EUROPEAN SUPPLY CONTRACTS

Forum shopping

Consider at the outset which court has the right to hear disputes when a contract has European supply elements. Jurisdiction is a key factor in formulating litigation strategy

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WHEN ANY INDIVIDUAL IS BUYING from or supplying to Europe, the law governing where they could be sued is based on the Brussels Convention. This is a set of rules signed by the Member States of the European Union in 1968, which regulates jurisdiction disputes of both a civil and commercial nature. Later replaced in 1988 by the Lugano Convention (amended and enforced in 2010), this extended the application of its rules to the European Free Trade Association (EFTA). The basic rule is, when a defending party is sued, it will be in the state where he or she is domiciled (Article 2), although the Convention does give the claiming party a choice so that disputes can be heard in a court based in the country where the contracted performance was to be performed (Article 5.1). This becomes an issue where a contract requires acts of performance to be made in several different countries and failure happened in more than one country.

ESTABLISH WHETHER IT IS A CONTRACT FOR THE SALE OF GOODS OR PROVISION OF SERVICES

The first hurdle that must be overcome is to establish whether it is a contract for the sale of goods or provision of services. Car Trim GmbH v KeySafety System Srl (Case C-381/08) involved a contract for the supply of components for use in the manufacture of airbag systems. The contract was terminated and an action of damages was brought in Germany (the place where the components were manufactured). The European Court of Justice (ECJ) was asked to decide whether it was a contract for the sale of goods or the provision of services. The seller not only had to manufacture, but also to deliver the components according to the buyer's specifications. The ECJ clarified the general approach is contracts for the supply of "goods to be produced" are contracts for sale of goods except for a number of situations, (a) the buyer supplying a substantial part of the materials for their manufacture; and (b) where the seller is only responsible for correct implementation of the buyer's specifications. The second hurdle is determining the place of delivery. In Electrosteel Europe SA v Edil Centro SpA (Case C-87/10), the goods were paid for and delivered on to a carrier in Italy and were then transported to France. The seller sued the buyer in Italy, but the buyer objected and claimed that it has its headquarters in France. Following the Car Trim approach, the ECJ found that the clause under the agreement that defined the place of delivery was decisive. The contract was based on standard terms that are used widely in international transactions. It stipulated that delivery was Ex Works, which means the seller was to deliver the goods to the carrier at a port in Italy and not their final destination in France. ECJ clarified that there is no need to consider any additional criterion of the "place of final destination" that was considered in previous references. However, where it is not clear, the place of delivery shall be the place where the goods were physically transferred or should have been physically transferred to as the final destination.