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INTERNATIONAL CONTRACTS : FROM CHOOSING APPLICABLE LAW TO SETTLING DISPUTES

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When it comes to contracts, diverging national laws tend to increase the complexity of the rules governing aspects such as applicable law; jurisdiction for cross-border disputes; or country-specific public policy.First, it is crucial to frame anything which has been agreed upon in a written document. Then, the parties must consult in order to anticipate – as much as possible – any difficulty which might arise over the lifetime of the contract. The idea is to identify possible solutions to avoid a time-consuming – and often costly – dispute. Disputes can arise either as a result of your action(s) or failure to act – or of your contracting party's. Circumstances change, and the people who signed the contract may change positions. A contract sometimes needs adjusting so as to better reflect such changed situations.

If drawn up with care, a contract can frame the commercial relationship in a both precise and flexible manner, while taking into account its specific international features.

Furthermore, the parties have to manage a variety of documents from the very beginning of the relationship: purchase orders, order confirmations, general terms and conditions of sale / purchase, framework agreement, Incoterms, (technical) specifications. It is important to set the priority order between these documents based on their respective legal value and know exactly which ones shall prevail.

I – Entering into an international contract

1. Language and legal capacity – First, one needs to choose the language of the contract; even if English has remained the most commonly used contractual language, some partners may request that the contract be also drawn up in their language, in which case the clauses must be written in the two languages to avoid any misunderstanding and the prevailing language must be specified.

It is moreover recommended to check whether the signatory has authority to execute binding documents on behalf of the legal entity he/she represents, based on the law of the State where this company was incorporated.

2. Background – For instance, embargo imposed by the UN Security Council is likely to impact a cross-border contract and even jeopardize contract performance. To allow for this contingency, which may be considered a force majeure event, it is recommended to include a suspension clause, or a time-limit prorogation or extension clause. It may also be useful to insert a full list of force majeure events in the contract including practical examples.

Additionally, it is prudent to collect information on the economic, legal and social climate of your future contracting party.

For instance, prior to entering into an exclusive distribution contract, it is in the distributor's best interest to obtain a list of all suppliers' intellectual property rights in the relevant products, but also check whether the supplier has granted any exclusive rights to others in the territory.

For a commercial agency contract, it should be pointed out that the provisions of EU rules are more favorable to the agent (see below).

One needs to be aware that some national laws, such as French, Chinese or Romanian law, include special provisions as regards franchising agreements by imposing a number of disclosure obligations onto the franchisor before entering into the contract (in particular regarding experience, prospective markets, network, contract term, non-compete, etc.).

For a manufacturing agreement, it is recommended to attach the final version of specifications so as to avoid any conflicting interpretations in the future.

Based on its storage capacity, a purchaser intending to sign an OEM agreement may find it interesting to add a clause limiting production in order to reduce its storage costs and thus improve its cash position.

Finally, in the case of subcontracting agreements, care must be taken to consider the subcontractor's rights, since it may one day wish to develop new products from products made available by the other party as part of the agreement…

The few examples above stress the need to address another crucial issue: which law shall govern the international contract?

3. Choice of applicable law must be made with care: will it be French law? English law? (need to distinguish between England & Wales and Scotland) German law? Japanese law? New York State laws (or the laws of another US State, given that, as is the case in Europe, there is no such thing as "US law"). Applicable rules will vary depending on the law chosen by the parties. For instance, unlike French law, common law systems (i.e. the main law in force in the English-speaking world) don't recognize the legal value of recitals in a contract, nor of penalty clauses (subject to pending developments); furthermore the legal concept of "good faith" is totally absent in such systems.

You need to ask yourself: which law would best protect my company's interests?

For instance, if your company is to act as the distributor, you will probably tend to opt for Belgian law; on the other hand, if your company is to act as the commercial agent, French law will offer more protection.

As far as international law is concerned, the rule is that the parties are free to choose the law to govern their contractual relationship. At this stage, it can be useful to clarify two points:

- First, for easier enforcement, choice of applicable law must be expressly included in the contract – failing which, should a dispute arise, and unless the parties agree otherwise, applicable law will be determined based on the rules applied by the judge seized of the matter as regards conflicting laws (see below).

- Second, some legal systems actually limit freedom of choice. For instance, the ECJ recently ruled that Belgian law could be applied instead of Bulgarian law, which had been initially chosen by the parties to a commercial agency contract involving a Belgian agent, since Belgian law is more protective of the agent (Judgment of the European Court of Justice of 17 October 2013, case 184/12, 3rd Chamber "United Antwerp Maritime Agence NV against Navigation Maritime Bulgare").

4. In the absence of any choice of law, the judge seized of the matter will determine applicable law based on both international rules and the law of the State where the court is located. For instance, if a French judge is seized of a dispute regarding a contract between a French client and an Italian service provider, he/she will apply Article 4.1 b) of EU Regulation of 17 June 2008 (also known as "Rome I Regulation"), which provides that applicable law should be the law of the State where the service provider has its habitual residence – in this case, Italian law. It should be noted that this rule regarding conflicting laws is specific to the EU; consequently, a judge seized of the matter outside the EU may apply another rule based on his/her national legislation – which actually generates some legal uncertainty.

Finally, some international conventions – which are binding only to the extent that they were first ratified by the respective States – include automatically applicable rules for cross-border contracts. Among these conventions, the Vienna Convention on the international sale of goods dated 11 April 1980 tends to be more protective of the seller.

If the law chosen for the contract is disputed by the opposing party, the cost and duration of the court proceedings will extend accordingly, since this issue of applicable law will need to be dealt with first, before the subject matter of the claim itself can be discussed.

II – Avoiding and settling disputes which may arise in connection with international contracts

5. Dispute prevention – When a dispute arises, the first thing to do is refer to the contract.

If well thought out, an international contract can help avoid court proceedings. You can actually include out-of-conflict, re-negotiation or mediation clauses under which the parties are bound to meet before starting any action before a State or arbitration court. For instance, inserting a renegotiation clause in the contract straight away enables the parties to try and reach a new agreement should a dispute arise regarding application of a clause.

6. International arbitration is another option which, in return for its higher cost, confers additional advantages in terms of confidentiality, practicality and enforcement. The contract must specify whether disputes will be settled through ad hoc arbitration (i.e. applying rules defined by the parties themselves for both substance of the matter and procedural issues) or through institutional arbitration (i.e. before an international arbitration court with its own binding set of rules). Moreover, when the contract includes an arbitration clause, any State court which may be seized of the dispute by a party will automatically declare that it has no jurisdiction over the matter.

Though often longer, proceedings started before State courts are usually cheaper.

7. In the absence of any choice of court (whether State or Arbitration courts), as for applicable law, the court(s) which the parties may seize of the matter will be determined based on rules governing conflict of jurisdictions. For instance, EU "Brussels I Bis" Regulation provides that, in principle, the European judge in the State of the defendant's domicile has jurisdiction to settle disputes.

8. Conclusion – Last but not least, you should also give consideration to cost and time before entering into an international contract: make sure you properly assess the cost of contract negotiations (drawing up, letter of intent, talks, lawyer's fees), to be compared with the cost of court proceedings, which a well thought out contract would help you avoid...

Taking time to negotiate can actually help you save time in the end.

Moreover, take into account that business partners from most countries are usually assisted by their lawyer(s).

Though it is sometimes hard, keeping cultural differences in mind is a crucial step to better understanding your contracting party.