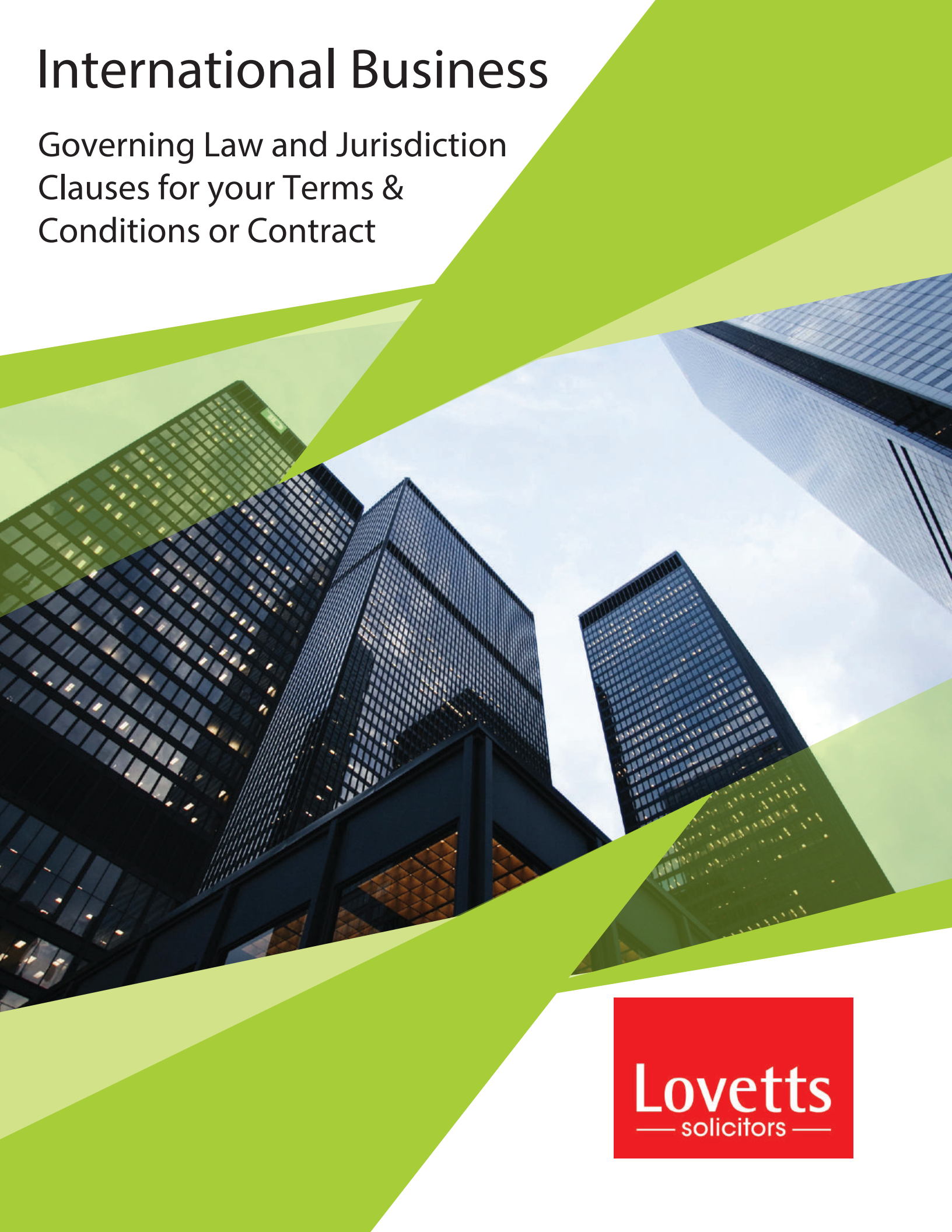


International Governing Law and Jurisdiction



International Business

Governing Law and Jurisdiction
Clauses for your Terms &
Conditions or Contract



Lovetts
— solicitors —



What clauses do you need in your Terms of Business/Contract?

One way to ensure an effective debt recovery process is to have well-drafted Terms of Business in place.

In this guide, we cover two clauses that need to be considered when dealing with international customers:

- jurisdictional clauses
- governing law clauses

We discuss the points you should consider when deciding what you want the clauses to say.

It should go without saying that the clauses need to express your intention clearly and you should take professional advice on these and the other clauses in your terms of business.



Clauses covering governing laws

A contract is a legal document which creates a legally binding relationship between two or more parties. If you are dealing with a customer in another country, it will be important to know which system of law applies to the contract. Is it to be the law of England and Wales, the law applying in your customer's country or some other law? You need to consider the choice of law whether disputes are to be dealt with through the courts or by arbitration.

For example, where you are dealing internationally, you and your customer will be based in different countries but the place for performance may be in another country altogether. In this case, there are several legal systems with potential relevance to the contract. It is therefore imperative that the contract clearly indicates which law is to govern the contract.

The following is a typical governing law clause you may find in Terms of Business or a commercial contract:

"This Agreement is governed by and shall be construed in accordance with the laws of England and Wales."

Perhaps rather obviously, when deciding which law to choose, you should choose a law you are familiar with. For parties based in England and Wales this is most likely to be the law of England and Wales. However, this may not always be the case and the law of another jurisdiction maybe more suitable to a particular contract.

If you are considering choosing another law, make sure you take advice first and understand the implications of the choice.

One question that currently arises is whether or not you should still choose the law of England and Wales in the light of Brexit. The short answer, at the moment, is generally, yes. A good governing law clause will set out expressly the parties' choice of governing law.



Jurisdiction clauses

When dealing internationally, you not only need to decide which law governs the contract but where any dispute is to be dealt with i.e. in which jurisdiction any court action is to be taken. It is inevitable that disputes will arise from time to time and it is how those disputes are handled that makes the difference.

When deciding where any disputes are to be dealt with you have a number of choices:

- You could give the courts of one country “exclusive” jurisdiction in which case any court action has to be started there.
- You could give the specified courts “non-exclusive” jurisdiction, in this case either party can start proceedings in that jurisdiction without argument but could start a case elsewhere and there could then be an argument over jurisdiction.

- You could consider a clause which limits your customer to starting any action in the courts of a specified jurisdiction but allows you to choose another jurisdiction if you want (an “asymmetric” jurisdiction clause). For example, you may want any case against you to be started in here but want the freedom to sue your customer in their local courts where that would be more economic.

However, care and advice are needed as not all jurisdictions will respect asymmetric jurisdiction clauses

- You may also want to consider whether or not any dispute should be referred to arbitration. The contract could require all disputes to be referred to arbitration or give a party the right to refer disputes to arbitration in certain circumstances. In these cases you will need to say where any arbitration should take place.

When considering which courts to choose, it will normally be appropriate to choose the courts of the jurisdiction whose law you have chosen.

So, if you have chosen the law of England and Wales you would normally choose the courts of England and Wales to have jurisdiction. However, the courts of one jurisdiction can apply a foreign law when enforcing a contract. So, if the law of England and Wales applies to the contract but you choose to start an action in your customer's local court, that court will apply the law of England and Wales.

Not all countries will enforce judgments obtained in another country. So, when deciding which courts should have jurisdiction it is important to know whether or not a judgment from a particular court will be enforceable in the place where you would want to enforce it. This will probably be where the defendant's assets are situated.

Conclusion

The above discussion in this post provides you with some points to consider as to:

- which law should govern your contracts,
- which courts should have jurisdiction
- or where any arbitration should take place.

As always, professional advice should always be taken when preparing your terms of business or any commercial contract.

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