Pitfalls in the drafting of cross-border contracts

The increasing globalisation and internationalisation pose a major opportunity for companies to open up new markets at an international level. However, cross-border contracts entail risks that should not be underestimated. It is often not just a question of two different languages and different economic, political and cultural backgrounds opposing each other but also two different legal systems. This article aims to offer assistance in the drafting of cross-border contracts.

A. Careful planning of contractual negotiations

Obtain information about the contractual partner and its country
Before starting with the actual contractual negotiations, a careful review must be carried out of the prospective contractual partner. What kind of a company is it? What is its legal form? Where is it headquartered? To this end it is worth obtaining credit rating information. This way it is possible to avoid the unpleasant surprise and reduce the risk of suddenly being confronted with an insolvent contractual partner. It should also be ascertained in advance whether the person carrying out the negotiations on the counterparty side is actually authorised to represent the contractual partner and sign the contract. An excerpt from the key registers pertaining to this in the applicable countries can provide information about the authority to sign. If there are sufficient doubts concerning the right to represent and authority to sign of the negotiating partner then written certification or power of attorney must be demanded. A review should also be carried out of whether any legal or actual impediments to trade or trade barriers could potentially hinder the planned cooperation.

Agree on authoritative language
Often the contractual parties do not speak the same language. At the start of the negotiations the negotiating and contractual language must therefore be agreed. The negotiations will then be conducted and contract concluded in this language. For contracts drawn up in two languages it is recommended that one of these languages should be accorded priority.

Duty of confidentiality
It is often inevitable that the contractual partners already gain knowledge about each other's business secrets and other confidential information during the contractual negotiations. This poses the risk that this knowledge could be deployed in an unlawful manner at a later stage. The consequences for a company can be very adverse. Signing a confidentiality agreement entailing a contractual penalty in the event of infringement of this duty of confidentiality can serve to counter the unlawful use of confidential information obtained during the contractual negotiations.

B. Options concerning applicable law and place of jurisdiction

In the event of disputes concerning cross-border contracts the question almost always arises as to which court is responsible for ruling on the dispute and which law applies to the contract. These two questions must be accorded due attention in the preparation and conclusion of international contracts. After all, who wishes to be forced to take legal action before the courts of a foreign country in the event of a conflict or suddenly be confronted with a legal system entailing disadvantages for his case? In cross-border contracts – especially in the B2B area – it is in principle possible to specify the applicable law and agreed place of jurisdiction for the contract without any further ado.

Specify the applicable law

First and foremost it is advisable to determine which law is to apply to the contract. A choice-of-law agreement is permissible as a matter of principle in international contracts. However, in order to take effect it must be explicitly stated or unambiguously derived from the contract or circumstances. It is therefore advisable to specify a choice-of-law agreement in writing in the contract. However, for certain types of contract the choice of law is restricted (e.g. in employment contracts), partially excluded (e.g. in a contract with a consumer) or without effect (such as in an agreement on the reservation of title). In connection with protection rights such as brands and patents it should be borne in mind that the protection is essentially only guaranteed in the country in which it is registered. Therefore protection must be safeguarded through entry in the local registers when asserting protection rights abroad.

The importance in international sales contracts of the UN Convention on Contracts for the International Sale of Goods of 1980 (often referred to as the "Vienna Sales Convention") should not be underestimated. 78 countries have now joined this convention. In the signatory states the Vienna Sales Convention automatically also applies alongside the prevailing national legislation for contracts for the international sale of goods. To exclude its applicability this has to be carried out explicitly in the following form: "Swiss law shall apply exclusively under exclusion of the Vienna Sales Convention."

The parties are not always able to agree on a law. Often each contractual partner wishes the law of his own country to be agreed. The outcome of this can be either that one party agrees to be bound by the law of its contractual partner's country or that the parties agree on a third, neutral law. However, in such a situation an expert should be contacted first of all to review the consequences of this choice of law. It is important at least to be familiar with the main features of the applicable law in order to be able to assess in which cases the applicable law is favourable or unfavourable for your own case. Attention should likewise be paid to ensuring that the contract is drawn up as comprehensively as possible and that important points in the contract are stated explicitly as in many areas the legal provisions are not compulsory and the parties can deviate from the law. As a result of this it is often the case that the provisions contained in the contract largely take precedence. This obviously offers no guarantee that all contractually agreed points can also be accordingly implemented. Mandatory provisions of the applicable law (e.g. provisions of antitrust, bankruptcy or tax law) can prevent the implementation of contractual provisions. It is also possible that the applicable law does not recognise certain agreed consequences or does not consider these legitimate.

Specify the place of jurisdiction

In international contracts the question often arises as to which courts are responsible for ruling on any dispute that ensues. Here too it is in principle possible to agree in writing (so-called choice of jurisdiction clause) on the responsibility of a court. Again, there are limitations in employment and consumer contracts as well as insurance and rental/leasing contracts.

If the parties do not agree any place of jurisdiction then the court at the place of residence of the defendant is normally responsible for ruling on the dispute. Often the plaintiff is also entitled alternatively to bring action at the place of performance of the services provided under the contract. It is therefore advisable to specify clearly in the contract a place of performance for the services owed. This serves to facilitate the definition of the place of performance in the event of dispute.

Furthermore, reference should be made in connection with the responsibility of the courts for international disputes arising from contracts to the Lugano Convention on Jurisdiction and the Recognition and Enforcement of Judgements in Civil and Commercial Matters. As well as the responsibility of the courts of the signatory countries it also governs the mutual recognition and enforcement of judgements. The Lugano Convention essentially applies to all civil and commercial matters where the place of residence of the defendant party is in a signatory country. The scope of application of the Lugano Convention also permits the conclusion of a written choice of jurisdiction clause.

Instead of a choice of jurisdiction clause the parties can under certain conditions agree in a so-called arbitration clause that a court of arbitration should rule in the event of any dispute (e.g. the ICC International Court of Arbitration). A court of arbitration is a non-state court the judges of which can be determined by the parties. Arbitration proceedings are non-public and often bring benefits in terms of time and costs. Furthermore, arbitration awards can generally be enforced better than state court judgements due to international conventions.

C. Summary

While the opportunities posed by the ongoing globalisation for opening up markets abroad are exciting and interesting, they also pose a challenge in terms of contractual negotiations and the drafting of cooperation. Thorough and extensive clarification of the starting position serves to create the necessary foundation for successful contractual negotiations and reduces the risk of unpleasant surprises during the negotiating and contractual period. In cross-border contracts the parties should particularly make use of their options for determining the place of jurisdiction and applicable law and not simply leave this decision to the contractual partner.

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