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Doing Business in Civil Law Countries – What to Know to Avoid Major Pitfalls and Key Areas of Concern During the Negotiation Process

Globalization of the construction industry is a reality and one that may afford many U.S. contractors significant profit opportunities abroad. Emerging countries often lack the financial resources required to support needed infrastructure projects. As a result, they rely on export credit agencies, the World Bank, or foreign investors who insist upon reputable construction contractors. U.S. contractors can certainly fill those gaps.

As two-thirds of the world follows the civil law system, U.S. contractors should be informed regarding major pitfalls and key areas of concern during the negotiation process in civil law regions, including countries in Europe, Latin America, parts of Africa, and the Middle East. Below are a few central contract clauses and the major differences to be mindful of when contracting in civil law countries.

Choice of Law

It is crucial for parties to address the governing law at the time of contracting, however, knowledge of local law is essential. Even if the contract includes a choice-of-law provision, many civil law countries impose their own substantive law governing the performance of construction work.

The civil law system provides for a categorization of legal matters that is prescribed by the legislature. For example, a construction contract is a part of a category of contracts for work and services to which a civil law code will always apply a set of default and mandatory rules. The mandatory rules cannot be contracted away and are incorporated into a construction contract, while the default rules apply to a construction contract unless specifically modified. Therefore, it is crucial to understand the consequences of these mandatory and default rules.

Scope

Scope in a construction contract is one of the most important clauses and the differences between civil and common law countries may surprise U.S. contractors. As mentioned, civil law countries have mandatory rules that apply to construction contracts. For example, an essential or mandatory obligation is for a contractor to attempt to complete the prescribed scope of work. A contractor cannot exclude this obligation except for *force majeure*. Limiting liability with respect to mandatory obligations will likely not be enforced.

Second, unlike the U.S. where a supplier is subject to the Uniform Commercial Code (UCC), a U.S. supplier of construction goods in civil law countries may qualify as a “contractor” and be subject to the same mandatory rules for work and services as a contractor who performs the work. A U.S. supplier of construction goods may wish to pass the construction obligations to a contractor.

Third, civil law jurisdictions lack the concept of "substantial completion." An owner will not accept work unless all work is finished. A contractor wishing to avoid continuous deferred acceptance should expressly define when the work is deemed complete.

Fourth, the design-build (DB) model is more common abroad. Contractors, designers, and engineers share joint and several liability. However, general contractors should be warned that they face a higher standard of care in DB model contracts and understand they have a duty to alert the owner of design flaws that they should have reasonably discovered.

Time Schedule

Unlike common law countries such as the U.S., "time is of the essence" language is unnecessary in civil law countries because time is always of the essence. The Society of Construction Law Delay and Disruption Protocol (the "SCL Protocol") is the most common tool utilized in civil law counties in providing guidance on accessing the impact of delay.

Liabilities (Damages)

Many civil law countries have laws that restrict contractual limitations of damages and indemnity obligations. In most civil law countries, an owner may seek a court order to require contractor to perform. Otherwise, a disgruntled owner may perform at the contractor's cost or rescind the contract. A contractor wishing to avoid such risk and cost should consider limiting the owner's specific performance.

In most civil law countries, the parties may agree on delay liquidated damages, which are commonly enforced by courts of law, just as in the common law system.

Differing Site Conditions

In common law, the owner typically bears the risk of differing site conditions, unless the contract states otherwise. In civil law, however, the test is generally whether the contractor should have reasonably foreseen the risk. There are differences amongst civil law countries. In French civil law countries, the risk of differing site conditions in a private construction project will generally lay with the contractor, while in a public project, the government bears the risk. Whereas in German civil law countries, the government or owner will generally bear the risk in both public and private construction projects.

Dispute Resolution Process

English has become the default language for international construction dispute resolutions and international arbitration is the preferred dispute resolution method for the aforementioned disputes. Therefore, this section will cover how some of the general international arbitral institutions rules and methods resolve international construction disputes.

There are several forums, such as the International Court of Arbitration (ICC) and the International Centre for Settlement of Investment Disputes (ICSID), and they have adopted different rules. An arbitration clause should carefully specify the choice of law, language, location, arbitral organization, and applicable rules. The clause should also stipulate whether one or three arbitrators will oversee the arbitration.

Common law and civil law differ significantly regarding how a dispute is commenced, developed, and presented. Unlike in the United States where an action is commenced with a “short and plain statement of the claim,” in civil law systems the claimant tells much of their story upfront. For example, a party before an ICC arbitration should be ready to fully develop their claim, together with key documents, though not necessarily produce all correspondence.

A case is also developed very differently in civil and common law countries and these differences are reflected in international dispute resolution forums. There is little, if any, discovery in civil law countries, however a middle ground is emerging in international arbitrations. For example, the International Bar Association (IBA) has developed a set of rules which permit a party to submit a “Request to Produce” to the arbitrator. Under these rules the requesting party may describe documents, or “a narrow and specific requested category of documents”, that are reasonably believed to exist and to be in the possession of the adverse party, together with an explanation of how the requested documents are relevant and material to the case. Although the IBA Rules have evolved to address production of documents, there remain no provisions for depositions or interrogatories – both are rare in international arbitrations.

Documents are also presented differently in civil and common law countries. In civil law systems, a practitioner will present the tribunal with a set of documents in advance of the hearing without any preliminary introduction by a witness. A common law lawyer will do the same, but is expected to have each document authenticated by a live witness. The IBA Rules provide a middle-ground, where an adversary may object to the introduction of a document, including lack of relevance, privilege, or fairness. In turn, the proffering party must demonstrate why it should be admitted.

The civil law system operates under the premise that the best evidence comes from documents, while common law provides affords greater weight to live testimony. Moreover, in civil law the roles of attorneys are significantly more limited in that cross-examination is not allowed. Instead, the role of lawyers is generally confined to making recommendations to the judge with respect to questions that should be asked.

In international arbitrations, it is common for the direct testimony of a party’s witness to be submitted to the arbitrators in writing in advance of the hearings. The approach is based on the attributes of eliminating surprise and serving as a substitute for depositions of witnesses. The IBA Rules permit opposing counsel to ask questions, but the arbitrator(s) ask questions first.

With respect to experts, the civil law approach provides for the tribunal to appoint its own expert, while the common law or American approach allows each side to retain their own expert. International arbitrations again take a somewhat middle-ground approach, in which arbitrators hear from each side’s experts. However, if the arbitrator(s) are faced with conflicting expert reports, they may appoint a tribunal expert to help resolve the conflict. Each side is generally permitted to question the tribunal’s expert.

In sum, when resolving international construction disputes, major international arbitration institutions have attempted to embrace an approach somewhere in between civil law and common law systems.

Conclusion

Although the differences between civil law and common law systems may be great, American contractors should not be discouraged from venturing abroad. By working with knowledgeable advisers and counsel, the risks of international opportunities can be managed, in particularly through carefully drafted construction contracts. Significant opportunities for profit await contractors that prudently engage in international projects.

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