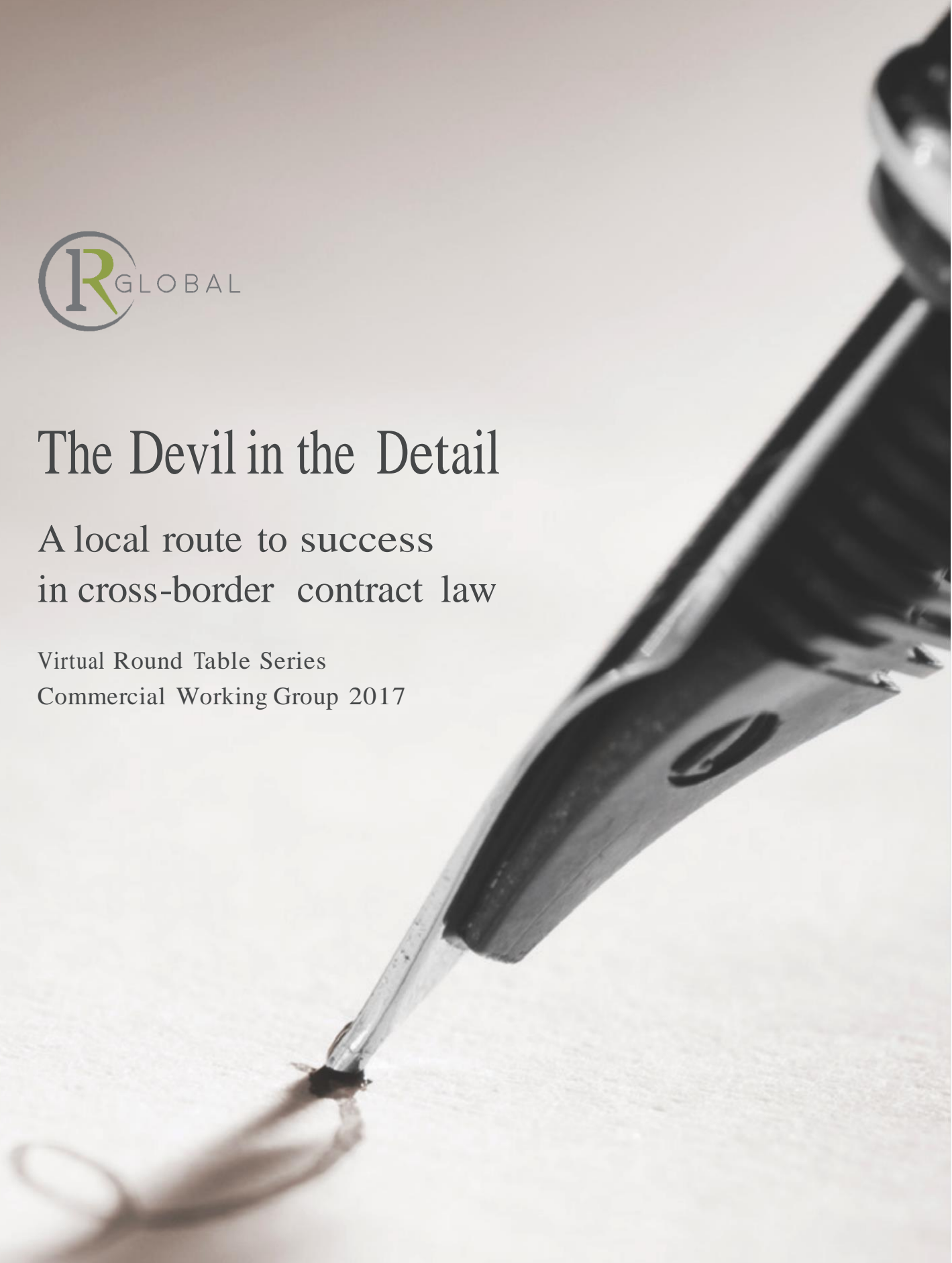




The Devil in the Detail

A local route to success
in cross-border contract law

Virtual Round Table Series
Commercial Working Group 2017



The Devil in the Detail

A local route to success in cross-border contract law

Contracts form a critical part of any commercial operation, allowing businesses to enter into agreements with the suppliers, customers and distributors that drive their operation. Commercial contracts can be complex and highly bespoke, covering a range of eventualities and containing a wide range of clauses designed to protect both parties in the event of breach.

That complexity usually increases when the contract is cross-border and must encompass different legal systems and cultures. Attempting to use standardised contracts from one jurisdiction in another can cause huge problems in the event of a dispute, particularly when it is unrecognised by a court or deemed unenforceable under a legal system.

Given this heightened risk, it is important to engage the services of professionals with expertise in the jurisdiction in question, to help head off any issues before they materialise.

With this in mind, IR Global brought eight members of its Commercial Law Group together to discuss contract law. The aim of the feature is to give members and their clients valuable insight into commercial contracts across a range of jurisdictions, including the common errors seen and best practice approaches to eradicate them. We also assess how judgments are enforced and the procedure for claiming damages in the event of a breach.

The following discussion involves IR Global members from The Netherlands, Panama, Denmark, Germany, Belgium, China, Turkey and Italy.



The View from IR

Thomas Wheeler

MANAGING DIRECTOR

Our Virtual Series publications bring together a number of the network's members to discuss a different practice area-related topic. The participants share their expertise and offer a unique perspective from the jurisdiction they operate in.

This initiative highlights the emphasis we place on collaboration within the IR Global community and the need for effective knowledge sharing.

Each discussion features just one representative per jurisdiction, with the subject matter chosen by the steering committee of the relevant working group. The goal is to provide insight into challenges and opportunities identified by specialist practitioners.

We firmly believe the power of a global network comes from sharing ideas and expertise, enabling our members to better serve their clients' international needs.



PANAMA

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Pardini & Associates is an international law firm with headquarters in Panama with more than 30 years of tradition and experience advising foreign clients and corporations of all sizes.

QUESTION 1

What are the three most common errors you see in commercial contracts drawn up in your jurisdiction?

Germany –Christophe Just (CJ) Our foreign clients from international groups sometimes fall into the trap of using master contracts or translated samples they already have in their collection. The problem is that Anglo Saxon Common Law does not always work in Germany's codified legal system.

A practice that translates literally in an Anglo Saxon context doesn't always work in German contracts. A mindset about how German law works is required, and you don't even necessarily have to have 20 pages of definitions or contractual terms to see that there are a defined set of contract types in German codified law. It's a tricky thing to take an American sample and simply translate it into German - it often doesn't work.

Netherlands –John Wolfs (JW) Due to an ever increasing internationalisation in the Netherlands, commercial parties tend to use a large amount of English wording in their contracts. What these parties forget is that the English terms used in a contract do not always have a clearly defined definition in Dutch.

In a famous case, called Lundiform / Mexx, there were two commercial parties who made an agreement to purchase hardware for a certain number of retail stores, using an 'entire agreement clause'.

Due to the fact that in Dutch we do not recognise such clauses, a subsequent disagreement led to legal proceedings. In the end the Supreme Court decided that judges still need to look at the statements and actions leading to the signing of a contract, and a mere linguistic approach in explaining a commercial contract is not enough.

Commercial parties tend to think that they can use so called take it or leave it contracts where there has been no negotiation on the wording used. This is where these parties make mistakes.

If their counterparty can prove that there has been no negotiation and they were not assisted by a legal expert, judges are no longer allowed to weigh the literal definition heavily. Therefore, uncertainty regarding the explanation of a clause increases risk.

Should a party choose to use standard contracts, I advise them to make a record of the fact that both parties are aware of the legal effects of the contract and the clauses included.

China –Graham Brown (GB) People often fail to get legal advice in China, and that includes foreign lawyers. Around 30 per cent of the contracts I see are defective to the point of being unenforceable; and some of those contracts have very big legal brands on them.

Secondly, the governing law and dispute resolution systems are Chinese. People seem to think that China doesn't have a decent legal system, so they will use their own. That often means the Chinese party has a remedy but the foreign party does not. China has very few judicial assistance treaties in place which mean a foreign judgement is usually not enforceable in China.

My third point concerns language. Many people with whom you will negotiate a contract will speak English, but the people who actually perform the contract may not, so bilingual contracts are best for China. Of course, this means that accurate legal translation is essential and this is not always easy to get.

Panama –Juan Pardini (JP) The most common mistake in Panama, is not to properly settle the terms of termination, governing law and arbitration clauses. Similar to other countries, our judicial system lacks clarity and foreign plaintiffs often find themselves in an endless process that does not match pre-established expectations, when attempting to collect their credit or claim.

Secondly, the general rule under Panama law is that all contracts are consensual, meaning they are perfected by the mere consent of the parties involved. Any form or language utilised in the execution of commercial contracts will obligate the parties under the terms expressed. The exception to this general rule would only be those contracts pursuant to the Commercial Code or special laws must be executed in a notarial deed or require certain additional formalities for their validity.

Lastly, there is the issue of formalities. In Panama, there are multiple contracts that, by law, are required to be notarised and/or registered meaning that the rights and obligations arise from the registration. Contracts that must be notarised and recorded at the Public Registry include pledge agreements, the purchase and sale of real estate, lease agreements and mortgage deeds.

For example, it is very common for two foreign parties to enter into a pledge governed by Panama law, based on their knowledge of foreign legislation, but missing some important formalities required under Panamanian law. This always results in a legally questionable agreement.

Denmark –Anders Hedetoft (AH) It is very common in Denmark to ignore the possibility of using CISG legislation or similar. It is not very well known that all our legislation is translated into six original languages and is very well defined. That is not properly understood.

In the daily line of business, the importance of having a fixed venue for the contract is often missed, including which law should govern the contract and where the dispute should be settled if required. Parties should not overlook the opportunity to play on home ground rather than, for instance, in Germany.

A third point is the battle of forms. The questions about whether we are going to use the seller's terms or the buyer's terms. It concerns what should happen in a conflict when each party has exchanged their own terms and how that should be defined in a contract.

Belgium –Stephane Bertouille (SB) We see many of the same problems as other civil law countries with the translation of common law documents. The wrong selection of courts can be a heavy impediment as can termination clauses and the lack of specificity of what constitutes a serious clause.

The wrong qualification of an agreement is pretty difficult to overcome when you want to defend your clients in a litigation.

China –GB China is nominally a civil law country, but that can be a trap for civil lawyers, since there is some common law influence, and there are differences in the detail of how the Chinese system operates. Contracts put in place with Chinese parties are always about the detail of the law and the jurisdiction it is going to be enforced in. China gets a bad rap, but in many cases China itself is not the problem, rather it is due to assumptions made about its legal system.

Turkey –Ilknur Peksen (IP) The nature of the errors we see depend on the scope of the commercial contract in question and its parties. There are three basic errors that we usually come across in practice.

Specific performance is not an available remedy in all circumstances under Turkish Law and it is problematic. Despite this we observe that many commercial contracts bear clauses which grant the parties the right to apply for this legal remedy even if enforceability of such term is not possible.

Secondly, the liability clauses are not drafted diligently and in many occasions, we observe that they do not reflect the real intention of the contractual parties, resulting in the parties of the contract assuming heavier responsibility.

Finally, the termination clauses are not always well-drafted and due to the ambiguities in relation to notice periods, the parties fail to notify termination in due time, leading to automatic renewal of the contracts.

Italy –Tommaso Mancini (TM) One of the most common mistakes in international contracts involving Italian persons or entities is ignoring that the Italian legal system includes 'internationally mandatory rules' protecting certain categories (e.g. rules on consumers or commercial agents) or certain public interests (e.g. antitrust or tax laws).

By way of example, foreign companies wishing to sell products or services to Italian consumers must be aware of the provisions of the Consumer Code, which encompasses specific consumer protection provisions.

Foreign companies - and particularly non-EU ones - wishing to appoint a commercial agent in Italy should be aware that the Italian agent, irrespective of any provision of the agency contract, may bring a claim before Italian Courts and seek payment of a goodwill indemnity upon termination of the relationship.

Italian subsidiaries of foreign multinational group of companies often use the same contract templates used by the other companies of the group. Contract templates drafted by foreign attorneys or consultants are seldom suitable to ensure such compliance with all applicable Italian laws, and therefore it is strongly advisable to have them reviewed and amended by a local law firm which specialises in national and international contract, custom and tax law.

Another common pitfall is to have a contract translated into Italian by an Italian speaker who is not also an Italian qualified attorney. Italian is a language with a very rich legal terminology and legal terms are often misused by people who do not have a solid legal background. This often leads the parties to rely on contractual provisions which are later discovered to be invalid and/or ineffective, or which trigger litigation when interpreted in different ways.

QUESTION 2

What best practices should professionals adopt in your jurisdiction to ensure contracts are viable and legally binding?

Germany –CJ There are two points that are of practical importance in negotiating a contract in Germany. Firstly, a bilingual format is required because it needs to be enforced in courts that operate in the German language only, even though contracts drafted in a foreign language are valid.

Secondly, a practical point is that contracts are often drafted and negotiated by the buying department only, particularly in the automotive industry. This involves engineers doing legal work as they understand it, so crucial parts are missing. There is often no complete description of the work, or warranties and performance details are missing. There is rarely a complete set of contract details.

Also some details, such as security taken, require notarising which can be missed by non-lawyers. I highly advise a lawyer be engaged from the start to prevent things going wrong.

China –GB That raises an interesting point, because one of my pet hates is people who say they will negotiate commercial terms and leave the lawyers to look after the legal side. There is no difference in my opinion, since the contract terms are either enforceable or they are not.

In China you can use foreign law for a contract with an international element, but it cannot avoid the operation of some provisions of Chinese law. The contract must comply with the mandatory provisions of Chinese law. This means that if you are using foreign law as a means of overcoming issues with Chinese law then it probably won't work.

Secondly, if you specify foreign law, then you as the foreign party have the responsibility to satisfy a Chinese court or tribunal on the completeness of the law. If the court decides that the information provided is insufficient it may decide to apply Chinese law anyway.

Denmark –AH Foreign lawyers are often surprised about the informality of making an agreement in Denmark, therefore it is best practice to understand the foreign jurisdiction you are making an appointment in and the rules of contract law. With respect to daily business in Denmark, it would, for instance, be highly unusual to put in the contract how to correctly identify legal representatives.

Under Danish law, a CEO would always be ultimately responsible for signing a contract in respect of daily business.

Belgium –SB A notary is almost never necessary in Belgium, unlike Germany and The Netherlands. It is, however, very important to correctly identify legal representatives and this is probably the problem we encounter the most.

China –GB Legal representative is a statutory office in China and is very important because that person is the only one that can bind a Chinese company on a signature alone. It doesn't matter what the fancy title, or whether the CEO signs, if they are not the legal representative, or they do not have a Power of Attorney valid in time and scope from the legal representative they cannot bind the company.

Italy –TM As a general rule, no special formalities are to be completed in order for commercial contracts to be legally binding. There are however some exceptions. For example, a lease contract for real estate having a duration longer than nine years must be made in writing, signed before a public notary and registered with the land registry.

More remarkably, articles 1341 and 1342 of the Italian Civil Code state particular rules regarding 'unfair clauses' included in general terms of contracts drafted by one party and not negotiated with the other party or included in pre-printed contract forms.

The unfair clauses are valid and enforceable only if the non-drafting party declares in writing that he has explicitly accepted them and if such declaration is rendered in accordance with the formalities required under the Civil Code and the relevant case law.

General rules aimed at ensuring contract effectiveness must also be observed, such as drafting the contract in a language that the parties can understand, identifying the prevailing version of the contract in case the same is drafted in different languages, giving the parties the chance to examine and sign the contract before triggering the underlying transaction and making sure that the signatories to the contract are duly empowered to do so.

Turkey –IP There is a very old law which requires the contracts with at least one Turkish party to be drafted and executed in Turkish, yet we observe that if the contract has a foreign element, the parties usually tend to sign an English version. In order to avoid any breach and risk a dispute over the validity of the contract, it is recommended to have a bilingual contract.

Professionals should also pay attention to those commercial contracts which are subject to notarisation requirements. The rules governing certification requirements are strictly enforced in Turkey and in case of any failure in following the certification requirements, the contract will be deemed void.

It is also wise to use trade registry records to confirm the signatory powers of those persons who can sign the contract. We would not recommend professionals rely merely on the signature circulars or similar documents provided by the opponent party.

Panama –JP First of all, always consult local legal experts before beginning any contractual relationship. Conduct an appropriate review of the terms of the agreement, followed by a responsible due diligence process in order to ascertain a laundry list of items to enter into and execute an agreement.

It is highly important to establish rules of disclosure in order to initiate a trustworthy relationship in which both parties have properly shown valid documents or deeds that allow them to act on behalf of their companies, trusts, LLCs or any other vehicles.

It is also highly important to legalise the signature of an agreement, by stamping the approval of a notary.

Since Panama is an international jurisdiction with a legal system that has produced multiple vehicles such as corporations, trusts, private foundations, LLCs and others that operate and own assets globally, these vehicles are often involved in international transactions subject to foreign laws. It is often overlooked that the entity entering into the transaction is Panamanian, and subject, from many legal angles, to Panama law.

Netherlands –JW When there is a bi-lingual contract in play, especially when the non-Dutch version is decisive, it is wise to make use of certified translators.

Legal English cannot always be translated to Dutch without losing its actual definition, therefore it is best practice to stay as close to the legal definitions recognised in Dutch law as possible. However, should there be a need to deviate from that, it is wise to clearly define any wording used that is not a legally accepted structure in Dutch law (such as the entire agreement clause from the Lundiform / Mexx case).

Reciprocity, meaning treating another person on the same basis as the other person treats you, is another important best practice concept in Dutch contract law. Legal doctrines such as 'good faith' (goeder trouw) and 'reasonableness and fairness' (redelijkheid en billijkheid) are integral to reciprocity and can, potentially, create the difference between winning or losing a case.

The pre-contractual stage of Dutch Law is also an important best practice concept for foreign lawyers to understand. Even though a contract is not yet signed, the negotiations might bring certain obligations for both parties under pre-contractual rules. The biggest problem is that this is not dealt with in our written law, only coming to light in case law, therefore it is important to be on top of all new relevant case law.

There are three phases through which the negotiation between parties 'flows'. In the first phase, parties are free to terminate the negotiations at any moment, without any cost consequences.

During the second phase negotiations reach a stage in which parties can no longer terminate without compensating the other party for the partial or total costs they have made.

At the third phase, negotiations progress to a situation in which termination would constitute a breach of the principles of reasonableness and fairness. Should a party choose to terminate in this phase, they would need to cover the costs of the other party and compensate any loss of profit.

QUESTION 3

How easy is it to enforce judgments in your jurisdiction? Any examples?

Panama –JP The recognition and enforcement of a foreign judgment, as it is called in our jurisdiction, is a non-contentious process that in most cases only requires compliance with appropriate documentary legalisation required by law. Panama applies the rule of international reciprocity and thus reserves the right to deny the enforcement of any judgment from a country that denies the recognition of any judgment made in accordance with Panamanian legislation.

There are many tactics applied by penalised parties to avoid payment. Our response will depend on the time and preparation of those tactics before the legal claim of enforcement. For example, a well prepared asset protection plan, executed years before the plaintiff's action, might be very hard to breach.

The Republic of Panama is a signatory of the Convention of Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters of 1971 as well as the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 – the New York Convention - and the Panama Convention on 1975 both related to recognition and enforcement of arbitral decisions.

Germany –CJ In our experience, enforcement in Germany usually works well. I have had to explain to the courts how some titles from Austria or France work, but generally the process is smooth.

Enforcement in Germany is done by court clerks who are not fully trained judges, but admin people with legal training, so is sometimes necessary to explain the legal ideas in question.

I recently had an Iranian client with an ICC arbitration title against a German entity. There was a seven-digit figure payable and it was done and executed the next day.

Italy –TM Foreign judgments in commercial matters are generally enforceable in Italy, but the time and efforts required for the enforcement depend on where the judgment comes from. Enforcing judgments rendered in EU Member States is usually a straightforward task, since no special recognition procedures or declarations of enforceability are required (articles 36 and 39 of the EU Regulation 1215/2012).

Unless international conventions apply, judgments rendered in other countries are enforceable if they meet the requirements of the Italian statute on private international law.

The first step required to enforce a non-EU decision in Italy is to obtain an enforcement decree from the competent Court of Appeal, which will take at least six months. Then, if the other party opposes the decision, the proceedings may continue for other two or three years before the Court of Appeal, and for a further year if the matter is submitted to the Court of Cassation.

The Italian judicial system suffers from excessive delays due to the complexity and high number of laws and the huge backlog of cases accumulated over the years by courts at all levels.

Tactics aimed at delaying the proceedings are widely employed and hard to discourage; consequently, unless you are the debtor, it is often advisable to reach an out-of-court settlement agreement and drop any lawsuit.

China –GB The court process is relatively cheap and quick in China, although the courts can be relatively inexperienced, compared with older legal jurisdictions, so outcomes can be less predictable. Our experience is that we usually win when the evidence suggests that we should. It is a sad fact that many people do not get the chance to seek a remedy, because they made a mistake in the contract formation. We do everything we can to reduce the likelihood of our clients needing to rely on legal remedies by using our hard won China experience to anticipate problems and allow for them in our contracts.

If we know there is likely to be a manufacturing problem, we will deal with that in practical and contractual terms, which could include putting an engineer or an inspector into a factory.

It's very difficult to get money in a China settlement. You are more likely to be offered settlement in kind, which, in other words, means an offer to buy more goods or make more orders or something similar. That can work well, but our overall situation is to always avoid getting to that point. If you have a contract for less than about USD100,000, it will be difficult to enforce formally in any profitable way, so smaller clients are in more danger than larger ones and need to pay more attention to contractual pitfalls in China.

Belgium –SB Tactics employed by penalised parties are a big problem in Belgium. Our Ministry of Justice is fighting very hard against this type of behaviour by deciding that the first judgment is enforceable, subject to appeal. The term for filing submissions has also been shortened to a month. Justice is therefore faster and more efficient and the parties who try to delay the matter are subject to penalties imposed by the judge, if their behaviour is improper.

Netherlands –JW Foreign judgments from all EU Member States, except Denmark, are recognised and enforced in The Netherlands pursuant to the Brussels I Regulation (recast).

An applicant submits a copy of the judgment to the Dutch enforcement authority, accompanied by a translation (if required), and a standard form certificate issued by the court that rendered the judgment.

If the judgment contains measures which are not known in The Netherlands, it should be adapted to include measures known under Dutch law (Article 54 Brussels I Regulation (recast)). Furthermore, the certificate will have to be served on the respondent against whom the enforcement is sought prior to the enforcement measure taking place.

The recognition and enforcement can only be refused on limited grounds and only upon an application of any interested party to the relevant District Court. In the event of an application for refusal of enforcement, the District Court may suspend the proceedings, request security or limit the enforcement to protective measures, (Article 44 Brussels I Regulation (recast)).

Foreign judgments from non-EU member states may make use of a bilateral or multilateral treaty. If there is no such treaty they may rely on Dutch Civil Procedural Code and the accompanying case law. A Dutch judge is allowed to recognise a foreign judgment if they believe it to be fair, based on an internationally accepted principle, not incompatible with a previous judgment and not contrary to Dutch public policy.

Denmark –AH From a Danish perspective the system works very well. Judges are usually well prepared and understand how to enforce judgments from foreign jurisdictions. I cannot remember having any problems with enforcement. We do occasionally have discussions from time to time, but that is when judgments conflict against some very fundamental rules.

As an example, if a UK entity came to me and asked me to enforce an English judgment in Denmark, that could be done within two or three weeks.

China –GB If an English company came to us and asked us to enforce an English judgment in China, our response would be that it is not a practical possibility. China does not have a judicial assistance treaty with many countries which only leaves reciprocity on a case by case basis.

The bottom line is that if you want to enforce an international contract in China, that has to be thought about and implemented at formation, not after a problem arises. You either rely on arbitration via the New York Convention, you rely on a Chinese Court, or resolve disputes in a different jurisdiction where the Chinese party has reachable assets.

Turkey –IP Enforcement of foreign judgments in Turkey is not easy and requires the applicant to go through an enforcement procedure in the form of a court action. Although the Turkish legal system on enforcement of foreign judgments is based on the international agreements to which Turkey is a party, there are major problems in practice.

Turkish Law requires the foreign judgment not to be against the Turkish public order, yet it leaves the assessment of whether the public order is breached, to the discretion of the courts. In the absence of objective criteria in relation to public order, the courts tend to refuse enforcement of the foreign judgments on grounds of public order in case they are undecided.

The judgment can be enforced only if the person against whom enforcement is sought does not raise objections in the courts of Turkey to the effect that they were not duly summoned to or represented at the foreign court, or that the judgment was rendered in their absence in violation of the laws of the foreign country.

In such case, the party who applies for enforcement of foreign judgment is expected to prove due service/notification of the opponent, which is not an easy task. For this reason, professionals are recommended to keep up-to-date addresses of the opponents and monitor the service or notification of the foreign court closely.

Christoph Just, pictured at the 2016 Annual Conference in Amsterdam.



QUESTION 4

How are damages dealt with in commercial contracts in your jurisdiction? Are liquidated (pre-agreed) damages common?

Turkey –IP Determination of pre-agreed damages is not very common in Turkey, instead the parties usually adopt penalty clauses to cover their risks. If a dispute over damages is referred to the court, the case is handled by court appointed experts.

Limitation of liability clauses will give parties the opportunity to foresee the upper risk to a certain extent and to limit the damages. We do come across such clauses frequently, yet, for certain damages, no limitation can be provided.

Denmark –AH We are very conservative in Denmark. We are focused on the actual direct and consequential laws as they apply. You will not see high levels of damages in the Danish system, but you could agree to have a penalty system. If such agreement has been reached between both parties, it would be respected by the judge.

Germany –CJ Damages can be actual losses or assumed lost profits, both of which are accepted by German Courts. For lost profits the burden of proof is with a claimant and they must be shown and proven by clear logical causation. This will be decided in court and depends on the quality of your evidence and how sure they are that the profits would have been gained otherwise.

There is an acceptance of a penalty system in Germany also, which can be agreed between parties for such issues as late delivery.

This is dangerous though, because, if it is included in the terms and conditions or in specific contract clauses that may be qualified as terms and conditions, then there is a threshold. Exceeding this makes the clause invalid, so even within commercial contracts there may be a danger of invalidity within a penalty system designed for pre-agreed damages.

There are industries that are more open minded, for example the automotive industry. Suppliers to the big firms have to accept pre-agreed damages or they are out of the game. If there is a disruption on the production line, then there will be a schedule for pre-agreed damages.

China –GB Liquidated damages are quite commonly used in China, but there is a sting in the tail. Either party to apply to the court if the liquidated damages are deemed to be disproportionate to the actual damages. To some extent that limits the benefit of contracting with liquidated damages.

Belgium –SB I would just add that we do not have punitive damages in Belgium like they have in the US.

China –GB Punitive damages are not awarded in China either.

Italy –TM The amount of damages reimbursable in case of a contractual dispute takes into account the loss suffered by the creditor and the lost profits, insofar as they are a direct and immediate consequence of the non-performance or delay. If damages cannot be proved in their exact amount, they are equitably liquidated by the court.

Through a ‘penalty clause’ or a ‘liquidated damages clause’ the parties can agree in the contract the amount payable in case of breach, or delayed fulfilment, of an obligation.

Under the Italian laws such amount represents the maximum amount payable, unless the right to obtain reimbursement of additional damages is expressly reserved in the clause.

The amount due under the penalty or liquidated damages clause can be equitably reduced by the court in case the breaching party has partially fulfilled the underlying obligation and/or the amount in question is manifestly disproportionate.

Punitive (or exemplary) damages are not recoverable, even in the context of extra-contractual liability, since the principle of punitive damages is incompatible with the Italian legal system. Moreover, Italian courts have always refused to enforce foreign judgments encompassing payment of punitive damages.

As of today, although a different trend may always arise, a similar judgment issued by a US Court against an Italian company would not be enforceable.

Panama –JP Normally, damages are included in commercial contracts as penalty clauses. Nonetheless, depending on the matter disputed, damages can be added to claims in order to force a favourable scenario to negotiate a suitable settlement of a case.

For a judge to grant damages in a judicial process in Panama is very common. We would even say that is the rule. The exception would be a case in which the judge recognises the good faith of the party that lost the dispute. On the contrary, if the Judge deems it appropriate due to his perception of bad faith of the party that lost the dispute, exemplary damages could be granted in favour of the affected party.

Our Judicial Code establishes a special procedure to liquidate damages recognised by the court’s judgment. If this procedure is not executed, the judgment will have to be executed through a separate process and be subject to a statute of limitation.

Netherlands –JW In Dutch commercial contracts, it is not unusual to make use of pre-estimated damages to be paid in case a certain event happens. This either works via a percentage or via maximum amounts to be paid. Dutch case law proves that the judicial authorities tend to view these pre-estimated damages as a penalty clause rather than damages. When fines are contractually imposed one should keep in mind that it is possible to add a clause stating any fines do not withstand a right to claim reparations and/or exercising of any other right.

Depending on the stakes involved it can either be beneficial or adverse for a party to gamble on quantifying actual damages. Most of the time this is only done in the bigger cases, as there are also a lot of costs involved. Exemplary damages, however, are not that common in Dutch law. The only cases in which we can see exemplary damages are cases regarding cartels. In those cases, the amount of damages to be paid (most often in the form of a fine) are raised to simply set an example for others.

QUESTION 5

Is there anything special or peculiar about commercial contract law in your country that clients should be aware of?

Belgium –SB One important thing to remember about Belgium is our Contract of Exclusive Distributorship. If Porsche, for instance, decides to stop working with its distributor in Belgium, it will be very tough to break and could cost up to five year's profit to terminate. Any company should think carefully before terminating a distribution contract in Belgium.

Germany –CJ We have the same thing with trade agents who are protected in a specific way.

In Germany there is a certain sensitiveness around antitrust matters whenever you go into a cooperation agreement, depending on the market, the volume of the transaction and the players involved. I would recommend foreign lawyers always look into antitrust matters.

The other issue is labour law, which can be problematic when insourcing personnel for an operation.

China –GB China is a foreign exchange controlled country and can cause problems in unexpected ways. A client can have an agreement that ticks all the boxes, but the other party can't pay because you haven't thought about the foreign exchange controls.

In general, there are particular steps that must be taken if money is to be moved out of China, even relatively small amounts. It is part of the attention to detail required to successfully engage with China.

China –GB Chinese law firms all have a seal as well. China restricts the scope of practice of foreign law firms licensed to be in China. There are also foreign law firms operating as 'consultancies' without a licence. When engaging a law firm in China it is always advisable to get express confirmation that the firm is licenced to give an opinion on Chinese law. Anything less than an unequivocal response is a reason for caution.

Netherlands –JW In Dutch law we have a very famous and influential ruling by the Supreme Court which is often cited. It states that, when explaining a contractual clause, one should take into account the reasonable expectations of the parties, given, among other things, the societal circle to which the parties belong and the knowledge of the law that may be expected of such parties.

Panama –JP Panamanian law also contemplates the possibility of execution of a general pledge of assets (called a floating charge in the UK) located outside of Panama. The general pledge of assets may be governed by a foreign law and must be registered at the Public Registry in Panama to be valid against third parties. This type of pledge would only affect assets situated outside Panama.

One final piece of advice is that Panama is a signatory of several Free Trade Agreements with different countries such as the United States, Canada, Peru, Singapore and others, and these FTAs contain their own rules regarding agreements and dispute resolution for commercial, financial, investment or trade transactions. Furthermore, Panama is a signatory of Bilateral Investment Agreements with approximately 30 countries providing additional rules and protections on bilateral investments. These agreements are international treaties that prevail over Panama law.

Turkey –IP According to the Stamp Tax Law in Turkey, all contracts (except for some exceptions) are subject to stamp tax. Even if the contract has been signed abroad by foreign entities, if the contract is to be submitted to Turkish authorities for any reason, then it would be subject to stamp tax.

Stephane Bertouille, pictured at the 2017 Dealmakers event in Barcelona.



It does not matter whether the contract is subject to foreign law for this stamp tax to become applicable, the important point is that it has been 'used' in Turkey. The tax is accrued on the amount that is stated on the contract. The law provides a ceiling (top limit) for the stamp tax, and even if the stamp tax calculated based on the actual contract value is greater than this limit, the maximum stamp tax will be equal to the ceiling amount.

Another point that the clients should be aware of concerns the language of the contract. If there is a Turkish party, then it will need to be drawn up in the Turkish language.

Italy –TM Based on the peculiarity of the Italian laws and judicial system, anyone doing business in Italy should secure transactions through properly drafted contractual instruments.

Our experience has taught us that a good contract is a well-balanced contract which (a) complies with the applicable laws and regulations, and therefore is fully valid and enforceable; (b) clearly defines rights, obligations and liabilities of the parties and (c) limits uncertainty and prevents (or significantly reduces the risk of) litigation.

Final tip: a good contract can be drafted only by a qualified Italian legal advisor or, better, by a team of experienced legal advisors specialising in international contracts and capable to cover all the aspects of the Italian laws and regulations involved in the underlying business transaction.