Outline

• By way of introduction
• The case
• The issues
By way of introduction

- Intl commercial agreements come in various shape:
  - Long term (e.g. joint venture agreement aimed at setting up and operating mobile telephone system)/ one shot (e.g. sale of brass fittings)
  - Commodity transaction / financial transactions (e.g. assignment of portfolio of receivables)
  - 2 or more parties

- Documentation of commercial agreements may also vary:
  - Sometimes purely oral agreement
  - Very often various one sided documents (e.g. purchase orders, acknowledgement, etc.) - often with general conditions
  - Ad hoc written agreement, specifically negotiated and drafted for one transaction
By way of introduction

Purpose of the seminar

• General issues common to all int'l commercial agreements
• Focus on drafting issues (with limited refresher on the law of int'l commercial agreements)
By way of introduction

- Starting point: a basic case – and a few questions ...
The case

- Two companies, one based in Germany ('Rhuner'), the other in the UK ('BestOrganics'), are negotiating a co-promotion agreement
- Purpose: allow Rhuner to participate in the marketing and distribution of the chemical products manufactured by BestOrganics
- Products are the result of the joint research efforts of the two companies
The case

- The agreement outlines how both parties would cooperate in order to promote the products in certain countries.
- The agreement provides for the development and formulation of joint co-promotion plans, detailing the parties' promotion strategies, resource allocation principles and projected sales.
- The cooperation further includes the sharing of information and know-how relating to promotional activities as well as the joint use and development of promotional and training materials.
The case

• You are advising Rhuner (DE) in the process of negotiations
• Rhuner is represented in the negotiations by Mr Gartner, VP Major Clients
The questions
1. Dispute resolution

- Mr. Gartner first points to section 23 of the draft – which provides that disputes should be submitted to English courts
- Mr Gartner does not like the idea of going to English courts
- He suspects BestOrganics will not accept a change to German courts
- What other solutions could you suggest?
The questions
1. Dispute resolution - alternatives

- If Rhuner is not comfortable with English courts, alternative solutions include:
  - Choice for 'neutral' courts
  - Arbitration

- Choice is influenced by various factors (e.g.: neutrality - perceived and effective -, confidentiality (caution for expectations), costs, enforcement, etc.)
The questions
1. Dispute resolution - alternatives

- Another alternative: adapt the choice for English courts to make it facultative and not mandatory

- Facultative choice of court clause
  - Two-sided ("Disputes may be brought before the courts of England")
  - One-sided - 'English clause' (e.g. "All disputes arising out of or in relation with the present agreement shall be exclusively settled by the courts of Spain. However, Buyer reserves the right to bring proceedings before other courts of competent jurisdiction" - very frequent in bank/financial agreements)
The questions
1. Dispute resolution - principle

• Mr Gartner is not happy with any of the alternatives and wonders if it is not easier to suggest deleting the choice of court clause
The questions
1. Dispute resolution - principle

- Agreement without a dispute resolution clause is probably the worse solution
- Crucial that anyone entering a contract with int'l dimension, should know beforehand the rules of the game (which law, which court) → you do not enter a restaurant without looking at the price list...
- Risks:
  - Uncertainty on court with jurisdiction (e.g. art. 5(1) Brussels I Regulation)
  - Litigation battle (litigation on the place of litigation)
The questions
1. Dispute resolution - enforceability

• Mr. Gartner wonders whether Rhuner could escape from section 23 and the jurisdiction of English courts in case of dispute
The questions
1. Dispute resolution - enforceability

- Principle: *pacta sunt servanda*
- Choice of court (and arbitration agreement) must be complied with
- See *e.g.* art. 23 Brussels I Regulation / Art. II 1958 NY Convention
The questions
1. Dispute resolution - enforceability

- However, choice of court / arbitration agreement must be tested
  - 3 stages:
    - Court chosen - Will court/body chosen accept jurisdiction?
    - Court excluded - look for all courts / other bodies which could take an interest in the dispute → will they recognize and uphold the agreement?
    - Enforcement court - refusal to recognize/enforce judgement / award (not necessarily linked to refusal to upheld choice of court clause)
The questions
1. Dispute resolution - enforceability

- In each stage, there may be limitations on enforceability of dispute resolution mechanism – e.g.:
  - Objective limitation: employment contracts: limitation on validity / enforceability of choice of court / arbitration agreements
  - Discretionary limitation: choice for courts of Belgium – discretion of court chosen under Art. 7 BCPIL
The questions
1. Dispute resolution – multi-tier clause

• Mr. Gartner finally concedes that the choice for English courts is fine
• Mr Gartner wonders, however, whether this could prevent Rhuner from suggesting mediation in case of a dispute
The questions
1. Dispute resolution – multi-tier clause

• Mediation always possible – even if not foresee expressly in the agreement
• Probably better to include a mediation clause in the agreement – avoid 'cold feet' of other party when dispute arises
The questions

1. Dispute resolution – multi-tier clause

• Specific concerns for combined or multi-tier dispute resolution clause:
  – Make sure that the *link* between the various stages (negotiation, mediation, arbitration, ...) is well defined. Parties must be able to determine when they may/must go from stage 1 to stage 2 etc.
  – Ensure that no ambiguity about disputes assigned to each method
The questions
1. Dispute resolution – multi-tier clause

• Multi-tier dispute clause e.g.: CPR Institute for Dispute Resolution:

  “The parties will attempt in good faith to resolve any controversy or claim arising out of or relating to this agreement by mediation in accordance with the CPR Mediation Procedure..."
The questions

1. Dispute resolution – multi-tier clause

- ... If the dispute has not been resolved pursuant to the aforesaid mediation procedure within 60 days of the commencement of such procedure (which period may be extended by mutual agreement), or if either party will not participate in a mediation, ... the controversy shall be settled by arbitration in accordance with the CPR Institute for Dispute Resolution Rules ... ”
The questions
1. Dispute resolution - drafting

• Mr. Gartner is willing to accept choice for English courts, but requests that you look at the language used and verify whether it may be improved
The questions
1. Dispute resolution - drafting

• “Parties agree that any dispute which may arise in connection with the interpretation or enforcement of this Agreement shall exclusively be submitted to the courts of England”
The questions
1. Dispute resolution - drafting

• “The Seller will bring all claims before the courts of the Buyer and the Buyer will bring all claims before the courts of the Seller”
The questions
2. Applicable rules

• Mr. Gartner next points to section 24 of the Draft, which provides that:

• “The Agreement shall be governed by the laws of England, with the exclusion of its private international law rules”
The questions
2. Applicable rules – impact on review

• Mr. Gartner does not like the idea of having the agreement subject to English law because he is not familiar with that law
The questions
2. Applicable rules – impact on review

- When reviewing a contract, applicable law will have an impact - together with dispute resolution clause
- Different standard depending on the perspective
  - Agreement subject to local jurisdiction and local law: full review is possible
  - Agreement subject to foreign jurisdiction and foreign law: marginal review, limited to enforceability of choice of court / dispute resolution clauses and potential impact of local mandatory rules – remainder to be reviewed by foreign counsel
2. Applicable rules – impact on review

- e.g. contract submitted to the laws of NY and courts of NY:
  1°) are the choice of court / choice of law provisions valid?
  2°) if yes, review by US law trained lawyer
  3°) review by non US lawyer: limited to int'l mandatory rules (Art. 9 Rome I Regulation)
The questions
2. Applicable rules – impact on review

• In all cases, review not limited to purely legal issues
• Review should include:
  – Global coherence of the draft
  – Balance of the draft
  – Comprehensiveness of the draft
• Useful starting point: models/templates
The questions
2. Applicable rules – principle

• Mr. Gartner wonders whether in view of the fact that choice for English law brings about additional costs, it should not be deleted altogether
The questions
2. Applicable rules – principle

• Mr. Gartner argues that the agreement is very detailed, spelling out the rights and duties of parties, with as much care for details as possible.

• Given the degree of details and the fact that the agreement is the law of parties (pacta sunt servanda), is it necessary to include a choice of law?
The questions
2. Applicable rules – principle

• Mr. Gartner has a point: impact of the choice of law is not as relevant as that of choice of dispute resolution
• Even without a choice of law, contract is there and may be used as starting point to resolve a dispute
• In fact, in many disputes, key is not so much which law applies, but interpretation of parties' intention based on the substantial provisions
The questions
2. Applicable rules – principle

- However, applicable law remains relevant in 3 respects:
  - Agreement may not be *not complete* (e.g. contract concluded on the basis of general conditions)
  - Agreement may not be sufficiently *precise* —> room for interpretation
  - Agreement may give rise to doubts as to its validity (invalidity decided by applicable law)
The questions
2. Applicable rules – principle

- Even if applicable law is only marginally relevant, why not make use of the opportunity to choose the law in the contract?

- Even more relevant since method to determine applicable law if no choice may not be the same in all jurisdictions and it may not guarantee predictable result:
  
  - Fixed rule premised on one connecting factor (such as place of contracting or place of performance – Art. 8-1 Lei de Introdução ao Código Civil Brasileiro)
  
  - Closest connection (Art. 7 Mexico Inter-American Convention or s. 188 Restatement Conflicts 2nd : “the law of the state which ... has the most significant relationship to the transaction and the parties ... ”)
The questions
2. Applicable rules – principle

• In the EU, degree of predictability achieved by the default rules is higher – mechanism of article 4 Rome I Regulation (based on concept of characteristic performance) allows in most cases for easy determination of applicable law

• However, difficult situations remains: quaere of:
  – Barter contract
  – Bond issue: law of issuer or of bond holder?
The questions
2. Applicable rules – alternatives

• Mr. Gartner is now convinced that it is useful to have a choice of law in the contract
• He is still not very fond of English law
• Given that BioOrganics is not likely to accept a choice for German law, what are the alternatives?
The questions
2. Applicable rules – alternatives

• Solutions for deadlock:
  – No choice at all (fall-back provisions; e.g. Art. 4 Rome Regulation → legal certainty reduced since escape clause)
  – Choice for a neutral law? (Swiss / Sweden → dispute resolution adapted!)
  – Choice for Unidroit Principles, 'Equity and Fairness' or lex mercatoria?
The questions
2. Applicable rules – alternatives

• *E.g.* : Article 32 ICC Model Int'l Franchising Contract : “This Agreement is governed by the rules and principles generally recognized in international trade together with the UNIDROIT principles on International Commercial Contracts”
  – Probably only valid if one opts for arbitration
  – Even then : caution, general principles of law are just that, not a developed code of law...
The questions
2. Applicable rules – alternatives

• Mr Gartner suggests that if choice for general principles does not offer sufficient certainty, why shouldn't contract be directly subject to an international treaty

• Mr Gartner remembers that a sales contract he has seen, made a direct reference to the 1980 Vienna Sales Convention
The questions
2. Applicable rules – alternatives

• May parties directly opt in for an int'l Convention?
• Answer is mixed
• 1\textsuperscript{st} case: the Convention is not applicable on its own
• \textit{E.g.} 1980 Vienna Sales Convention not applicable in Vietnam \(\rightarrow\) sale of flat screen televisions from Vietnam to Germany, opt in for the CISG?
The questions
2. Applicable rules – alternatives

• Validity of choice
  – in some jurisdictions (and arbitration), choice is *upheld*
  – in other, choice is downgraded to mere *incorporation* of the Convention (trumped by mandatory provisions of law objectively applicable)
The questions
2. Applicable rules – alternatives

• If a Convention is applicable as such?
• *E.g.* 1980 Vienna Sales Convention applicable to sales agreement between US company and company based in France — relationship to choice of law?
The questions
2. Applicable rules – alternatives

• If the Convention is applicable as such
  – Choice for the law of a Contracting State: Convention not displaced – except if expressly excluded (e.g.: “This Agreement is governed by the laws of Spain. The provisions of the Vienna Sales Convention are expressly excluded”)
  – Choice for the law of a non Contracting State: Convention displaced (art. 1 -1 (b) CISG)
The questions
2. Applicable rules - enforceability

- Mr Gartner gives in and accepts that contract be governed by English law
- He wonders, however, whether this at least guarantees that no other law will ever be applied to the contract
The questions
2. Applicable rules - enforceability

- Principle: yes – law chosen is the law of the parties
- Many jurisdiction recognize freedom to choose the law as a fundamental tenet of int'l contracts:
  - Art. 3 Rome I Regulation
  - Art. 7 1994 Mexico Inter-American Convention of March 17, 1994
  - Section 1-301(c) § 2 UCC
  - Art. 7 Japanese PIL Law 21 June 2006 (Ho No Tekyo Ni Kansuru Tsusokuho)...
The questions
2. Applicable rules - enforceability

- Nuances...
- 1st nuance: limits to enforceability of choice of law provision
- Sometimes, choice of law provision will be enforced, but only with some reservations (e.g. not if chosen law has no relevant connection to the contract)
- Sometimes unclear whether the choice of law provision will be upheld (e.g. position under Brazilian law - Lei de Introdução ao Código Civil Brasileiro - is apparently not settled)
The questions
2. Applicable rules - enforceability

• 2\textsuperscript{nd} nuance: even if choice of law is upheld, need to take into account the 'super priority rules' – i.e. the int'l'y mandatory rules (e.g. Art. 9 Rome I Reg.)

• What are int'l'y mandatory rules? “national provisions compliance with which has been deemed to be so crucial for the protection of the political, social or economic order in the ... State concerned as to require compliance therewith by all persons present on the national territory of that ... State and all legal relationships within that State” (ECJ, Arblade, § 30).
The questions
2. Applicable rules - enforceability

- Intl'y mandatory rules look like national mandatory rules, but have distinct features:
  - In both cases, substantive provisions of a given national law
  - Difference lies in strength of the mandatory rules:
    - Domestic mandatory rules displace any substantive provision of the agreement which runs against them — you cannot contract out of these provisions in a domestic contract (e.g. prohibition of exclusion of liability for one's wilful negligence)
    - Intl'y mandatory rules displace both the content of the contract and the law chosen by parties — you cannot contract out of these provisions even in an int'l contract governed by foreign law
The questions
2. Applicable rules - enforceability

• Examples int'l'y mandatory rules:
  - Provisions protecting national cultural heritage and prohibiting export sales (e.g. Art. 25 of the Law of the PRC on the Protection of Cultural Relics of 19.11.1982 – prohibition of sale of artefacts to foreigners)
  - Provisions prohibiting certain commercial agreements (e.g. Art. 5 of the Tunisian Act nr 91-64 of 29.07.1991 “relative à la concurrence et aux prix” : “Sont prohibés, sauf cas exceptionnels autorisés par le ministre chargé du Commerce après avis du Conseil de la Concurrence, les contrats de concession et de représentation commerciale exclusive.”)
The questions
2. Applicable rules – exclusion of pil

• Mr. Gartner wonders why section 24 of the Draft not only includes a choice for English law but also expressly disavows the 'private international law rules'

• “The Agreement shall be governed by the laws of England, with the exclusion of its private international law rules”
The questions
2. Applicable rules – exclusion of pil

- Exclusion of the conflict of laws provisions of the law chosen
  - Goal is to avoid the application of the renvoi mechanism of the law selected (whereby account is taken of the conflict of laws rules of the applicable law)
  - However, in most countries, renvoi is not accepted for contracts. Even if renvoi were to be accepted, it is probable that the conflict rules of the law chosen would designate the law chosen by parties

- There is therefore not much point in excluding the conflict of laws rules of the law chosen. But, if it does not help, it does not hurt...
The questions
3. Language

• Mr. Gartner wonders whether it would be possible to have the final agreement translated in German, so that it is easier to understand
The questions
3. Language

- Translation of contracts is perilous
- Specific attention to English as the *lingua franca* of int'l commercial agreements
  - Legal English much more sophisticated than 'Euro-English'... (e.g. “execution of obligation” → “performance of obligation”)
  - Watch out for 'imports' (e.g. provision entitled “Frustration” : import of the English doctrine of frustration? / Recitals : “In consideration thereof...”)

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The questions
3. Language

• Agreement in **two languages**?
• Language priority clause: “if any discrepancy appears between the various language versions of the present Agreement, the English version shall have priority in settling its true meaning”
Wrap up

- Process of contract reviewing – drafting: fundamentally similar for domestic and international contracts
- Two main differences: dispute resolution and applicable law: two fundamental issues – you cannot assume that it will be a 'home game according to your rules'