

Contributor
Comment

Going international



New build contracts take on a more complex life and require widespread knowledge when applied internationally. **Arnold J van Steenderen**, partner and lawyer of Van Steenderen MainportLawyers, assesses what needs to be taken into consideration.

Drafting a contract in an international context should be undertaken with the utmost care. The draftsman should have a general understanding of the different characteristics of national legal systems that could come into play during the performance of the contract.

To show the relevance of this I will give an example. A Russian HNWI wants to build a yacht at a German or Dutch shipyard. He approaches a broker in London and during the negotiations with a shipyard in

continental Europe. The common feature of the civil law systems is that their private law is based on a systematic set of general rules of law contained in legislative enactments (a 'Code'), which have their roots in the reception of Roman law principles. The Dutch legal system belongs to the civil law systems family and to find the answers to questions of private law, it is always necessary to examine both case law and the text of the Code. Within English law the doctrine of precedent (the binding force of case law) has a firm basis.

One could wonder whether a choice of law clause in a building contract in favour of English law will discard the applicability of foreign law entirely when the yacht is built in a another civil law jurisdiction.

the Netherlands, a draft of a build contract is put on the table by the yard. After some deliberation, and advice from a London solicitor, the Russian gentleman requests that the yard agrees to accept English law as the law applicable to their relationship and arbitration, in accordance with the London Court of International Arbitration (LCIA) Rules, and the yard agrees to this. Does this mean that the parties are now completely contracted out of applicability of any other law, including Dutch law? Before answering this question more background information is required about the legal setting of a contract with international elements.

The general features of the English common law system differ significantly from the civil law systems we find in

That said, one could wonder whether a choice of law clause in a building contract in favour of English law will discard the applicability of foreign law entirely when the yacht is built in a civil law jurisdiction as in the Netherlands or Germany, for example.

Private international law is an aspect of English private law and of any other domestic system of law, whether based on common law or civil law principles. Each country, however, tends to have its own rules for private international law. Private international law applies to cases where a foreign element or aspect is present. The objective of private international law is to build a bridge between different legal systems by providing rules of jurisdiction, choice of law and recognition and enforcement of foreign judgements.

The body of principles and rules known as ‘private international law’ will become relevant whenever a court or arbitral tribunal is faced with a case that contains a ‘foreign’ element. A court or tribunal should then establish by what principles and rules it should be determined, whether it has jurisdiction to decide the case and, if so, what law it should apply. Across the European jurisdictions there has been a great deal of harmonisation of private international law in recent years. Awareness of principles of private international law is essential to any lawyer who aspires to work in an international setting.

shall be presumed that the contract is most closely connected with the country where the immovable properties are situated. According to Article 9.6 Rome I a contract, the subject matter of which is a right in immovable property or a right to use immovable property, shall be subject to the mandatory requirements of that country where the property is situated, if by that law those requirements are imposed irrespective of the country where the contract is concluded and irrespective of the law governing the contract.

Are there any statutory law provisions in the Dutch jurisdiction that set aside certain

Domestic law provisions in a country where many shipyards are currently active may come as a surprise to owners if they have not been careful enough to (also) obtain legal advice from a lawyer within the relevant jurisdiction where the yacht is being built.

In the European Union (EU), uniform rules for determining the law applicable to contractual obligations have been established. Currently the Rome I Regulation applies to contractual obligations in civil and commercial matters in the event of a conflict of laws. According to the Rome I Regulation, a contract shall be governed by the law chosen by the parties. By their choice the parties can select the law applicable to the whole or part of the contract. The choice must be expressed or demonstrated with reasonable certainty by the terms of the contract or the circumstances of the case (Article 3.2 Rome I). However, the fact that the parties have chosen the applicability of a foreign law, whether or not accompanied by the choice of a foreign tribunal, shall not, where all the other elements relevant to the situation at the time of choice are connected with one country only, prejudice the application of rules of the law of that country, which cannot be derogated from by contract. These are the so-called ‘mandatory rules’ of that country. To the extent that the subject matter of the contract is a right in or a right to use immovable property it

contractual provisions? The answer is yes. The Dutch Civil Code is divided into 10 different sections whereby certain sections are mandatory in nature and others contain rules of a non-mandatory nature. The mandatory rules will apply irrespective of the law chosen by the parties in their contract.

Under Dutch law, a vessel under construction that has not yet been registered follows the provisions of the property law relating to things that are moveable. For a non-registered vessel this means that the law of the State in which territory the vessel is situated will apply. According to another provision of the Dutch Civil Code the property law regime relates to registered vessels that will be governed by the law of the State where the vessel is registered. This means that irrespective of the choice of law, if the yacht is built in the Netherlands and it is not registered, Dutch law will be applicable to determine, in particular: whether materials and equipment form part of the vessel, whether a security right can be created therein, which right may be vested in respect of the

vessel and the nature and content of such rights, and in the manner in which such rights may arise, be modified, be transmitted and/or extinguished, and the relationship between such rights.

Certain provisions of the Dutch bankruptcy law may also temporarily (cooling off period declared immediately after the yard is declared bankrupt) or permanently override the contract provision and/or the provisions of the law chosen by the parties. If the owner of the yacht is both a debtor and a creditor of the bankrupt yard he may offset his debt against his claim against the bankruptcy, provided each arose before the declaration of bankruptcy, or resulting from legal acts entered into with the bankrupt shipyard before the declaration of bankruptcy. However, offsetting is never permitted for claims or debts assigned or assumed after the declaration of bankruptcy.

These are a few examples of domestic law provisions in a country where many shipyards are currently active that may come as a surprise to owners if they have not been careful enough to (also) obtain legal advice from a lawyer within the relevant jurisdiction where the yacht is being built. On the other hand, the domestic law of the country where the shipyard involved is located may also contain provisions beneficial to a buyer of a yacht. To gain the maximum benefit of such provisions one cannot seek local advice too early. The best time for this is before seriously approaching a yard to make an offer for the construction of a yacht. ■



[TO COMMENT ON THIS ARTICLE,](#)
EMAIL: ISSUE163@SUPERYACHTREPORT.COM
WITH SUBJECT: GOING INTERNATIONAL