to be entirely dismissed.
4. Avoidance of registration of agency, if possible.
5. If registration of agent is necessary, requiring the agent to deregister immediately and pay liquidated damages.
6. Limiting the scope of products or relevant territory (e.g., to a particular Emirate).

Questions & Discussion