contrast



Forum selection and choice of law clauses: they're not just boilerplates...

Imagine…

As a Belgian distributor, you enter into a new cooperation with an Italian supplier for the distribution of racing bicycles in Belgium. The supplier sends you a draft contract in which you read that Italian law will apply to the contract and that the courts of Milan will have jurisdiction if ever a dispute arises between the parties.

That strikes you as absurd, given that the products are delivered in Belgium and are sold primarily to Belgian cycling enthusiasts. However, you do not want to be needlessly confrontational with your supplier, so you ask your legal department for advice.

Can the Italian supplier really impose requirements like this? And if so, is it important to insist on a different arrangement, or will the applicable law and competent court make little difference in practice?

A brief clarification.

Within the European Union, the determination of both the competent court and the applicable law is subject to European regulation. In civil and commercial matters, the Brussels I bis Regulation governs jurisdiction in cross-border disputes. Furthermore, the Rome I Regulation defines what law applies to (international) contracts.

Concerning the **competent court**, the starting point is that a defendant domiciled in an EU Member

State is summoned before the courts of that Member State. In other words, a Belgian company can be called before a Belgian judge. However, in certain cases, the defendant can (or must) be convened before the court of a different Member State because of the special or exclusive jurisdiction of that court under the Brussels I bis Regulation.

For our situation, it is important that the parties themselves can also determine which court has jurisdiction (whether or not exclusively). They can do this both *before* any dispute arises, for example via a forum selection clause in their contract, and *after* a dispute has arisen.

The Italian supplier and the Belgian distributor can thus perfectly well agree that the courts of Milan (whether or not exclusively) shall have jurisdiction in case of a conflict. They can even opt to institute proceedings on “neutral” territory, for example by choosing the courts of Sweden, the Netherlands or Germany.

With regard to the **applicable law**, the basic rule in the Rome I Regulation is that an international agreement is governed by the law that the parties have chosen. Here too, it makes no difference whether that chosen law has an organic link with the parties or the situation. So once again they can opt for a “neutral” law, e.g. Swedish, Dutch or German law.

Nevertheless, in certain cases the choice of law of parties is restricted by the application of so-called *overriding mandatory provisions*. These are provisions the respect for which is regarded as crucial by a country, to such an extent that they are applicable to any situation falling within their scope, irrespective of the law which the parties have chosen.

For example, Belgian law contains in certain cases a mandatory protection for exclusive or quasi-exclusive distributors who are active within Belgium. In case of termination, they are entitled to a reasonable notice period (or financial equivalent) and a goodwill indemnity. Important for our situation is the fact that Italian law does not offer any comparable protection.

Overriding mandatory law will not always be automatically applied in international situations. Much will depend on the judge who has been seized. Any Belgian judge will be obliged to apply this special protection even if the parties opted for the law of a different country, such as (in this hypothetical case) Italian law. By contrast, the Italian judge in our case will be free to decide whether or not to apply these Belgian protection rules - and thus there is a very real chance that he will not do so. In brief, in principle a judge *must* apply the overriding mandatory provisions of the law of his own country, and he *can* apply those of a different country.

Now let us go back to your specific question and concern. Do you have an interest in not simply accepting the choice of Italian law and the jurisdiction of the courts of Milan, and instead checking first?

The answer is clearly yes. Instituting proceedings before an Italian court, in Italian and on the basis of Italian law, obviously will not offer you anything resembling a home court advantage. Quite the opposite, in fact. Furthermore, there is a real chance that, as a result, you will lose protection that you could otherwise claim on the basis of Belgian law.

So, in a nutshell (and brace yourself, because this is a bit complicated):

- Through the choice of the Italian courts and Italian law, you must proceed on the assumption that you

will not be able to enjoy the Belgian protection for distributors.
- If you maintain the choice for the Italian courts, but make Belgian law applicable, in principle this Belgian protection regulation should apply. The Italian judge would have to apply this as part of the chosen (here: Belgian) law.
- However, if you want greater certainty that you will enjoy this protection, the safest course is to opt for the Belgian courts. After all, they are familiar with these rules. Hereby in principle it makes no difference whether one chooses Italian law or Belgian law, since the protection is overriding mandatory law and therefore must be applied by any Belgian judge - regardless of what country´s law was chosen by the parties.
- Things are different if the protection that you as a contracting party are seeking is not characterised as overriding mandatory law (which will be the case for many European countries). In that case, the only safe course is to choose as applicable law the law containing this specific protection (thus for example German or Dutch law if that is the law offering the protection you are seeking). If you do not do so, this protection will not apply, regardless of the judge you have chosen.

If one thing is clear, it is that forum selection and choice-of-law clauses are not mere boilerplates casually inserted at the end of your contract. They can make a world of difference when a conflict arises.

Concretely

- The applicable law and competent court are important in practice. Within the EU there are still fundamental differences between the ways of (and deadlines for) conducting litigation and the applicable provisions.
- In the case of (international) contracts, both the applicable law and the competent court should be contractually determined in order to avoid needless discussions.
- In principle, the parties can freely choose what law applies to their contract and which courts have jurisdiction in the event of a dispute. But be aware that this freedom of choice is limited in certain cases, e.g. through the application of overriding mandatory law provisions, and that both the Rome I and the Brussels I bis Regulations contain specific rules for certain categories of contracts.
- If during negotiations you receive a forum or choice of law proposal whose implications are not immediately clear, be sure to check with your legal department. If the contractual relationship ever goes south, you do not want any unpleasant surprises on that level.

Want to know more?

- The consolidated version of the **Brussels I bis Regulation** (*Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters*) is available via this link: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32012R1215.
- The consolidated version of the **Rome I Regulation** (*Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I)*) is available via this link: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX%3A02008R0593-20080724.

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