



briefing

Dispute Management - November 2009

Jurisdiction in cross border business

It has been recognised for many years that doing business with parties in another country can create jurisdictional problems should a dispute arise. The ever increasing growth in cross jurisdictional commercial transactions, particularly of an e-commerce nature, requires thorough consideration as to where any dispute would be resolved.

In order to protect your position in this regard, it is advisable for any contract concluded with a party based in another jurisdiction to contain an express jurisdiction and choice of law clause. Most people see "home turf" as a distinct advantage in any dispute and it is usual therefore that this clause will provide that the laws of England and Wales will apply to the contract and that both parties will submit to the exclusive jurisdiction of the Courts of England and Wales. It is not always the case however, that the law and jurisdiction must accord and it is possible to stipulate that a dispute will be heard in one jurisdiction but under the laws of another.

Where a dispute arises and there is a doubt as to the jurisdiction and/or the law to apply to the contract, the Court will first look to see whether the parties have put in place such express clauses as discussed above. The Courts will generally seek to uphold the parties freedom to choose how their contracts will be regulated and will therefore recognise the wishes of the parties as to the law and jurisdiction which will apply to their business arrangements. This has the immediate benefit of providing the parties with certainty in this regard from the outset.

If no express choice of law or jurisdiction has been expressed by the parties, the Court will look to the rules currently in place to decide where the dispute must be resolved and under which law.

The basic rule applied is that a Defendant must be sued in the state in which it is domiciled. You may, therefore, find yourself having to pursue a Defendant overseas if your contract lacks an express choice of jurisdiction.

If no particular law has been chosen, the Courts will impose the law of the country with which the contract is most closely connected. The following factors may be considered by the Court when taking this decision:

- any express choice of jurisdiction - this is deemed to show an intention by the parties that the laws of that country will also apply;
- the location where the contract was performed;
- the physical location of the subject matter of the contract;
- the methods of payment being adopted and the currency of the contract.

It is relatively simple to ensure that a choice of jurisdiction and law clause is contained in your contracts. This should prevent a dispute arising in the first instance simply to decide where the main issue is going to be resolved. This can be an expensive exercise in itself which can so easily be avoided.

The lack of such clauses can in the worst case scenario find you having to pursue proceedings in a foreign jurisdiction under laws which were never intended to apply to the contract. There are clear consequences of having to pursue this course of action in terms of costs and uncertainty of outcome which are best avoided.

More information

Should you wish to discuss any of the matters raised or if you require any assistance then please contact David Hudson on 01792 2634594.



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Professional advice should always be sought where you require assistance in specific areas of the law. No responsibility can be accepted for any action based on these articles.