Top Ten Tips on Negotiating and Drafting Cross-Border Commercial Contracts: A Practical Approach

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There is no doubt that negotiating and drafting cross-border commercial contracts bring with a number of challenges. From the differences between common law and civil law jurisdictions, to deciding whether or not to arbitrate disputes, to the commercial terms themselves - each decision will ultimately have an effect on your company’s bottom line. What follows is a series of tips to help you navigate through some of these issues.

1. What is the Deal All About?
Think of a good commercial agreement as a document that tells a story. It should recite the intent of the parties in a clear, simple and consistent manner. However, you cannot assume that every deal will fall neatly into your template agreement. Ask questions of everyone involved to be sure you know how the story is supposed to end before you begin drafting.

Without a solid understanding of the regulatory and technical requirements of your industry, it is impossible to adequately negotiate and prepare contracts that will both protect your company and allow it to reach its intended goals. This is not to say that every in-house lawyer needs to be an expert in regulatory affairs or completely understand the science behind the widget your company is trying to sell or buy. Especially if you are new to in-house or have switched industries, however, it is worthwhile spending time with the regulatory and technical professionals at your company to make sure you know the basics (and whom it is best to ask when you need more information!).

2. Anticipate the other party’s demands.
Make educated guesses about the other party’s requirements and incorporate what you can into the draft document. Drafting a totally one-sided agreement or refusing every requested change from the other party might give you a heady feeling, but it often leads to a breakdown in the entire negotiation process. Your commercial colleagues will not thank you if a potential deal implodes because of your intransigence. (Obviously, there will be times when you must refuse to compromise, but try to find a way to resolve the impasse whenever possible.)

If your transaction is with a company in a non-English-speaking country, the lawyer for the other party may not have the best command of English and may be at a disadvantage when it comes to drafting the contract. Showing that you are taking the other side’s requirements into account often eases negotiations considerably, and clarifying the language of the contract to be sure it reflects the intent of the parties will often result in surprise concessions on points you anticipated would be contentious.

3. Try not to expose yourself.
When you are involved with an international transaction, carefully investigate issues that might lead your company to be
exposed to significant negative publicity, unanticipated costs – or worse, criminal liability. Depending on the jurisdiction involved, issues relating to child labor, local privacy laws, antitrust issues, and tax requirements can be just some of the subjects that must be taken into account before finalizing a commercial deal.

As an example, the latest “hot” topic in this area – especially for those of us with operations in the United Kingdom - is the new U.K. Bribery Act 2010 (2010 Chapter 23), which went into effect in July, 2011 (Bribery Act). The Bribery Act is similar to the U.S. Foreign Corrupt Practices Act of 1977 (15 U.S.C. §§ 78dd-1, et seq.) (FCPA), but goes well beyond the scope of the FCPA, as it covers all bribery intended to benefit your company in some manner, not just bribes involving public officials (in effect, “commercial bribery”). The Bribery Act makes it a corporate criminal offense to fail to prevent bribery, as well as to give or to receive a bribe.

The Ministry of Justice has issued a formal Guidance to the Bribery Act, which provides procedures that companies can put in place to prevent people associated with them from committing acts of bribery. The Guidance document can be found here.

Your company’s policies with respect to these matters should be appropriately reflected in your commercial contracts.

4. Whose law is it anyway?

Often the first hurdle when negotiating a cross-border contract is the determination of which law will be selected by the parties to govern the interpretation of the contract and establish the rights and obligations of the parties. Each party, of course, would prefer the laws of its own jurisdiction. Often, however, a neutral country’s laws are chosen so that both parties are mutually inconvenienced. Such neutral countries often include England, especially for parties familiar with a common law system, or Germany, France or Switzerland when the parties prefer civil law. While there are differences between civil and common law contracts, both legal systems offer essentially the same protections for the parties.

If you are not familiar with the chosen country’s laws, it is best to have the contract reviewed by a local attorney before committing your company to a contractual relationship.

5. To arbitrate or not to arbitrate, that is the question.

Contracts are usually negotiated when there are good relations between the parties and it is anticipated that everything will follow the pleasant path to profitability that the parties intend. However, planning in advance for a breakdown in relations is an important part of contract negotiations. In addition to resolving the choice of governing law, the process of resolving disputes must be decided.

Most contracts fall into two categories: either providing that disputes will be resolved by litigation or by arbitration. Arbitration is often preferred because it is perceived as being faster and cheaper than litigation (a perception that may not, in fact, always be true - but that’s another article).

If arbitration is agreed upon, items often overlooked in drafting a contractual arbitration clause include a determination of the scope of discovery rights, the language of the proceedings and where they should be held, as well as whether any issues relating to confidentiality need to be considered. For example, in Switzerland, while the arbitrator must maintain the confidential nature of the proceedings, there is no express duty of confidentiality applying to the parties to the arbitration. As a result, it may be best to either provide that the provisions of any separate non-disclosure agreement between the parties will extend to any proceedings in arbitration or be aware of the need to include strict confidentiality provisions in any application for arbitration.

6. Force Majeure

The “boilerplate” clauses at the end of the contract are often neglected during the course of negotiations. However,
anyone who has dealt with claims of force majeure by Japanese companies as a result of the earthquake and tsunami in March 2011 knows that the textbook force majeure clause included in their form document may merit a second look.

A force majeure frees the parties from liability or obligation when an extraordinary event or circumstance beyond control prevents one or both from fulfilling their obligations under the contract. Defining the events which constitute a force majeure may differ from contract to contract – and might even change depending on whether your company is the supplier or the purchaser in a given situation. For example, if your supplier introduces a general clause which states that “strikes or lockouts” are events of force majeure, it might be wise to insist that the supplier be under the obligation to minimize the disruption as much as possible, perhaps even requiring that the relevant products be sourced from a third party (with the supplier paying any differential in cost, of course).

7. Incoterms®
In the event that your contract involves the cross-border shipment of goods, the International Chamber of Commerce’s (ICC) Incoterms® are the commonly accepted rules for the use of international trade terms that clearly define each party’s respective obligations and rights. Therefore, familiarity with Incoterms® is absolutely essential, regardless of whether your company is the supplier or purchaser in any given situation. The Incoterms® chosen will determine when the title and the risk of loss will transfer from the seller to the buyer (which may occur at different times), which party is responsible for the procurement of insurance, and whether the goods are being shipped by sea, ground or air.

Be aware that the ICC recently released its 2010 version of Incoterms®, which makes a number of changes to the descriptions of the tasks, costs and risk allocation under international commercial contracts.

8. Should you exclude the exclusion clause?
The exclusion clause is a provision designed to exclude liability for consequential or indirect damages in the event one party breaches the terms of the contract. While there are some differences between common and civil law with respect to the definition of consequential or indirect damages, the end result is essentially the same. Many contracts will specifically define the types of consequential damages to be excluded (for example, damages for loss of profits due to breach). However, on occasion, it might be worthwhile excluding the exclusion clause – making it possible for your company to claim loss of profits or other consequential damages in the event of a breach by the other party, especially with single-source suppliers. This can be a double-edged sword if the other company demands the same, so adroit drafting and negotiation skills are necessary to be sure that you aren’t creating a bigger problem than you’re solving.

9. Surprise! Not all decisions are made by the lawyer!
Many of the issues the in-house lawyer faces in day-to-day commercial drafting and negotiations are practical, rather than legal ones. From the lawyer’s perspective, it is irrelevant whether the customer must pay 30 days or 60 days from invoice date. Commercially, however, it might make sense to require a new customer to pay within 30 days, while you might give an established customer 60 days to pay.

It is not your job to argue whether or not the business decisions being made will lead to the anticipated (profitable) results. It is your responsibility to object to those ideas that will have a negative legal impact on, or a significant legal risk to, the company. However, once the decision to proceed has been made, your role is to be sure that the terms are correctly spelled out in the agreement and to protect your company to the maximum extent possible.

10. Teamwork, teamwork, teamwork!
I spend a lot of time consulting with the other in-house lawyers and those individuals from other parts of my company
who will be affected by contracts I am preparing. They help me out by reviewing documents, discussing alternatives or simply by serving as a sounding board for ideas. I like the fact that my colleagues and I find time to work together to resolve issues and prevent problems before they happen. As a team, we can better ensure that the ending to our story is a happy one.

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