

Efficient Dispute Resolution
Clauses in Film and Media
Transactions & Bird & Bird

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Introduction

- Section 1 – Types of dispute resolution clauses
- Section 2 – Factors to take into account when deciding which dispute resolution mechanism to choose
- Section 3 – Dispute resolution clauses in practice

Section 1 – Types of dispute resolution clauses

Types of dispute resolution clauses

- Jurisdiction clauses

- Choosing the right forum
- Exclusive v non-exclusive jurisdiction clauses
- Service

- Arbitration clauses

- Conflicting clauses
- Courts' approach in leading arbitration jurisdictions
 - England: *Paul Smith Ltd v H&S International Holding Inc* [1991] 2 Lloyd's Rep. 127
 - Singapore: *Tri-MG Intra Asia Airlines v Norse Air Charter Ltd* [2009] SGHC 13
 - France: *Techniques de l'Ingenieur v Sofitel* (1980), TGI Paris, February 1, 1979, *Revue de l'arbitrage*
 - New York: *Montauk Oil Transportation Corp v S.S. Mutual Underwriting*, No 90 Civ 3801 (JFK)

Types of dispute resolution clauses (2)

- ADR clauses
 - Negotiation
 - Mediation/conciliation
 - Early neutral evaluation
 - Med/Arb – problems may arise at enforcement stage
- Multi-tier dispute resolution clauses
 - Period(s) of time triggered by a defined and undisputable event
 - Disputes defined in same terms at each stage
 - Provide for a binding process (arbitration, litigation or expert determination) in case negotiations/mediation fails
- Expert determination clauses

Section 2 – Factors to take into account when deciding which dispute resolution mechanism to choose

Factors to take into account

- The industry – creative outcome for creative minds!
- Your counterpart
- Likely range of value at stake
- Timeframe/speed
- Type of relief likely to be required
- Confidentiality
- Third party neutral
- Enforcement
- Arbitrability issues?
- Need to establish a precedent / "pour encourager les autres"
- Ability to appeal

Section 3 – Dispute resolution clauses in practice

Dispute resolution clauses in practice – Governing law

- Law clauses recognised by most developed legal systems
- If no choice of law clause, relevant conflict of laws rules apply
- Governing law v law of the forum
- National law v *Lex Mercatoria* or "principles of fairness"
- Laws most frequently chosen in int'l arbitration are English law (40%), NY law (17%), Swiss law (8%), French law (6%), US law (5%), Others (24%)*

*"2010 International Arbitration Survey: Choices in International Arbitration" by White & Case and Queen Mary University of London

Dispute resolution clauses in practice – Scope

- Scope: *ratione materiae* – which claims?
 - Wording
 - Tortious claims
 - Multi-contract projects
 - "Split" dispute resolution clauses

"In the event of a dispute relating to delivery hereunder [of the film], the provisions for arbitration specified in Schedule III attached hereto shall apply. Any dispute other than a dispute relating to delivery shall be submitted to the jurisdiction to [sic] the courts of law of England..."

Film Finance Inc. v The Royal Bank of Scotland [2007] EWHC 195

Dispute resolution clauses in practice – Scope (2)

- Scope: *ratione personae* – who?
 - Third party claims
 - Signatories are bound
 - Non-signatories may be bound by virtue of certain doctrine recognised under applicable law
 - Multi-party contracts
 - Arbitration clauses should reflect multiple parties
 - ~ Appointment of Tribunal
 - ~ Joinder

Dispute resolution clauses in practice – Formalities

- Formalities

- Jurisdiction agreement

- Article 23.1 of the Brussels Regulation
- Position outside Europe? Check the applicable law

- Arbitration agreement

- Article II(1) of the New York Convention
- Section 5 of the Arbitration Act 1996

Dispute resolution clauses in practice – Arbitration

● Basic elements

- Seat
 - Choice based on both legal and practical considerations
 - Preferred seats of arbitration are **London** (30%), Geneva (9%), Paris (7%), Tokyo (7%), Singapore (7%), New York (6%) and Others (34%)*
- *Ad hoc* v institutional arbitration
- Arbitration rules (use relevant model clause as starting point)
- Arbitrators
 - Number
 - Method of selection and replacement
 - Selection of an appointing authority if *ad hoc* arbitration
- Language
- If it isn't broken don't fix it!

*"2010 International Arbitration Survey: Choices in International Arbitration" by White & Case and Queen Mary University of London

Dispute resolution clauses in practice – Arbitration (2)

- Optional elements
 - Confidentiality issues
 - Qualifications required of arbitrators
 - Time limits / fast track?
 - Disclosure
 - Preservation of rights
 - Costs
 - Unreasoned award?
 - Finality / recourses

Dispute resolution clauses in practice – Arbitration (3)

- "For the benefit" or "sole option" clauses
 - Valid under English law/Brussels Regulation
 - *NB Three Shipping Ltd v Harebell Shipping Ltd* [2005] 1 All ER
 - *Law Debenture Trust Corp plc v Elektrim Finance BV* [2005] 2 All ER 476
 - May raise issues of enforceability in other jurisdictions
- Optional clause
 - *Halifax Financial Services Ltd v Intuitive Systems Ltd* [1999] 1 All E.R.
 - Escalation clause with option to arbitrate
 - No stay under s 9 AA1996
 - Dual regime can lead to protracted correspondence and disputes

Conclusions

Should a dispute arise, the dispute resolution clause in an agreement may well become the most important clauses of all. It is therefore worth giving it the care and attention it deserves from the outset.

Any questions?

Thank you & Bird & Bird

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