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Choice of Law and Arbitration in International Contracts: A Roundtable with Stakeholders

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> "*Whatever the nature of the transaction, in international business there is one prime question fundamental to the validity, interpretation, effectiveness and enforceability of the contract: what law governs?"* – Professor Julian Lew QC, Preface, *Rethinking Choice of Law in Cross-Border Sales*, Gustavo Moser (Eleven International Publishing, 2018).

On 15 April 2019, a sunny Monday in Vienna, Austria, a roundtable composed of Luca Castellani, Louise Barrington, Prof. Ingeborg Schwenzer, Patricia Shaughnessy, Florian Mohs, Sabrina Strassburger, and Michael McIlwrath (by video), sat down to address the choice of governing law in international contracts. With the backdrop of Gustavo Moser's book *Rethinking Choice of Law in Cross-Border Sales*, and with him acting as the moderator, the esteemed speakers addressed three issues: (i) choice of law and Brexit, (ii) the drafting of choice of law clauses, and (iii) CISG status and prospects.

Gustavo Moser started off by reminding everyone that emotions pervade our decisions and that perceptions influence our choices: human beings make around 2,000 – 10,000 decisions a day. We frequently take similar decisions from the past as a 'proxy' and arrive at the same decision to (what we believe to be) a similar 'set of facts'. The trouble with this, Gustavo continued, is that there are 'glitches' in our thinking, of which individuals may not be fully aware of, let alone know how to quantify its effects (e.g. status quo bias). A good example of this arises in the choice of governing contract law.

Topic 1: Choice of Law and Brexit

Michael McIlwrath initiated the discussion. Having gone through ICC data prior to the Brexit years, Michael found that London had not been increasingly selected as a seat of arbitration between 2008 and 2015, whereas non-traditional seats were conversely growing, a trend compatible with the parties choosing to have disputes closer to home. Michael highlighted that London has benefited from the reliability and predictability of English courts, and the wide adoption of English law is because it is considered contract-friendly. In his perspective, the

significance of English law is neither impacted by Brexit, nor from the enforceability in the EU of arbitral awards rendered in the UK, potentially perceived in the future as less advantageous. Michael concluded that Brexit might possibly affect the choice of English arbitrators, London's convenience as a seat and the practice of international arbitration, depending on the future conditions imposed on free movement of professionals and whether certain industries go abroad. Michael proposed that parties should be asking whether any of the laws chosen is better for their contracts. Citing a recent survey that Gustavo shared (*Practical Law Survey 2018 on the Impact of Brexit on dispute resolution clauses*), Michael added that whereas previously approximately 25% of companies intended to conduct a review of their choice of law or jurisdiction clauses, the combined number in the revised survey was 78%.

Prof. Ingeborg Schwenzer expressed her concern that the uncertainty potentially surrounding enforcement in Europe of judgements rendered in the UK might drive parties away from London. Prof. Schwenzer and Patricia Shaughnessy discussed the impact of EU law incorporated into English law, be it consumer law or other areas of law, regulation of distribution contracts, franchise relationships, and even competition law, which would no longer be subject to any developments binding on the EU (including ECJ judgements). Louise Barrington shared her experience of a similar "frozen law" situation in Hong Kong, where English law continued in place after 1997, but not bound by subsequent developments of this jurisdiction, thus suffering a detrimental delay in legal updates and some commercial uncertainty. Louise agreed that choice of forum, more than choice of law, might be impacted by Brexit.

Florian Mohs was of the same position, and stated that both Rome I and II Regulations would be restated in English law. Regarding choice of court, he shared that, in an attempt to overcome the mentioned voluntary exclusion from the freedom of movement of judgements, the UK had acceded to the Hague Convention on Choice of Court Agreements (2005), conditioned upon exiting the EU. Moreover, Florian interestingly added that a "reverse home bias" effect could also take place, whereby potential creditors based in the UK (such as financial institutions) could select the forum of the potential debtors to litigate/arbitrate when in the EU.

Gustavo then cited the LCIA Casework Report 2018, informing that c. 78% of the new cases arose from contracts concluded between 2007 and 2016, and that in c. 75% of these, English law was chosen. Sabrina Strassburger added that no instructions were conferred to her regarding changes in choices of law contained in the contracts she supervised as in-house counsel. In this respect, Gustavo mentioned that this could be due to the status quo bias, since at the end of the day, a review of the clauses does not necessarily equate to change. Gustavo's recent Kluwer posts on this matter are available here, here and here.

Finally, Luca Castellani argued that, from a global perspective, enforcement of judgements was more challenging than enforcement of arbitral awards, and encouraged UK lawyers to consider uniform law as an alternative for the clients' benefit.

Topic 2: Drafting of Choice of Law Clauses

The discussion started with a comment from Michael saying that typically parties focus on their own familiarity with a certain law as the determining factor to select it. Sabrina, in response to Gustavo's enquiry as to how scientific the drafting process is, added that, in her experience, there

was no scientific approach to choice of law clauses (like a checklist approach, mentioned by Gustavo), and was dependent on variables such as the dispute resolution mechanism selected or the industry specialization of courts in a given jurisdiction (say in IP law). Furthermore, these clauses were typically addressed last, after weeks of long and demanding negotiations, and often neglected.

Louise warned that using choice of law as a bargaining tool in contract negotiations should be avoided as it could have dangerous effects and could give rise to lawyers' professional liability. Luca added that the CISG was meant to be used when parties were not in a position to choose the applicable law, such as when one is contractually weaker or lacks legal advice.

Prof. Schwenzer added that in her experience, parties may, at times, chose laws to apply to their contracts without having an understanding of the respective consequences. Prof. Schwenzer gave the example of parties choosing Swiss law, for its perceived neutrality, when, in her opinion, challenges could arise from its conception in an archaic context, giving rise to different scholarly interpretations, rendering it unreliable. She provided another example, where UK lawyers, drafting lengthy contracts, would choose Swiss law. Consequently, there would be a discrepancy in regulation (later echoed by Patricia in regards to the common law four corner rule and Scandinavian practice of relying on the applicable legal framework), as well as problems with contract interpretation, since English terms would have to be interpreted under Swiss law. Florian replied that Swiss law conversely had other advantages, such as giving great effect to freedom of contract, with little mandatory requirements, less influenced by EU law, and predictable in its application. Patricia gave an example of parties choosing a law to a long-term contract without knowing if this law provided the possibility of limiting liability and to what extent, or if under it moral damages were compensable, rather merely considering the alleged reputability of a legal system.

Gustavo mentioned the results of two interviews conducted with multinational companies' counsel on this issue, from which he concluded that, in general, the choice of law and choice of court clauses took into account several strategic factors. Brexit had not impacted the internal policies of these multinational companies in this regard, and CISG and the Unidroit Principles, although considered a viable alternative, were not chosen because the counterparties had no experience with it.

Topic 3: CISG Status and Prospects

All speakers argued for increased awareness, capacity building and legal training regarding the CISG. Louise gave the example of Canada, a contracting state to the CISG, where lack of awareness of this convention led to entire proceedings being conducted under Canadian contract law without the due application of the convention. Prof. Schwenzer mentioned that education or bar training should include the CISG as a mandatory subject, and gave China as an example, where students study the CISG as well as Chinese contract law in their syllabus. Louise and Luca added that there are some recent developments concerning Hong Kong and its accession to the CISG, partially also because of the Vis East, and the generated familiarity with the convention.

Florian spoke of his experience with the CISG, considering it a great tool, and shared that most choice of law clauses he had worked with did not exclude its applicability. He added that a clear choice of law would save time and costs otherwise incurred in debating this issue. Sabrina then

shared her experience with contracts in the tech industry and mentioned that her counterparties typically expressly excluded the CISG for the following reasons: to avoid conflicts with domestic law; to avoid the gaps in the CISG; and due to a perceived lack of publicly available CISG case law.

Prof. Schwenzer added that interpretation costs could be avoided, as the CISG was translated into multiple languages. Pushing for the re-evaluation of the convention was also Michael, in his video, highlighting that Article 39 of the CISG conferred great legal predictability to a seller (providing for a clear 2-year warranty period for latent defects in goods), that parties could always contract around.

The roundtable also discussed the most recent accession of a state to the CISG, North Korea. Patricia and Luca discussed the process incurred in the last years for this purpose, the relevant policy reasons and the historical bridge that the CISG represented between eastern and western countries.

Luca praised the CISG in its quantitative adoption. Demystifying perceptions with numbers, Luca mentioned that the CISG from 1980, with 90 contracting states, had a rate of adoption of 2,3 states per year, when, in comparison, the New York Convention, from 1958, with 159 contracting states, had a rate of adoption of 2,5 states per year. As pertains to its qualitative adoption, the CISG had seen 4 processes of domestic adoption reach an end but deposit of the instrument of ratification was still pending. (Shortly after the roundtable, one of the four States, Liechtenstein, deposited its instrument and became the 91st State party to the CISG).

As to CISG prospects, Luca added that, given the current situation regarding multilateral treaties, negotiating the CISG today would be a challenging endeavour. Thus, from a uniform law perspective, Luca informed that no new projects were under way, but addressed hypothetically interesting developments, such as a model law on sales of goods (unexpected) or greater influence of the CISG in domestic sales law (desirable).

All in all, it became clear that both emotion and perception can cloud parties' decisions on choices of law and forum, and that these clauses should be discussed at the first available opportunity. The Vis Moot is a starting point for worldwide dissemination of knowledge both regarding international arbitration and international sales law, and this seminar was a great chance to further acknowledge how choices of law and forum operate in the field.

The post had contributions from Gustavo Moser.

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