

Have we already concluded an agreement?

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Parties that negotiate a contract for sale when they are based in different countries are not always aware of the legal nature of their negotiations and the possible legal consequences. However, the conclusion of a contract in the course of negotiations can be regulated differently depending on the jurisdiction and legal system.

Background

Under Article 72(1) of the Civil Code, if two parties are engaged in negotiations to conclude a contract, the contract is concluded once the parties reach an agreement regarding the provisions under discussion. Thus, under Polish law it is impossible to claim that a contract has been concluded when the parties have reached an agreement regarding only some of the contract provisions being negotiated, even if they constitute elements of the essential terms (Section 154(1) of the Civil Code). However, other jurisdictions treat this issue differently (eg. Article 1583 of the Belgian Civil Code).

The parties engaged in negotiations should therefore be aware of which substantive law is applicable to the assessment of:

- whether a contract has already been concluded; and
- other potential consequences of the negotiations.

Under Article 10(1) of the Rome I Regulation (593/2008), the law applicable to determine whether a contract exists between parties is that which governs the contract. The conflict-of-law rules under Articles 4 to 8 of the Rome I Regulation determine:

- the governing law for a given contractual relationship; and
- whether a contract has been concluded.

The conditions required for a contract to exist include the parties' statements of will and the rules applicable to the conclusion of contracts. As regards a contract for the sale of goods, the governing law is that of the state in which the seller has its habitual residence.

However, in accordance with Article 10(2) of the Rome I Regulation, a party may rely on the law of the country in which it habitually resides in order to establish that it did not consent to a contract if it is unreasonable to determine the effect of the party's conduct in accordance with Article 10(1) of the Rome I Regulation.

Liability

Additional consequences of contract negotiations (apart from the conclusion of a contract) include compensatory liability on the grounds of *culpa in contrahendo* (ie, fault in the conclusion of a contract). *Culpa in contrahendo* is regulated differently depending on the jurisdiction either as liability in contract or in tort.

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Issues concerning liability for a fault in the conclusion of a contract are excluded from the scope of the Rome I Regulation. Under Article 1(2)(i), obligations that arise from negotiations before the conclusion of a contract are excluded from the scope of the regulation. Instead, these issues are governed by Article 12 of the Rome II Regulation (864/2007), according to which the law applicable to non-contractual obligations that arise before the conclusion of a contract – irrespective of whether it has been concluded – is that applicable to the contract or the law that would have been applicable had the contract been concluded. Article 12 of the Rome II Regulation references the applicable law specified in the Rome I Regulation's conflict-of-law rules (if applicable).

Article 12(2) of the Rome II Regulation lists the following auxiliary factors to determine the applicable law that should be used if this cannot be determined on the basis of Article 12(1) thereof:

- The law of the country in which the damage occurs applies irrespective of:
 - the country in which the event giving rise to the damage occurred; and
 - the country or countries in which the indirect consequences of that event occurred.
- If the parties were habitually resident in the same country when the event that gave rise to the damage occurred, the law of that country applies.
- If the non-contractual obligation that arose out of dealings prior to the conclusion of a contract is manifestly more closely connected to a country other than that indicated in the bullet points above, the law of that other country applies.

Under the Rome II Regulation, it is essential that *culpa in contrahendo* is an autonomous concept which should not necessarily be interpreted in the manner adopted by national law. It should include a breach of the confidentiality obligation and the severing of contractual negotiations.

Under Article 14 of the Rome II Regulation, the parties to a contract may also choose the law applicable to *culpa on contrahendo*.

In Polish law, this liability is regulated by Article 72(2) of the Civil Code, under which the party which started or carried out negotiations in breach of good faith, particularly with no intention to conclude a contract, must redress the damage that the other party suffered by counting on the conclusion of the contract.

It is assumed that the wording of Article 72(2) of the Civil Code limits compensation to negative contractual interest. In accordance with this provision, a disloyal negotiator must redress "the damage that the other party suffered by counting on the conclusion of the contract" and not the damage suffered by not concluding the contract. As a result, in order to establish the amount of damage suffered – in accordance with Article 72(2) of the Civil Code – the circumstances which would have existed had the negotiations not been conducted disloyally must be compared with those after the event has taken place. However, whether this damage extends to lost profits is disputed.

Comment

It is advisable that parties choose the law applicable to the contract being negotiated and the negotiations themselves as soon as discussions begin. This will enable them to:

- avoid the potential risk of the courts, in the event of a dispute, finding that the contract in question has already been concluded; and
- assess the risk of incurring compensatory liability on the grounds of *culpa in contrahendo*.

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