Preface

Whatever the nature of the transaction, in international business there is one prime question fundamental to the validity, interpretation, effectiveness and enforceability of the contract: what law governs?

Businesses frequently see the transaction in practical terms: to provide needed services or equipment, investments and expansion, control and management, or ensuring rights and obligations *inter partes*. It is for this reason that contracting parties will inevitably spend enormous time, energy and even money in negotiating and agreeing the specifics of a contract. Often, the law will be secondary or not even considered.

In very many contracts, advised by professional law organisations, there is a strong recommendation that contracts expressly provide for the law to apply. The issue in many circumstances is whether the law controls the specific terms agreed or if the applicable law is there to supplement and support the parties' agreement. In very significant part, most national laws are permissive and allow parties to agree their own arrangements. National laws will give effect to the terms agreed, provided they do not breach any mandatory laws or fundamental international public policy of the jurisdiction before which the issue is brought. On the other hand, contracts are inevitably incomplete with issues unforeseen or not provided for. In such circumstances, where necessary the applicable law may be required to play a key role in implying terms or filling the gaps to give the contract meaning and effect.

In some cases parties may not agree on a choice of national or other law. There are many reasons. The 'deal' is agreed, perhaps after hard bargaining. The parties (or their lawyers) cannot agree on the law of the other party, and no neutral law is acceptable. In the circumstances, the parties do not wish to scupper their agreement because of a pure choice of law which, in turn, would appear to have only limited relevance at least at the time of contracting and until a dispute arises. Most terms recording obligations, undertakings, promises, warranties, prices, penalties, remedies, etc. are self-explanatory. They are agreed and – at least at the outset – are clear and of mutual benefit and they have built-in protections that are seen as sufficient for the parties.

Even where there is an agreed choice of applicable law, there will always be other legal influences, such as national law specific to an aspect of the contract, the capacity of a party to the transaction, the existence of a corporation, effect of a shareholders' agreement, contract interpretation, enforceability of provisions in given jurisdictions and, of course, dispute resolution agreements.

Developed through business transactions, international and national institutional efforts, industry practices and the decisions of international arbitration tribunals, general

principles of law which can be applied to specific transactions and situations have emerged. What rules should be applied and in what circumstances is not always clear but it does allow arbitrators and even national court judges to interpret and enforce the contract terms through these international practices and rules.

Much has been written about *lex mercatoria*, including what it is and whether it has sufficient status to be applied to international business transactions. This issue is well discussed in this book by Dr Gustavo Moser. Whilst this issue is controversial – to the extent of which a majority of scholars approach it with scepticism and often challenge the very existence of *lex mercatoria* as an 'autonomous legal system' – the role of transnational rules in international contracts is notable and relevant.

Various organisations have undertaken initiatives to recognise the commercial relevance of these general and often transnational principles. These principles include *pacta sunt servanda*, the obligation to compensate for breach to place the victim financially in the place it would have been, but for the breach and the duty to mitigate the effects of the breach. Model contracts providing for optional choice-of-law clauses referring to 'principles of law generally recognized in international trade' in conjunction with other rules are often used. There are widely accepted neutral legal standards, such as the Unidroit Principles and the principles in the United Nations Convention on Contracts for the International Sale of Goods (CISG). Another example are the Hague Principles on the Choice of Law in International Contracts, which established a set of general principles to guide the interpretation of the choice of law in international agreements.

The *lex mercatoria* will not replace national law. However, it can have an influence on the way national law is applied in given circumstances of international transactions. It may also be applied directly to the meaning of the contract terms as part of general principles of law or to the specific contract itself. It may further be used as an integrated choice (in conjunction with Unidroit Principles, for example CISG, or specific trade usages), and provide a neutral or transnational playing field for contracting parties.

This book, *Rethinking Choice of Law in Cross-Border Sales*, provides an in-depth analysis of the sources of these general principles and standards and how they are and can be applied. Dr Moser has brought together many of the sources and opinions on these issues and has provided an analysis which will be useful both prospectively, when choosing the law to apply, and retrospectively, when seeking to understand what the contract means, how it could or should be applied, and how international arbitrators and judges can use them to give commercial effect to an agreed transaction.

The book will assist parties and lawyers to limit difficulties which can occur with the selection of a national law which may not properly support the contract. It discusses alternatives to overcome or control the effects of uncertain intentions and mistaken choices that are made by parties and their lawyers when selecting the governing law for

their transactions. Here, Dr Moser explains factors which may assist lawyers and decision-makers to make rational and efficient choices of the laws and rules to apply.

Rethinking Choice of Law in Cross-Border Sales will be a useful tool to all those involved in choosing, determining and applying law and rules to international transactions. Dr Moser is to be commended for a timely book which fills a gap in the readily available materials on the subject.

London, April 2018
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