

HAZLOLAW

BUSINESS LAWYERS | AVOCATS D'AFFAIRES

PRIVATE INTERNATIONAL LAW IN ACTION

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The Three Pillars of PIL

Determination of the court that is competent to decide the dispute

conflict of jurisdictions

Determination of the law applicable law to the dispute

conflict of laws

Recognition and application by the court of one country of a decision from a court (or
arbitral tribunal) of another country

exequatur

Relevance of Private International Law

- How relevant is PIL to the commercial/transactional lawyer?
- PIL is useful to the transactional lawyer inasmuch as it is combined with comparative law
 - Need to evaluate the differences in result stemming from each of the potentially applicable legal systems
 - Need to consider both parties' perspectives

The seized court will apply its own PIL rules to determine whether it has jurisdiction, which law is applicable and whether it recognizes a foreign judgement

Approaching PIL Issues as a Business Lawyer

Approach # 1

Give no importance to the question and accept whatever the initial draft proposes

- As with other issues that are not explicitly addressed by contracting parties, it may not be a bad decision to keep your options open.
- Count on the “debatibility” of PIL rules and on its (perceived) arbitrary nature, e.g. *forum non conveniens* might be able to oust jurisdiction *simpliciter*.
- “Keep your gun powder” for more important things.

Approaching PIL Issues as a Business Lawyer

Approach # 2

Go NEUTRAL

- Select third-party jurisdiction for a court
- Use arbitration
- Use neutral law
 - Vienna Convention on the International Sale of Goods
 - UNIDROIT Principles of International Commercial Contracts (UPICC)
 - Incoterms

Approaching PIL Issues as a Business Lawyer

Approach # 3

Argue for your laws and your courts because that's what a savvy lawyer does, right?

- The gift of party autonomy
- The myth of *Praeferuntur legem tuam*
- Beware though:
 - There are limits imposed by international *ordre public*
 - There are limits of internal public policy (criminal or prohibited rate of interest or the very notion of interest (Islamic finance))
 - Party autonomy is not perfectly respected in all countries

Approaching PIL Issues as a Business Lawyer

Approach # 4

Determine which party is most likely to bring legal action

- The creditor of the defining obligation of the contract
- The party who is owed a substantial amount of money
- If you are representing the debtor of the obligation, you will want to select the legal system that will give it the smallest amount and the shortest duration of exposure, as well as the remedies that are most favourable to it
- Conversely, if you are representing the creditor of a financial or other obligation, you will want to select the legal system that gives it the most rights and remedies, as well as the longest time to enforce them.

Approaching PIL Issues as a Business Lawyer

Approach # 5 Bifurcate the Transaction

- This is nothing other than the concept of dépeçage in action
- Some aspects of the deal that may make sense to separate :

Entity
Formation

Guarantee

Security

Employment

Approaching PIL Issues as a Business Lawyer

Approach # 5

Bifurcate the Transaction (cont.)

TWO WAYS TO DO THIS:

1. Splitting out the APA/SPA/Credit Agreement

OR ...

Approaching PIL Issues as a Business Lawyer

Approach # 5

Multijurisdictional choice of law/choice of forum clauses

*This Agreement, the rights and obligations of the Parties under this Agreement, and any Dispute, including all matters of construction, validity and performance, shall in all respects and **except as otherwise expressly noted** be governed by, interpreted, construed and determined in accordance with, the laws of the Province of Ontario and the federal laws of Canada applicable therein, without regard to the conflicts of law principles thereof.*

•Any Dispute which is not resolved pursuant to Section 8.4 or 8.5 shall be finally resolved by arbitration by a mutually acceptable sole arbitrator in accordance with the Code of Civil Procedure of the Province of Québec.

•Governing Law. THIS AGREEMENT SHALL BE GOVERNED, CONSTRUED, AND ENFORCED IN ACCORDANCE WITH THE LAWS OF THE PROVINCE OF ONTARIO EXCEPT THAT QUESTIONS AS TO PERFECTION OF LENDER'S SECURITY INTEREST AND THE EFFECT OF PERFECTION OR NON-PERFECTION OF LENDER'S SECURITY INTEREST SHALL BE GOVERNED BY THE LAW THAT WOULD BE APPLICABLE EXCEPT FOR THIS SECTION.

How to Select a Jurisdiction

1. Establish as best you can which court(s) have or could have jurisdiction in case of litigation.

- Look to the PIL of all potential jurisdictions

2. Determine whether any of the potential choices are not acceptable.

How to Select a Jurisdiction Cont.

3. If one of the possible venues is unacceptable, decide whether you need to push for an exclusive jurisdiction (neutral or non-neutral)

HAGUE CONVENTION ON CHOICE OF COURT AGREEMENTS

- Presumption of exclusiveness, i.e. if you want the clause to be non-exclusive, you have to say so.
- Make your non-exclusive clauses “smart”: *The parties agree to the non-exclusive jurisdiction of the courts of Versailles. VS The parties hereto agree that all actions or proceedings arising in connection with or related to this agreement, shall be tried and litigated in Versailles, or, at the sole option of lender, in any other court in which lender shall initiate legal or equitable proceedings and which has subject matter jurisdiction over the matter in controversy.*
- Doctrine of separability: A choice of forum agreement, even if physically embodied within a more complete contract will, for the purposes of ascertaining its validity and effect, be treated separately from the rest of the contract.
- *Forum non conveniens* doctrine does not apply

HAGUE CONVENTION ON CHOICE OF COURT AGREEMENTS

- **When will a choice of court fail?**
 - a) a party lacked the capacity to conclude the agreement under the law of the State of the court seized
 - b) giving effect to the choice of court agreement would lead to a manifest injustice or would be manifestly contrary to the public policy of the State of the court seized
- The principle of competence-competence: a tribunal has the jurisdiction to determine its own jurisdiction

Not completely eliminated. Either court can rule on the choice of clause agreement.

How to Select a Jurisdiction Cont.

Considered to date in one case – Singapore enforcement of a UK judgement (Ermgassen & Co Ltd v Sixcap Financials Pte Ltd [2018] SGHCR 8)

This is how the clause read:

The Engagement Letter and these Terms of Engagement shall be governed by and construed in accordance with English law. ERMGASSEN & CO and the Client irrevocably submit to the exclusive jurisdiction of the English courts to settle any disputes in connection with any matter arising out of the Engagement Letter and/or these Terms of Engagement.

HAGUE CONVENTION ON CHOICE OF COURT AGREEMENTS

- Can a party challenge the validity of the contract that contains a choice of court clause before a court other than the chosen court?
- **Francesco Benincasa v Dentalkit Srl. - Brussels Convention - Case C-269/95.**

The courts at Florence shall have jurisdiction to entertain any dispute relating to the interpretation, performance or other aspects of the present contract". The clause was specifically approved within the meaning of Articles 1341 and 1342 of the Italian Civil Code.

The courts of a Contracting State which have been designated in a jurisdiction clause validly concluded under the first paragraph of Article 17 of the Brussels Convention also have exclusive jurisdiction where the action seeks in particular a declaration that the contract containing that clause is void. Therefore you cannot circumvent a choice of court clause by arguing that the contract in which it is contained is void.

Consolidating Your Choice of Court

- Include exclusion of forum non conveniens in choice of forum clause
- Drafting a forum clause that expressly stipulates that disputes and claims relating to the existence and validity of the agreement (including this clause) are subject to the same forum.

Each of the parties to this Agreement irrevocably agrees that the courts of [jurisdiction X] (the “Forum”) shall have exclusive jurisdiction to hear and decide any suit, action or proceedings, and/or to settle any disputes, which may arise out of or in connection with this Agreement, including all claims and disputes relating to the existence and validity of this Agreement and, for these purposes, each party irrevocably submits to the jurisdiction of [jurisdiction X].

All claims and disputes relating to the validity and scope of this Section shall be subject to the exclusive jurisdiction of the Forum and, for these purposes, each party irrevocably submits to the jurisdiction of the Forum.

Consolidating Your Choice of Law

- Beware of « renvoi » : the application of foreign law could include its conflict of law rules
- **Governing law.** This Agreement shall be governed, construed, and enforced in accordance with the laws of the province of ontario, without regard to its conflict of laws rules or the conflict of laws rules of the jurisdiction in which suit is initiated under or in relation to this agreement.....
- Scope issues: This Agreement shall be governed by the laws of the State of New York..... VS “relating to, arising from or connected with” (statutory, delictual claims and any other claims)