The Malta Business Weekly

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Doing business with Germany – a lawyer's perspective

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20 August 2009 Malta and Germany have a long standing track record of good business relations dating back as early as to the early 1960s. Whereas in the beginning German-Maltese commerce was namely in the field of textiles, today's situation has altered substantially – Germans are using Malta as a hub for innovative technologies, for example in the IT sector, in the field of production (Geobra Brandstätter/pharma industry) or maintenance (Lufthansa Technik). At the same time, it is vital for the Maltese business community to "go international" given the limitations of their home market. The island's accession to the European Union has indeed facilitated such international ventures as the respective legal framework has been harmonised at a European level.

Both Maltese and German partners can hence rely on certain rules governing their relationship, namely when it comes to the applicable law or questions of enforcement of cross-border claims.

Apart from legal issues, the awareness for cultural differences remain however vital for the success of a business relationship. In this regard, contract negotiations can be a good opportunity to learn at a rather early stage more about the future partner, its underlying interests and its approach towards communication. Astonishingly enough, partners will realise that they have more in common than they would have thought of. Namely, family run Small- and Medium-Sized Enterprises (SME) share common values across borders which can be a reliable basis for joint efforts.

Contract certainty as key to success

As any business, cross-border trade and commerce entails risks which have to be borne in mind when going international. Contract certainty gains accordingly vital importance – even more so in a cross-border situation.

Traditionally, Maltese private international law rules follow the English system and are hence not codified. One important exception to this general rule is the law of international contract law which has been unified within the European Union by the Rome Convention (and subsequently as of December 2009 by the Rome-I-Regulation No. 593/2008 of 17 June 2008). Accordingly, the same rules govern throughout the whole of Europe when it comes to determine what law shall apply and under what circumstances and to what extent the individual parties can opt for alternatives. Art. 3 of the Rome Convention provides in this respect that the parties to an agreement shall be entitled to choose a particular law to govern their contractual relationship.

Against this background, contracts in writing gain vital importance for the business success. The absence of such a written contract may indeed compromise the claimants' position. From

our own practice, we know of cases where Maltese businesses did not further pursue their valid claims as – in the absence of a written contract – they would have ended up before a German court which was to apply Maltese law. Under German laws of civil procedure, a judge knows the law (*ius novit curia*). This rule holds also true for foreign laws. In practice, a judge will however instruct a German law professor to give an expert opinion on Maltese law. Whether, if at all, such opinions will reflect Maltese legal reality is however doubtful given the substantial constraints in accessing Maltese law in Germany.

It is therefore advisable to base any cross-border business relationship on a written contract. To ensure predictability in the case of conflicts and hence to mitigate the pertaining risks, it is moreover of utmost importance that such agreements provide for a choice-of-law-clause stipulating explicitly for the applicability of one or the other legal regime. From our own practice, we are aware that parties tend to forget such clauses using their "usual" templates developed for their home business or are indeed not aware of the far-reaching consequences of such choice-of-law-clauses for their whole contractual relationship. This is not only the case for SMEs but also for big multi-nationals.

We have been involved in cases where parties had negotiated for months and ultimately agreed on longish contract wordings but forgot to determine (explicitly) the applicable law. Of course, in the case of a conflict this gives plenty of possibilities for creative lawyers to find strategies to optimise their respective clients' position to the detriment of the counterpart. Indeed, creating legal uncertainties from the absence of a choice-of-law is rather common in negotiations. In such cases, parties will ultimately have lost a lot of money.

Against this background, any agreement with a German counterpart should include an (explicit) stipulation on the applicable law. We are aware that the choice of the governing law will reflect the respective negotiation power. One valid alternative could therefore be to determine a "neutral law". Parties should in this regard opt for civil law regimes, such as Swiss law, rather than common law regimes as in the latter case it is rather difficult to assess at the outset what actually the law is. Whereas in theory the choice of a "neutral law" appears to be an appropriate compromise, we would strongly advise to go for the law of one of the parties. Otherwise both parties would at the end of the day not know in detail their rights and obligations; a situation which will eventually cause major problems.

Should the parties agree on German law, we would recommend to go also for the jurisdiction of German courts. Although the choice of law does not predetermine jurisdiction automatically, the approach suggested is advisable as in general courts are more at ease to apply their own law rather than a foreign law. All the problems mentioned earlier in predicting the outcome can thus be overcome. Moreover, additional expenses for legal advice on a foreign law can be saved.

Proceedings before German courts are comparatively fast and the fee structure transparent as German law provides for scale fees based on the value of the causa in dispute. Moreover, the rates of German lawyers are rather moderate in comparison to their English or French colleagues.

The niceties of cross-border litigation

Going to court should be an option of last resort. This holds true for domestic cases and even more so for cross-border claims. Pursuing claims at an international level remains indeed complex. Maltese are therefore often reluctant to pursue their rights against Germans as they

feel uneasy about their position. Our advice in such cases is hence not confined to solving legal questions but rather to help our Maltese clients to understand German mentality and to find a viable way for all parties concerned to solve the dispute at hand.

Should informal negotiations fail, various options are to be considered.

In principle, parties may go for arbitration or other means of alternative dispute resolution proceedings to mitigate the risks involved in legal proceedings at an international level. Both Malta and Germany are Member States to the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. Accordingly, such arbitral awards are easily enforceable in cross-border cases. Moreover, arbitration proceedings are in general more flexible than proceedings before state courts and can hence better accommodate the parties' individual needs. One major advantage in this respect is the confidentiality of arbitration proceedings excluding namely competitors from access to the hearings and the final award. Whether arbitration proceedings are however faster than proceedings before state courts, is arguable and depends on the individual case.

In any event, arbitration can be an expensive exercise and it is therefore doubtful whether it is a real alternative, namely for SMEs.

Seeking justice in cross-border cases before state courts gains at the same time importance since Malta's accession to the European Union. European law provides for effective and efficient means which facilitate in such cases to obtain a judgement to be enforced in another Member State. By establishing a set of rules governing the jurisdiction of the courts in the various Member States (the so-called Brussels regime), the EU recognises the importance of a judiciary coordinated at a Pan-European level for the functioning of the internal market.

In this respect, the Brussels-I-Regulation No. 44/2001 of 22 December 2000 establishes basic rules in determining the competent court in a German-Maltese dispute. Pursuant to Art. 23 of the Brussels-I-Regulation business partners are in principle free to provide for the jurisdiction of a certain (named) court. In order to be valid, such choices have to conform with certain obligations set out by the Regulation. Namely, they have to be in writing or evidenced in writing or in any other form as established between the parties concerned. In the absence of an explicit jurisdiction clause in a written contract, parties in subsequent disputes often try to challenge any implicit or subsequent choice of jurisdiction on the grounds that the required formalities are not met. Namely, respective references only made in an invoice might not be sufficient to establish jurisdiction.

In the absence of a valid jurisdiction clause, it remains with the general rules as set out by the Brussels-I-Regulation. Accordingly, it will be for the claimant to sue its counterpart at its seat or at the place of performance. Against this background, in general cases will be heard before the domestic courts of the respective counterpart. Hence, Maltese will have to go for German courts, whereas Germans will face proceedings before a Maltese court. Such cross-border litigation may naturally cause headaches for the party which is forced to seize the foreign court.

Enforcing claims at an international level

Enforcement of claims at an international level has become easier. European law provides for various options to bring a claim against a counterpart having its seat in another Member State.

Prior to the accession of Malta to the EU, a Maltese judgement was not recognised in Germany and could therefore not be enforced. The reason was that reciprocity as required under German law of civil procedure was not given. This situation has now changed under the Brussels-I-Regulation No. 44/2001. Unifying jurisdiction at an European level, the Regulation ensures that decisions rendered in its accordance are recognised within and enforceable throughout the Community. We have used this argumentation in various negotiations pointing out that the German counterpart may eventually have to defend a claim before Maltese courts. For obvious reasons, none of the Germans wanted to go for this option and were hence willing to compromise. In using the mentioned strategy, one has to be very prudent however as the German counterpart may file an action for a declaration of non-infringement (*negative Feststellungsklage*) in Germany establishing the respective jurisdiction.

In principle, judgments by default are also enforceable under the Brussels-I-Regulation. This requires however that the document commencing the legal proceedings has been properly served upon the German counterpart. Again the respective legal provisions have been unified at a European level by Council Regulation No. 1393/2007. The aim of said Regulation is to improve and expedite the transmission of judicial and extra-judicial documents in civil or commercial matters for service between the Member States while at the same time providing safeguards in the interest of the recipient. Namely, the recipient is entitled to refuse the document served, if it is not written in a language that he or she understands nor in the official language of the Member State where service takes place. It is therefore advisable to include language clauses in contracts to speed up (potential) legal proceedings and to reduce translation costs.

Furthermore, Council Regulation No. 1896/2006 of 12 December 2006 creates a European order for payment procedures. The Regulation permits the free circulation of European orders for payment throughout the European Union by laying down minimum standards, compliance with which renders unnecessary any intermediate proceedings in the Member State of enforcement prior to recognition and enforcement. In this manner, the procedure simplifies, speeds up and reduces costs of litigation in cross-border cases. With the introduction of this new instrument, creditors can recover their uncontested civil and commercial claims according to a uniform procedure that operates on the basis of standard forms which are available on the internet. The claimant only has to submit its application, after which the procedure will lead its own life. No further formalities or interventions on the part of the claimant are required. Namely, the claimant does not need to appear before a court seized.

Since 1 January of this year, Council Regulation No. 861/2007 of 11 July 2007 provides for a European small claims procedure. It is aimed to improve access to justice by simplifying cross-border small claims litigation in civil and commercial matters and reducing costs. The procedure is optional, offered as an alternative to the possibilities already existing under the domestic laws of Malta and Germany. “Small claims” pursuant to the Regulation are cases concerning sums under EUR 2,000, excluding interest, expenses and disbursements (at the time when the claim form is received by the competent court). Judgments delivered under this procedure are recognised and enforceable in Germany without the need for a declaration of enforceability.

Conclusion

The accession to the EU has reshaped the legal landscape for Maltese business with Germany. Indeed, harmonisation at a European level leads to legal certainty and hence predictability minimising the pertaining risks. At the same time, the various Freedoms under European Law,

namely the Freedom to provide Services, make Malta an interesting jurisdiction within the EU for a business which wants to go for the European market at large and Germany in particular.

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