OVERLOOKING CHOICE OF LAW AND FORUM PROVISIONS IN YOUR INTERNATIONAL CONTRACT IS LIKE PLAYING THE LOTTERY

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Any contract between parties in different countries such as the United States and Canada heightens the risk of a conflict between different laws and court systems when resolving a contract dispute. It's possible that the laws of several jurisdictions could be involved and multiple courts could exercise jurisdiction over the dispute. If the parties fail to select the governing law and forum for resolving disputes, the courts of Canada and the United States will apply their conflicts of law rules, which deal with the threshold question of what substantive law applies to a dispute. The conflicts of laws rules in the United States and Canada (neither I nor my firm practice Canadian law and mention of Canadian aspects in this blog are from my reading of relevant Canadian articles) are relatively similar and, in general terms and with certain exceptions, provide that the legal system with the closest connection to the contract or subject of the dispute should apply. But the analysis is not always clear and determining the applicable law and forum can be complex, costly, and a little like playing the lottery for the parties involved.

A choice of law provision specifies which jurisdiction's law governs the contract, while a choice of forum provision specifies which court will adjudicate a contract dispute. These provisions can be easily overlooked by the parties when negotiating the more commercial terms of a contract. Believe me, I've seen that oversight on more than a few occasions.

In most circumstances, choice of law and forum provisions will be enforced by U.S. and Canadian courts. The parties should carefully consider the laws and legal system of the state, province, or other jurisdiction selected. There are many factors that play into the decision, including which law will provide the most certainty and the most beneficial outcome (obviously, the parties may have differing views on that).

Generally, the choice of law should be consistent with the choice of forum. This may not always be the choice made, but there could be significant cost and complexity issues if they are different—such as where a court applying the law of another jurisdiction needs to hear expert evidence concerning that other jurisdiction's law. The provisions should also be well drafted to achieve the desired result, as there can be nuances in the language that can affect the coverage and application of the provisions. If arbitration is desired, a well-drafted arbitration provision should be

included in the contract.

The United Nations Convention on Contracts for the International Sale of Goods (the CISG) should be dealt with if the international contract covers the sale of goods. The CISG is a treaty adopted by the United States, Canada, and currently 76 other countries, which contains rules governing many, but not all, of the important issues concerning international sale of goods contracts. The CISG automatically governs international sales contracts between parties located in signatory countries, and there are pros and cons to that. However, the parties cannot opt out of the CISG merely by including a choice of law provision in their contract. Instead, they must specifically state in the contract that they do not wish to be bound by the CISG, or it will apply.

The outcome of a contract dispute sometimes dramatically depends on the law and forum chosen to litigate or arbitrate the dispute. Including well-drafted choice of law and forum provisions in your international contract won't leave those important decisions to chance and will provide the parties with more certainty in the unfortunate event of a dispute.