**OEM Agreement – legal principles**

Further to the meeting of the working group tasked with creating a new security scheme for S100 please find outlined here my initial observations on the current OEM & Data Server agreements (“Agreements”).

The biggest concern with the current Agreements is that they contain no governing law clause.

A governing law clause enables the parties to specify the system of law that will apply to the interpretation of an agreement and its effect if a dispute arises. It identifies the substantive law that will be applied when determining and interpreting the rights and obligations of the parties and any disputes that may arise, but it does not indicate how disputes are to be resolved, for example through the courts or arbitration.

A jurisdiction clause is a dispute resolution clause which identifies which court or courts are to hear a dispute. The Agreements do contain a jurisdiction clause.

It is important for parties to consider including both governing law and jurisdiction clauses in their contract. A failure to include clear provisions on governing law and jurisdiction can lead to lengthy and costly disputes over which court should determine a dispute arising out of the contract and which substantive law will be applied to determine the parties' rights and obligations under the contract.

The choice of governing law should be considered before beginning to draft the contract since a lawyer qualified in the relevant jurisdiction will need to advise on, or draft, the agreement. A well drafted governing law clause will minimise uncertainty and the risk of potentially costly disputes concerning which country's law governs the parties' contractual rights and obligations.

While the formal requirements may differ by jurisdiction, generally a governing law clause will be considered valid if:

* It is in writing or evidenced in writing.
* It clearly specifies the law of a jurisdiction.
* The parties have consented to it.

Parties often choose the law they are most familiar with or the law that is typically used in similar transactions. Given the wide divergence in the manner in which different provisions of civil and commercial law are interpreted in national legal systems, the choice of governing law can have significant implications in cross-border transactions. The following factors should be considered when choosing and drafting the governing law clause:

* Whether the chosen law offers certainty and ability to foresee how a dispute in connection with the contract is likely to be determined. In other words, do the principles of law and their interpretation favour the parties and the type of transaction for determining any future dispute?
* Whether the chosen law has a good reputation in international commerce for providing fairness and certainty of outcome to the parties.
* Whether the parties have chosen the law that will govern the contract as well as the forum that will hear the disputes arising in relation to that contract. A governing law clause is distinct from a jurisdiction clause. A governing law clause determines the law that will be applied when resolving a dispute while a jurisdiction clause determines the place where the dispute will be heard. The court chosen to hear the dispute may not automatically apply the law of the forum to adjudicate the dispute, especially if the dispute has cross-border elements. Therefore, practitioners should be careful in drafting clear and separate governing law and jurisdiction choices in their contracts.
* Whether there is a risk of the chosen law changing so that there may be a direct impact on how the dispute is likely to be determined.
* Consider whether the chosen law should be the law of the country or jurisdiction where the dispute is to be heard. While the choice of law need not be the same as the choice of forum, it is important to consider the implications of choosing a system of law that is foreign to the jurisdiction chosen by the parties to hear the dispute. Foreign laws may be interpreted in a different manner in comparison to how they would be in their home jurisdiction. Furthermore, the process of instructing foreign lawyers to give evidence can significantly add to the time and costs of the cross-border litigation.
* The need to be specific when choosing the law of a country which has multiple legal systems. It may lead to uncertainty if parties provide that their contract be governed by the "laws of the United States/Canada/China." It would be advisable to be specific about which jurisdiction's laws would apply.
* The relevance of mandatory rules. The law chosen by the parties is likely to be subject to the overriding mandatory laws of the forum and, in some jurisdictions, to the mandatory rules of the country where all other elements relevant to the contract are located. It is therefore important to seek legal advice on the impact of mandatory rules on the parties' choice of law.
* Whether the parties have access to sufficient numbers of specialist lawyers trained in the chosen legal system or jurisdiction.
* Whether the chosen law is typically used in international commercial contracts and in the relevant industry or sector.
* Whether it is prudent to have the same law apply to all issues arising under the contract. While it may be possible in many jurisdictions to split the governing law clause and select different laws for different disputes under the contract (for example, issue A to be decided under the laws of country A and issue B to be decided by the laws of country B), this kind of a clause may result in separate but related claims being filed in the courts of the chosen jurisdictions. The ability to file a concurrent, parallel action can result in unnecessary delays and increase litigation costs. Further, it can:
  + lead to conflicting judgments on identical or similar issues;
  + subject the parties to incompatible obligations; and
  + hamper the proper adjudication of disputes.

The IHO should therefore give consideration to deciding on an appropriate governing law before taking any further steps in formalising the new security scheme.

Notwithstanding the above as a primary consideration, the termination provisions (particularly 8.1) would not be considered well drafted and the termination provisions in general should be more robust.

There is also merit in considering changing from an enduring agreement to one that is required to be renewed periodically. This would enable the systematic review of terms & conditions and also ensure that membership of the scheme is effectively assessed. Currently, I believe there are members of the IHO s-63 security scheme who we believe are no longer manufacturing equipment but can still access data and this is a potential risk.

Any agreement for S-100 should also include an appropriate audit clause. Reducing the number of members of the scheme will make any audit process less onerous but there should also be a clear understanding within the organisation as to who is responsible for undertaking any audit and whether it is necessary to appoint external experts.

Overall there are a number of standard boilerplate clauses missing but these can be drafted relatively quickly once the bigger issues have been resolved.