Top 10 – How can I use my US sales terms in Europe?

Nearly every US in-house counsel has faced the task of tackling an impending overseas deal when only US State law governed terms are at hand. Staring down the barrel at an unknown legal system, a familiar scene plays out:

Do you push to use the US terms unamended?

Often, there is an overwhelming desire to use what you have. You have invested time in these terms, you understand their structure and where you would concede on them. What's more, they are based on your home law. If you get embroiled in litigation, it is not far to travel to litigate in the Santa Clara County courts and you will be defending your position with California law and with terms you drafted.

However, if you use them abroad, are they enforceable?

Should you fully localise the US terms?

If there is the budget and time available, another option is to take the US form and have someone with the right expertise "localise" the contract. They can make the necessary amendments to ensure the provisions comply with the relevant local law and local market practices. Inevitably, this involves relinquishing the relative sanctity of local courts and familiar law.

When localised, you know the contract will now be enforceable and acceptable. But what have you lost? Unfamiliar with your systems and appetite for risk, has the local counsel "given away" ground? Why are there now fewer exclusions and wider warranty provisions? Inevitable, some control is ceded.

The contractual dilemma

Depending on the scenario, it may be reasonable to take either approach. Seasoned advisors will know where to draw the line. The decision is a fundamental one which sets the tone and shape of negotiations immediately. Where each side favours their own system and laws, building an entrenched position in favour of home advantage may, in practice, turn out to be the wrong decision.

Yes, each party could agree to local law and the right to apply for their home courts when defending an action under the contract. But what will a French court make of a US style exclusion of liability clause crafted for Washington State law? At that point you may wish you had localised.

Yes, local counsel can attempt to cobble together an agreement which would "work" in every EU Member State as well as the US, but do you understand and accept the consequential risks of an imperfect document? With a true blend of applicable systems, can anyone actually understand the extent of the compromises being made?

The legal dilemma

Like it or not, different territories have different laws. There are 28 states in the European Union and across these states there are tranches of relatively harmonised laws in certain areas. The basic underlying laws of contract and case law or codes which aid their interpretation are, however, all different.

Faced with just such a decision regarding localisation – what are **10 issues should you consider**?

One: Freedom of contract

In Europe we have "freedom of contract". For most business-to-business (B2B) contracting scenarios, it is possible for the parties to negotiate freely and choose the law that should apply to the contract and to the forum that should hear any resulting dispute. Yes, particular local regulation may intervene in a few areas, but there is nothing to outlaw a Delaware State law deal between two consenting businesses in Italy.

The instinctive reaction is to go with what is familiar. Instead, step back and consider the likely scenarios in which the contract could be enforced. Consider also which legal concepts/provisions on which you are most likely to rely.

Two: When consumers are involved in Europe, work to their local law

Across the European Union, when consumers are contracting, the game changes. EU consumers are always entitled to have any contract they are entering into subject to the law of the land in which they are domiciled. This is the case whether the Dutch consumer is offered Californian or Belgium law. Any attempt to over-ride this will fail.

Additionally, an EU-based consumer cannot be denied their local court. And, no matter how hard you try, you cannot force a consumer into arbitration.

If a court will apply the consumer's local law, to get the best protections for the business, you should try to craft terms around these laws. Take time to assess the local system and approach of peers and regulators. In Germany consumer organisations and even competitors have standing to object. Elsewhere, there are potentially more lenient enforcement regimes. US terms maybe unenforceable but, if it's a free product, perhaps retaining US State law is an acceptable risk to take?

Additionally, European consumers are entitled to terms which are:

- "*fair*" and "*reasonable*"; and
- accessible in "*plain and intelligible*" language.

This means not only the use of clear and non-technical language, but also local language (English language terms for a French customer are always "unfair" and unenforceable). The law also overreaches to restrict how aggressive and one-sided you can be. There cannot be a "significant imbalance" in approach. Admittedly, drafting to this vague and flexible notion can be a challenge.

Three: Be aware of legalese and differences in terminology

Words familiar and acceptable in the US sometimes have a different interpretation in the EU. For example, only an individual goes "*bankrupt*" in the UK and- at times- restrictions permissible in the US are outlawed in the EU. The use of stock phrases like "*save as maybe permitted by law*" or "*including the occurrence of any analogous event in any jurisdiction*", can get you so far but, as in any legal system, there is an art to crafting restrictions within laws and limitations.

As discussed below, this is particularly the case with vocabulary used to exclude liability.

Four: Consider and assess mandatory laws

"*Make the necessary amendments for local mandatory laws*"- this is a common instruction which is rarely understood. Few have the confidence to get to the bottom of whether there is value in doing this kind of review. The answer varies depending on the context and market.

Sometimes, including a provision which over-steps a mandatory law simply renders the provision unenforceable. Occasionally, it may be tactical to include the restriction, knowing that some opposing parties may believe it to be enforceable and not open to challenge. However, over-step in areas of competition/anti-trust law (e.g. by fixing prices or imposing minimum pricing in a vertical agreement) could lead to significant fines and pain.

Five: Dealing with intellectual property

There are a number of nuances to be aware of when dealing with intellectual property (IP). First, be aware that "*Works for Hire*" concepts do not apply in Europe. If you want to own the IP created, you will need to get an express written assignment.

If the circumstances dictate, ensure a developer of IP waives any moral rights (rights to be recognised as author). These moral rights can be waived but only by the author. Consider contractual obligations to ensure the appropriate waivers are provided by legal persons other than the contracting party.

Thanks to international treaties many IP concepts are similar, but be aware of Europe's unique beast – the database right. Where there is specific effort involved in compiling a database (even absent any element of creativity), an IP right known as database right may arise. Does the contract consider this right and do you need any specific rights to use, transfer, or protect any database?

Six: Effectively excluding liability

If you do anything, consider provisions limiting or excluding liability:

(1) There are certain liabilities which cannot be excluded by law (e.g. causing death or personal injury as the result of negligence in the UK).

(2) Case law or codified law in various European countries ascribes particular meaning to commonly used words like "*indirect*", "*consequential*", and "*direct*" loss. In the UK loss of profit can be a direct loss. In most jurisdictions the courts will never make exemplary or punitive awards. Use of any of these words in exclusions is likely to be unfair when dealing business-to-consumer.

(3) There is often an over-riding concept of reasonableness which pervades contractual exclusions. This applies where a vendor deals on non-negotiated standard terms or to provisions which are not negotiated. Under unfair contract legislation, in many circumstances, clauses which exclude too much, and leave no real remedy other than refund of monies paid, may well contain unreasonable exclusions which are open to challenge in the courts (even B2B).

While evolving case law applies at common law, if you move to France, Germany or Austria your exclusion clause may need to say much less because the applicable codes imply core principles around recovery and exclusions.

Seven: Effectively dealing with privacy

A common mistake when deploying a US-style contract in a European situation is to forget to consider what is not there; privacy is seldom sufficiently dealt with. As you will be aware, European privacy laws are rigorous and have ubiquitous application to personal data, unlike the US situation where particular privacy wrongs have been addressed on a sectoral

basis.

In a nutshell, in Europe, the "*data controller*" (as the entity than makes decisions about the manner in which personal data is used) has a legal responsibility in relation to the use and sharing of that data. As data controller, rules which apply across the EU require them to handle data in accordance with eight broad principles. The seventh principle requires the data controller to ensure it has a written contract with a data processor (i.e. an entity processing or using the data on their behalf) requiring certain contractual protections to ensure that the data remains adequately protected. Under that same principle, they also have an obligation to ensure they take technical and organisational steps to keep those data secure.

Data controllers are required to pass on certain contractual requirements to ensure that data is protection both by their data processor but also ensuring these obligations are flowed down to any sub-processors. Of course, European rules equally restrict the transfer of personal data outside of the European Economic Area (the 28 EU Member States plus Norway, Iceland, and Lichtenstein), unless there is adequate protection for that data. Typically this is a key point of contractual friction.

Eight: Assess and understand what terms are automatically implied into a contract

On the basis that implied provisions usually add risk and liability, it is important to understand what terms will be implied into any contact. Broad-brush exclusions can be effective but be aware some implied terms are conditions and not warranties like the US. Standard US language often misses this or alternative concepts like "*satisfactory quality*".

Not all implied terms can be excluded in all situations. Importantly, know where these can be excluded and, where possible, ensure that you effectively exclude them.

Nine: Boilerplate

An area often ignored is the boilerplate. Sometimes, localisation focuses only on how and where to serve notices within the EU. Precedent law has evolved to require terms be drafted in a particular manner. Whilst the boilerplate in US and EU agreements may appear similar at first glance, there are subtle differences which are there for a reason. Fraudulent misrepresentations cannot be effectively excluded with an entire agreement clause in the UK. Some EU jurisdictions have laws which dispense with the rules of privity of contract- do you want a third party who is not a party to this contract taking a benefit?.

Ten: "Look and feel"

So, you think this final point is trivial? While many agreements used in Europe have their roots in the US, it's amazing how easy it is to spot a US agreement. Whether it is the lengthy paragraphs, references to "*Section*" and not "*Clauses*", CAPITLISATION, or simply the tone, a US agreement is easily identified. This is not always an issue, but, if you're a vendor competing with other European businesses or trying to get your own terms accepted in a battle of the forms scenario – "*look and feel*" counts.

In Europe, it's not necessary to capitalise to ensure the effectiveness of clauses. Equally, if you've not fully localised, a single unenforceable clause or concept included within a large paragraph this may cause the entire clause to fail. If you are not fully localising, sometimes breaking up concepts and clauses and considering severability counts.

Conclusions

There is lots to think about and the devil is in the detail. Striking a clear balance and making a determination based on the actual risk is important. Risks will vary depending on the circumstances. In a business-to-consumer context, more careful and more piecemeal localisation is typically required.

Ultimately, do you want to understand why a provision works effectively in the EU, or are you prepared to risk it?

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