CROSS-BORDER CONTRACTS: GOVERNING LAW AND JURISDICTION OR FORUM CLAUSES
SAME COUNTRY/DIFFERENT COUNTRY? HOW DO YOU DECIDE?

By Karen A. Monroe and Olga Larionova

We recently hosted our quarterly Wine and Wisdom event at our offices in Geneva to discuss on an informal basis the above questions because many times contract drafters confuse governing law clauses and jurisdiction clauses. They are related and not the same. This confusion certainly exists with purely domestic contracts, but there is a greater likelihood of confusion or overlap in the context of international contracts. We were happy to welcome lawyers from Switzerland, France, Russia, Australia, USA, UK and Spain to this lively and informing discussion. Because I and Olga are New York bar lawyers (Olga is also a Russian lawyer) the following summary will focus on the State of New York because there is no U.S. contract law just as in Europe there is no “European” contract law.

Example Governing Law clause:

“This agreement constitutes the entire agreement between the parties and shall be governed by and construed in accordance with the laws of the State of New York applicable to agreements made and to be performed solely within such State and without application or reference to principles of conflicts of law.”

This clause is sufficient for a “domestic” U.S. contract. However, if the contract involves the international sale of goods, a clause must be added to expressly exclude the Convention on the International Sale of Goods (CISG) if both parties’ countries are signatories to this international treaty, and the parties do not want this international treaty to apply. Conversely, in some jurisdictions, for example, Germany and Russia, the parties may prefer to have the CISG apply. The U.S., Switzerland, and many other countries are signatories to the CISG.

Interestingly, and what many practitioners forget, is that the UK is not a signatory to the CISG.

Under New York law, for some contracts it may not be necessary to add the reference to exclude conflicts of law analysis, but as a general rule it should be included. See case cited in footnote 3 below.

One caveat is that mandatory or public policy laws may take precedence over governing law clauses, such as in the areas of employment, franchise, and distribution law.

Contrast the above governing law clause with the following jurisdiction/forum selection clause:

Sample Jurisdiction/forum selection clause for dispute resolution by courts and not by arbitration

“Each of the parties to this Agreement hereby irrevocably consents and agrees that any legal action, suit or proceeding with respect to this Agreement may/shall be brought in a federal or state court located in New York, New York, and each of them hereby irrevocably accepts and submits to the jurisdiction of such courts with respect to any such action, suit or proceeding.”

“One of the common causes of confusion in drafting a jurisdiction clause is whether to use the word “may” or “shall.” If the parties want non-exclusive jurisdiction, then the word “may” is correct; for exclusive jurisdiction only use the word “shall.” If you want certainty in your clause and you have agreed on jurisdiction, it should always be “shall.”

The analysis for determining the appropriate governing law and jurisdiction/forum selection clause requires answers to the following questions:

- Are parties in the same country or different countries/states?
- Where are the assets of each party located if you ever need to enforce a judgment against a party?
- Could the contract also be governed by the law of another country? For example, in our Swiss-US practice a Swiss company may employ someone in the U.S. The Swiss company may want to use Swiss law for the employment contract. However, if Swiss law is used as governing law, it is highly unlikely that a court in the U.S. in the state where the employee is employed would apply Swiss law even if Swiss law is the governing law. Similarly, for the jurisdiction clause in such an employment agreement, it is also highly unlikely that a Swiss jurisdiction clause would be enforceable unless, in the unlikely event, the U.S.-based employee chose to bring the employment claim in Switzerland.
- Where will the transaction be performed?
- Which type of dispute settlement is involved—litigation or arbitration?
- Which law would best protect my client’s interests?

What happens if there is no governing law clause or jurisdiction clause? Before the parties even get to resolve their dispute on the merits, much time and money will be lost not only to find the appropriate court, but also to have a judge decide the applicable law based on the parties and the facts in dispute. The absence of governing law clauses and jurisdiction clauses results in major uncertainty if there is a commercial dispute. Such absence also minimizes the likelihood of a successful conclusion of a contractual claim.

Choosing New York Law as Governing Law and New York Courts as Jurisdiction

In some jurisdictions parties are free to choose that jurisdiction’s governing law and use of its courts. However, many jurisdictions for reasons of judicial efficiency and public policy require at least some contacts with that jurisdiction. Many states in the U.S. require some contacts before the state will provide relief by its courts or apply its law. Significantly, the state of New York has a statutory exception for contracts with a value greater than $250,000;
that is, parties to any contract can chose New York law as the governing law, even in the absence of contacts with the New York State so long as the minimum value of the contract is $250,000. New York State has provided this statutory advantage to the international business community because New York State is a world business and financial center with an excellent court system[3].

Similarly New York law provides that any party can sue another party in New York courts if the agreement included a New York choice of law clause, the parties consented in the contract to New York jurisdiction and the amount in dispute exceeds $1 million[4].

For cross-border contracts, governing law and jurisdiction/forum selection clauses are often overlooked or not sufficiently analyzed resulting in significant costs and delays in the event of the interpretation of contract terms and resolution of a dispute.


[2] A UK colleague informed us that as a general rule UK courts will accept all cases, even those without connections to the UK. A Swiss colleague confirmed that Swiss practice is generally similar to the UK with Swiss courts accepting cases without connection to Switzerland, if Switzerland has been chosen as the jurisdiction/forum.
