Efficient Dispute Resolution
Clauses in Film and Media Transactions

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“Many [corporate counsel] referred to [dispute resolution clause] as the "2am clause" or similar and described how often they are brought into negotiations late and expected to conclude dispute resolution clauses with minimal negotiation because the commercial terms are settled”

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

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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!**

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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
Key message

According to the relevant factors identified earlier, in order to ensure that a clause is effective both in terms of its interpretation and implementation, parties should find the right balance between:

- model dispute resolution clauses which may not address their specific and more complex requirements; and

- over engineered clauses which may give rise to peripheral issues and protracted disputes about procedure.
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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