ACC EUROPE
Association of Corporate Counsel

108.1 Governing Law Provision – ADR

Dr Annette M. Schüller

Director Legal

Tetra Laval International S.A.

ACC EUROPE
Association of Corporate Counsel

Governing Law & Forum Clauses

- Reasons for Governing Law/Forum Clauses
- Governing Law Clauses
- Jurisdiction Clauses
- Arbitration/ADR

ACC EUROPE
Association of Corporate Counsel

Reasons for governing law and forum clauses

Main goal of contracting parties:

A valid, binding and enforceable agreement that correctly reflects the parties' intent.

Governing law & forum clauses ensure this goal.

ACC EUROPE
Association of Corporate Counsel

Reasons for governing law and forum clauses

- Governing Law Clauses:
  - "What kind of game do we play?"
  - "What are the rules of the game?"
- Forum Clauses:
  - "Where do we play?"
  - "Who is the referee?"
  - "What does (s)he require?"

ACC EUROPE
Association of Corporate Counsel

Governing Law Clauses

- What is the governing law?
- Who decides on the governing law?
- When to chose governing law?
- How to draft a governing law clause?

ACC EUROPE
Association of Corporate Counsel

What is the governing law?

- Substantive law governing the contractual relationship
  - Legality
  - Formalities
  - Interpretation of the substance of the contract

ACC EUROPE
Association of Corporate Counsel

What is the governing law?

- Not the only law applying to the contract
  - Respective laws of domicile govern the parties' capacity to enter into the contract
  - Mandatory laws in any one affected country apply regardless of choice of law
  - Procedural laws of the country/countries in which disputes over the contract are to be determined
  - Laws of the country/countries in which contract is to be enforced

ACC EUROPE
Association of Corporate Counsel

Who decides the governing law?

- Principle of freedom of choice by the parties
- Exceptions:
  - Laws governing capacity to enter into contracts
  - Areas of mandatory laws (e.g. consumer protection, employment, financial services)
  - *Ordre public*
- If not chosen, governing law will be determined by the dispute resolution body
  - Within EU: law of the country with which the contract has the closest connection (1980 Rome Convention)
  - Outside EU less certain (depend on PIL conflict of laws rules applicable at the seat of the dispute resolution and can lead to referrals between legal systems (*renvoi*)

ACC EUROPE
Association of Corporate Counsel

When to choose governing law?

- Always, because outcome of determination in dispute uncertain and may not reflect at least one party's expectations
- Governing law needs to be chosen even in documents published by international bodies (e.g. ICC guarantees)
- Particular care with standard agreements that are supposed to be applicable in more than one country

ACC EUROPE
Association of Corporate Counsel

How to draft a governing law clause?

- KISS (Keep It Short & Simple):

  "This agreement shall be governed by and construed in accordance with the laws of Switzerland".

  (In a U.S. legal context:)

  "This Agreement shall be construed and enforced in accordance with the laws of the State of New York, United States of America, without regards to its conflict of laws rules.

- Stay within suggested clauses; anything additional is probably not helpful and may be harmful
- Understand chosen law before making choice

ACC EUROPE
Association of Corporate Counsel

Jurisdiction Clauses

- Roles
- Kinds/Forms
- Considerations for Choosing
- Wording

ACC EUROPE
Association of Corporate Counsel

Roles of Jurisdiction Clauses

- Confirm forum for disputes
- Determine procedural laws applicable to dispute
- Distinct from governing law
- Should usually be matched with governing law
  - Law foreign to jurisdiction may not be enforceable or may have to be proven as facts (costs for legal expert witness evidence)
  - Judges may not have enough knowledge of foreign governing law to ensure proper attention to all detail

ACC EUROPE
Association of Corporate Counsel

Kinds of Jurisdiction Clauses

- Exclusive or non-exclusive
  - Within EU: presumption of exclusive jurisdiction (Art. 23 of the 2000 Brussels Regulation)
  - Outside EU: no agreement on jurisdiction clauses yet; 2005 Hague Convention on Choice of Court Agreements so far only ratified by one country (Mexico)
  - Non-exclusive jurisdiction clauses seldom useful, as leave room for ambiguity and forum shopping
- Reciprocal or for the benefit of one party only

  Clauses for the benefit of one party only:
  - Help to "chase assets" facilitating enforcement
  - Depend on relative bargaining powers of parties

ACC EUROPE
Association of Corporate Counsel

Considerations for Choosing a Jurisdiction Clauses

- Familiarity of and comfort with tribunal system
- Cost of proceedings (most important cost factor: evidence – extent of disclosure)
- Cost awards (who pays costs of proceedings?)
- Ease of availability of temporary relief measures
- Ease of enforcement (the U.S. has not signed any convention on recognition of enforcement of judgments)
- In the absence of choice of parties:
  - Court or arbitral tribunal ascertains own competence in accordance with PIL rules (may be time-consuming and costly)
  - Within EU/EFTA: 2000 Brussels Regulation, 1988 Lugano Convention)

ACC EUROPE
Association of Corporate Counsel

Wording of Jurisdiction Clauses

- Wording differs depending on the legal system of the jurisdiction:

  "The courts of Geneva, Switzerland shall have exclusive jurisdiction over any dispute arising out of or in connection with this agreement."

  "Any legal action, suit or proceeding arising out of or relating to this License or the breach thereof shall be instituted in a court of competent jurisdiction in Passaic County in the State of New Jersey and each party hereby consents and submits to the personal jurisdiction of such court, waives any objection to venue in such court and consents to the service of process by registered or certified mail, return receipt requested, at the last known address of such party."

  "The parties submit to the exclusive jurisdiction of the competent courts in Amsterdam, The Netherlands. However, the [Party One] may bring proceedings in any court having jurisdiction over [Party Two] or any of its assets."

ACC EUROPE
Association of Corporate Counsel

Arbitration / ADR

- What is arbitration?
- What is ADR?
- Arbitration or litigation?
- Most commonly used arbitration rules and organisations
- Contents of arbitration clause

ACC EUROPE
Association of Corporate Counsel

What is arbitration?

- Private binding resolution of conflicts between contracting parties
- Enforceable in most countries in the world
  - 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards ratified by 142 countries (as at 3rd February 2008)
- Two kinds, institutional or *ad hoc*
  - Institutional: Follow procedure by arbitration organisation
  - *Ad hoc:* Parties create own procedures
- Institutional arbitration preferable:
  - Tried and tested rules
  - Less space for error and omissions

ACC EUROPE
Association of Corporate Counsel

What is ADR?

- Alternative Dispute Resolution
- Collective term for number of different methods of dispute resolution
  - Mediation
  - Mini-trial
  - Expert determination
- All ADR is NON-binding
  - Effectiveness depends on both parties' willingness to submit to decision
  - Can be followed by binding decision (arbitration or litigation)

ACC EUROPE
Association of Corporate Counsel

Arbitration or litigation?

- Advantages of Litigation
  - May cover any matter and any counterparty
  - Ease of enforcement in national environment
  - Temporary relief readily available
  - Publicity/Public pressure/press interest
- Advantages of Arbitration
  - Confidentiality
  - Allows choice of arbitrator with requisite technical skills; arbitrators do not have to be lawyers
  - No “home court” advantage
  - Ease of enforcement in international environment (New York convention)

ACC EUROPE
Association of Corporate Counsel

Arbitration or litigation?

- No decision criteria: Cost and Speed
  - Arbitration can be as costly as litigation, especially in civil law jurisdictions
  - Costs depend on:
    - Number of arbitrators,
    - Arbitration organisation fee schedule (hourly or per value of matter)
    - Outside counsel (biggest cost factor – manage your outside counsel closely)
  - Speed depends mainly on case management capabilities of lead arbitrator
    - Willingness to employ time saving procedures
    - Double-edged sword: arbitrators with (too much) time

ACC EUROPE
Association of Corporate Counsel

Most commonly used arbitration rules and organisations

- ICC (International Chamber of Commerce)
  - Most widely accepted; widest pool of arbitrators
- LCIA (London Court of International Arbitration)
  - Especially for commercial/insurance disputes
- SCC (Stockholm Chamber of Commerce)
  - Neutral choice for counterparties from outside Western Europe)
- AAA/ICDR (American Arbitration Association)
  - Widely accepted with U.S. counterparties
- UNCITRAL (UN Commission on International Trade Law)
  - *Ad hoc* rules; can be administered by other arbitration organisations (e.g. LCIA)

ACC EUROPE
Association of Corporate Counsel

Contents of the arbitration clause

Suggested general arbitration clause (independent of organisation):

- Any dispute arising out of or in connection with this contract, including any question regarding its existence, validity or termination, shall be referred to and finally resolved by arbitration under the [*Rules of the Arbitration Organisation*], which Rules are deemed to be incorporated by reference into this clause. ***Describe which rules are used.***
- The number of arbitrators shall be [*one/three*]. ***Always odd number to prevent stalemate.***
- The seat, or legal place, of arbitration shall be [*City and/or Country*]. ***Determines procedural laws for arbitration as such.***
- The language to be used in the arbitration shall be [*language*].
- The governing law of the contract shall be the substantive law of [*Country*]. ***Not to forget: Arbitration clause does not replace governing law clause.***

ACC EUROPE
Association of Corporate Counsel

Governing Law and Forum Clauses

- Cornerstones for the good functioning of your contractual relation, but don't hold interest for your business colleagues
- Don't take the decision lightly:

  There are many ways to get it wrong
- But: You have the right to choose your framework – Do it, or someone else will!

Litigation, Arbitration and ADR Clauses in Agreements
When to stipulate what in a contract?

Dr. Annette M. Schüller, LL.M.,
Director Legal, Tetra Laval International S.A.*

Ten questions to consider before deciding on the dispute resolution provision in an agreement

The following questions have been assembled from practical experience. The list is neither exhaustive nor will it in every case give a clear indication as to which route of dispute resolution is the best to take. The relevant circumstances have to be weighed in every case to decide whether on the whole litigation, arbitration alone or in connection with some other form of ADR is most suited to the contract or the potential conflict. The list is intended to help ask the relevant questions to arrive at the appropriate conclusion for the matter.

1. Is your counterparty a consumer or a natural person?

   YES: Litigation in counterparty's home court may well be required by local law
   NO: You may consider arbitration or ADR

2. Do you expect your counterparty to submit to the decision of a neutral person?

   YES: Non-binding forms of ADR may be sufficient (e.g. mediation, expert determination, mini-trial)
   NO: Binding form of dispute resolution required, (arbitration or litigation), but can potentially be combined with non-binding forms of ADR as a prerequisite to arbitration/litigation

   (*Note: This is rather difficult to assess as you are establishing your contract at a time when the parties are usually on good terms. At the time of the dispute your counterparty (or you yourself) may not be willing anymore to submit to non-binding determination of the issue. It is usually easier to cooperate with a counterparty on a non-binding basis when both parties are interested in conserving a continuing long-term relationship than on a "one off" matter. Therefore, non-binding ADR procedures should ideally always be combined with binding dispute resolution procedures.*

* *The author would like to thank Mrs Carole Beaupied-Puetzer, Legal Manager, Tetra Laval International S.A. for her cooperation and helpful suggestions.*

3. Do you anticipate requiring decisions on single issues only or on the entire agreement?

YES: Expert determination or mini-trial of issue only
NO: Mediation, arbitration or litigation of entire agreement

4. Is the matter capable of being treated through arbitration (i.e. no public policy restriction)?

YES: You may consider arbitration or ADR depending on your answers to the questions below.
NO: Arbitration is not possible. You may be allowed to consider non-binding ADR procedures followed by litigation.

(*Note: The most frequent examples of matters that may not be capable to be treated through arbitration in a number of jurisdictions are competition law issues, patent law issues or securities laws issues.*)

5. Do you need to enforce a binding decision in a country where your home country does not have enforcement conventions with?

YES: Arbitration strongly preferred
The 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards covers is recognized in 142 countries world-wide (as of 5th March 2008)
(Note: As some states have ratified the NY Convention on certain reservations, you may want to ensure that the arbitral award you may be seeking under your contract is enforceable in the country you are dealing with before agreeing to arbitration; the status of accession as well as reservations by ratifying countries is available at http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html
In case where you cannot be sure to be able to enforce your arbitral award, you may want to agree the provision of security (e.g. deposition of amounts into escrow or with an agreed third party) for a potential arbitral award))
NO: No preference between litigation and arbitration

6. Do you foresee that you will require temporary or interim relief measures (e.g. injunctions)

YES: Litigation preferred
While all the major arbitration rules include provisions for temporary measures, they habitually depend on the arbitral tribunal having been constituted. This can be a lengthy and

protracted process, which defies the purpose of temporary measures

NO: No preference between litigation and arbitration

7. Would you feel uncomfortable having to litigate your matter before the courts of your counterparty (if it is avoidable, see No. 1)?

YES: Arbitration or ADR preferable; you can choose your forum in a country that is alien to both parties and thus eliminate the "home court advantage" (very useful in countries where jury trial might otherwise apply to your dispute; *Note: if you cannot avoid trial in a jury system, consider agreeing a waiver of right to jury trial, if possible*)

NO: No preference between litigation and arbitration

8. Does your dispute relate to confidential issues (trade secrets, sensitive issues) or do you fear press interest?

YES: Arbitration/ADR strongly preferable
(ADR proceedings are private while court proceedings are usually on-the-record and public (with usually very limited exceptions only))

NO: No preference between litigation and arbitration

9. Does your dispute relate to highly technical issues?

YES: Arbitration/ADR preferable
(The parties can chose non-legal arbitrators/mediators who will understand the technical issues and may be able to avoid at least some expert witness costs; *Note: in such cases it may be worthwhile to opt for three arbitrators/mediators instead of one (if this can be justified by the amount under dispute), as this allows each party to have his/her own technical expert arbitrator/mediator plus a legal person to preside*)

NO: No preference between litigation and arbitration

10. Would you like to depart from the procedures usually in force in your country's procedural system?

YES: Arbitration strongly preferred
Under the rules of most of the arbitration institutions, the parties have wide rights to determine the procedures that apply to the arbitration (in a number of cases, the arbitration institution rules are a last resort). The parties may so liken the procedures to those of their home court system.

(Note: This may counterbalance one of the stated advantages of arbitration, not to submit to the court procedural system of your counterparty (see No. 4). However, if the parties design the procedures themselves, the procedural issues (e.g. form and categories of permitted evidence or extent of discovery) are at least agreed in advance and known to both parties before tensions arise)

NO: No preference between litigation and arbitration

Speed and Cost of Litigation, Arbitration and ADR

Speed

Contrary to popular belief, arbitration or ADR are not necessarily faster than litigation in front of the competent courts. If the jurisdiction has been correctly and exclusively specified in the contract, it depends (i) on the docket of the competent court(s) and (ii) on the possibilities of recourse against the judgment of the court of first instance how fast a final judgment will be reached. As a colleague of mine at some point put it: "Sometimes you may be better off in a busy U.S. court on a 'rocket docket'."

In theory it may hold that the parties to an arbitration procedure may be able to decide on the "speediest" procedures, but at the time of the contract, the parties may not know what the potential dispute and thus the speediest procedure will be and at the time of the dispute the parties may not want to cooperate anymore and may use procedural issues as "weapons".

In order to ensure that arbitration procedures are fast, it is therefore of great importance to choose an arbitrator who is not only knowledgeable in the matter but has also good case management abilities and can preclude "procedural battles".

The addition of mandatory non-binding ADR measures prior to arbitration or litigation may slow decisions down even further, especially at a time where the parties are not on speaking terms and the positions entrenched. Consider having an "out" of the ADR procedures when it seems improbable that a non-binding decision may have any value.

Cost

Similarly to speed, cost is not necessarily a factor in favour of arbitration/ADR, especially when compared to litigation in a civil law environment.

Costs to take into account are the costs for the tribunal and the parties' advisors. While the former can be fixed either in accordance with the value of the matter in dispute (e.g. ICC) or on an hourly basis (e.g. LCIA), the latter are usually hourly costs and can accumulate greatly if the proceedings drag on. The outside counsel costs are typically the highest cost item of an arbitration by far. Therefore, it is paramount to manage your outside counsel and the entire arbitration proceedings closely as in-house counsel.

Again, the addition of mandatory non-binding ADR measures prior to arbitration or litigation adds to costs. As for the question of speed, consider having an expedited procedure or "out" of the ADR procedures in entrenched cases.

Therefore, as with the speed issue, it holds for costs as well that the chosen arbitrators need to possess good case management skills.