Governing Law in Transnational Commercial Dealings in the Gaming Industry

By Joerg Hofmann and Martin Jarrett

Why should anyone concern himself with what is the governing law of transnational commercial dealings? Take, for example, an American land-based gaming operator which decides that it wants to be part of the convergence phenomenon. To this end, it identifies, for example, a certain business asset of a German online gaming manufacturer for purchase. The parties conclude the contract without any regard to the governing law, which happens to be German law. In time, a dispute arises and the American party finds itself confronted with a claim from the German party for rescission of the contract, meaning that the business asset should be returned. To exacerbate the problem, the German party brings its claim before a German court.

This situation is a nightmare scenario for any gaming executive: participation in foreign litigation for the possession of a critical business asset, the acquisition of which has cost considerable time and financial resources. Accordingly, the question arises, how is this situation avoided? The commentary below offers some solutions.

Introduction

It is a cliché, but the business-to-business commercial dealings of the gaming industry are globalised. What does it mean to say that commercial dealings are 'globalised'? In short, it means that the parties to such commercial dealings are based in different jurisdictions. This diversity can give rise to various difficulties, one of which is: what should be the governing law of the commercial dealings?

Governing law

What is a governing law? In summary, it is that body of law which provides the legal framework underpinning the commercial dealings between the parties. It defines the legal rights and obligations of the parties, and stipulates what consequences flow from the breach of such rights and obligations. It is usually expressed in the form of a 'governing law clause', which finds its place at the end of the document recording the contract between gaming operators and their suppliers. This governing law clause will usually read something to the effect of: this contract is governed by a law of a particular state, such as law of the Federal Republic of Germany.

Problems

Some might query why this is problematic. Provided there is a governing law, there should be no problem; however, the choice of the governing law matters for all parties. For example, parties from civil law jurisdictions might be surprised to learn, potentially to their detriment, that the only remedy they can claim for inadequate performance by their counterparties, in respect of their commercial dealings governed by a body of law from a common law jurisdiction, is damages. This is because in common law jurisdictions "damages" are the default remedy for defective performance, while other remedies, such as performance of the contract as ordered by a court, are only ordered exceptionally.

The typical scenario is as follows. The party drafting the

contract designates its preferred governing law, which is usually the law of its home jurisdiction. The other party protests this designation of the governing law and argues for the designation of its preferred governing law, which, again, is usually the law of its home jurisdiction. Consequently, the parties reach a deadlock.

Flawed Solutions

The conflict above is usually resolved via either one of the following options. First, the party with the stronger commercial position imposes its will regarding the governing law on the other party. Second, the parties might agree to a neutral law which is not the law of any of their home jurisdictions. Empirical evidence suggests that English law and Swiss law are popular choices for neutral governing laws.

Both of these solutions are unsatisfactory. With regard to the first solution, it might be contended that this is part of the 'rough and tumble' of commercial negotiations. While this contention might be applicable to commercial aspects of a contract, such as price and warranties, it is debatable whether it should apply to the purely legal aspects of a contract, of which the choice of the governing law is the most critical. This is because the validity of the commercial aspects of a contract depend on the legal framework underpinning the contract. Further, under this approach, one party necessarily loses and, from the commercial perspective, the aggrievement of one party might sour future commercial dealings between the parties.

With regard to the second solution, both parties lose. Both parties will usually be unfamiliar with the neutral governing law and will need to decide whether to engage legal advice to assist in navigating such unfamiliar legal waters. Those parties who do not seek legal advice in the designated jurisdiction risk creating legal risks for themselves they may not have intended to create, whereas the parties who do engage legal advice have to engage lawyers with whom they might otherwise have no existing relationship. Additionally, to compound this problem, lawyers advising on the popular neutral governing laws, English law and Swiss law, are among the most expensive.

The Solution

Ostensibly, there is no solution other than the two solutions detailed above. With some legal innovation, however, another may be proposed which offers better outcomes than the other two solutions.

Parties should designate a non-state based body of law as their governing law, such as the *UNIDROIT Principles of International Commercial Contracts 2010* (the "UNIDROIT Principles"). Using the UNIDROIT Principles avoids the problems the other two solutions encounter. First, their selection does not make one party a definite loser regarding the choice of the governing law. Second, as any lawyer may advise on a contract governed by the UNIDROIT Principles, all parties can retain their most favoured lawyers. The other considerable benefit of using UNIDROIT Principles is that they are a body of law which have been specifically designed for transnational commercial dealings. This contrasts with state based governing laws which are intranational in nature.

To the uninitiated, it might be objectionable that a non-state based body of law could operate as the governing law of a contract. Often, the choice of law rules on contracts in most states provide that a governing law must be a state based body of law. While this is correct, it does not take account of the use of arbitration agreements. If an arbitration agreement is inserted into a contract, the parties are at liberty to select any body of law as their governing law, including non-state based bodies of law such as the UNIDROIT Principles. Additionally, by inserting an arbitration agreement into their contract, the parties accept the benefits of a dispute resolution method which is tailored to transnational commercial disputes. This, however, is another topic which could only be properly addressed through an article dedicated to the subject.

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Conclusion

The nature of the gaming industry means that executives of gaming operators must be prepared to conduct business transnationally. When they enter this field, they are likely to encounter bodies of law of which they, and their lawyers, have limited or no knowledge. To understand their legal risk, they should attempt to make the governing law of their commercial dealings a body of law which they are familiar; however, the demands of the other party might make this impossible. The proper solution to this problem is to use a governing law which is designed for transnational business and one which both parties can become familiar with: the UNIDROIT Principles. ♣

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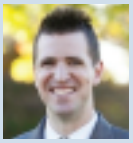

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