

German Federal Court Rules on Jurisdiction Clauses and Mandatory Rules

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On September 5th, 2012, the German Federal Court (BGH) upheld the inapplicability of a jurisdiction clause in an agency contract that gave jurisdiction to the Courts of Virginia to rule on the agent's right to indemnity after termination of the agency contract.

The dispute arose out of an agency contract between an American firm and a German commercial agent acting in several European countries. The contract provided for the exclusive jurisdiction of the Courts of Virginia and for the application of US laws. It also provided for an exclusion of indemnity in case of termination of the contract.

Arguing that the Courts of Virginia would apply solely their own law, the Court of Appeal of Stuttgart refused to enforce the jurisdiction clause, stating that doing so would lead to the rejection of the claim for indemnity and to an obvious violation of Art. 17 and 18 of Directive 86/653 EEC. The defendant wanted to submit a request for a preliminary ruling before the ECJ, however the BGH ruled that there was no need for such a request.

The BGH ruled that there is no doubt that Directive 86/653 gives the possibility to "refuse to recognize" such a clause, as:

- the law chosen by the parties (here, the law of Virginia) does not provide for mandatory indemnity or compensation for the agent after termination of the contract;
- the foreign court will not apply the mandatory provisions of European and German law, and will reject the agent's claim.

The BGH stated that such refusal of recognition protects the international mandatory scope of these provisions, as defined by the ECJ in the *Ingmar* decision

dated November 9th, 2000 (C-381/98).

Another issue raised during the litigation was whether the partial ineffectiveness of the jurisdiction clause shall lead to the incompetence of the US courts for the entire litigation. In addition to an indemnity based on the termination of the agency contract, the agent had claimed for unpaid commission stemming from the contract. The defendant wanted the BGH to ask the ECJ for an additional preliminary ruling regarding the jurisdiction clause: if it was considered partially ineffective because of the above mentioned reasons, would it have to be invalidated for the whole in order to guarantee the "effet utile"?

The BGH ruled that this question must only be discussed on the basis of German law, as Art. 17-19 of Directive 86/653 EEC concern only the claim for indemnity after termination of contract and not the right for pending commissions.

This seems to be a very strict but coherent approach to the jurisdiction question by the BGH and may lead to the non-application of foreign jurisdiction clauses in many cases when agents carry out their activity in Europe.