Remco van der Kroft

Advocaat (Dutch licensed lawyer) and partner of Olczak-Klimek Van der Kroft Węgielek

International disputes

When negotiating international contracts, often one of the last points for discussion is the applicable law and dispute resolution. There is a simple reason for this. When the business conditions of a deal have been discussed between the parties, usually one of them calls his lawyer and asks the lawyer to start drafting. This lawyer will usually include the law of his country in the agreement and will do so at the end in a boilerplate provision. The parties will then sit down and go through the contract and on the last page they arrive at 'applicable law' and 'dispute resolution'.

There are a few very good reasons to have the discussion about applicable law at the very beginning. First of all, contracts are interpreted differently under different laws, and secondly should the negotiations break off, article 12 of EC Regulation No864/2007 on the law applicable to non-contractual obligations (called Rome II) states that the law applicable to obligations arising out of pre-contractual dealings is the law that would have been applicable had the contract been entered into. The potential liability for breaking up negotiations differs greatly between countries and is probably most far-reaching under Dutch law (I wrote about culpa in contrahendo under Polish law in the summer of 2009 in Bulletin 28).

Another issue that is often treated much too lightly is dispute resolution. First of all, dispute resolution should be in line with the applicable law. I am currently involved in trials in Poland under Hungarian and Greek law. This is all great fun for lawyers, but it is not what you want when your goal is to swiftly resolve a conflict and go on with business. International parties will sometimes have an engrained mistrust for the legal system of the other party, so people choose arbitration instead.

After all, a Dutch party and a Polish party can choose arbitration in Paris or Stockholm because it is neutral territory. Again, this is great for lawyers, because few procedures are more expensive and time-consuming than arbitration in France or Sweden. Always consult with your lawyer first and choose the form of dispute resolution that best suits the situation. If the most likely dispute under a contract will be about paying rent, your best bet will be choosing the common courts in the place where the property is located. If you have a very complicated technical agreement, arbitration may be better because you can choose competent arbiters. In this respect it should be remembered that both in the Netherlands and in Poland there are arbitration institutions that are less expensive and well experienced in international disputes. In the case of very technical disputes it is sometimes possible to choose a specialized arbitration institution for a given sector.

It is also possible to build in several alternative dispute resolution mechanisms. For example, if the contract envisages that parties have to agree on a price in the future, a system can be included whereby an independent accountant will determine the price if parties cannot agree. If the contract is concluded between two companies that are each part of a group with parent companies, a system can be included whereby parties have to negotiate, and if they cannot reach agreement within a certain time frame the conflict is escalated to the highest board level.

One should assume that this takes the emotions out of the discussion and makes compromise easier. Although that does not always work: I was once involved in a dispute between two European companies that sued each other in a Polish court. Both these companies had the same ultimate parent company. Another mechanism that can be built in to a contract, but which can also be invoked at a later stage, even at the suggestion of the court, is mediation.

In short, both applicable law and dispute resolution are important elements of a contract that should be considered well up-front.