The new German choice-of-law rule for agency: Improved translation

Readers of our blog will recall that we posted a translation of the new German choice-of-law rule for agency last week. That translation, however, was misleading because it referred to the law "applicable to a contract between principal and agent", thus implying that the provision applies to the agency contract itself. The provision, however, is only meant to fill the gap left by Article 1(2) lit. g) of the Rome I Regulation. It is, therefore, limited to the agent's authority (granted by contract). We thank an attentive reader for making this point and offer the following revised translation of the newly adopted Article 8 of the German Introductory Law to the German Civil Code (Einführungsgesetz zum Bürgerlichen Gesetzbuch – BGB):

> *(1) An agent's authority is governed by the law chosen by the principal before the agency is exercised, if the choice of law is known to both agent and third party. Principal, agent and third party are free to choose the applicable law at any time. The choice of law according to Sentence 2 of this Paragraph takes precedence over Sentence 1.*
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> *(2) In the absence of a choice under Paragraph 1 and if the agent acts in exercise of his commercial activity, the agent's authority is governed by the substantive provisions of the country in which the agent has his habitual residence at the time he acted, unless this country is not identifiable by the third party.*
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> *(3) In the absence of a choice under Paragraph 1 and if the agent acts as employee of the principal, the agent's authority is governed by the substantive provisions of the country in which the principal has his habitual residence, unless this country is not identifiable by the third party.*
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> *(4) If the agent does not act in a way described by Paragraph 2 or 3 and in the absence of a choice under Paragraph 1, a permanent authority between principal and agent is governed by the substantive provisions of the country, in which the agent usually exercises his powers, unless this country is not*

identifiable by the third party.

(5) If the applicable law does not result from Paragraph 1 through 4, the agent's authority is governed by the substantive provisions of the country in which the agent acts in exercise of his powers. If the third party and the agent must have been aware that the agency should only have been exercised in a particular country, the substantive provisions of this country are applicable. If the country in which the agent acts in exercise of his powers is not identifiable by the third party, the substantive provisions of the country in which the principal has his habitual residence at the time the agent exercises his powers, are applicable.

(6) The law applicable for agencies on the disposition of property or the rights on property is to be determined according to Article 43 Paragraph 1 and Article 46.

(7) This Article does not apply to agencies for exchange or auction.

(8) The habitual residence in accordance with this Article is to be determined in line with Article 19, Paragraph 1 and 2, first alternative of Regulation (EG) No. 593/2008, provided that the exercise of the agency replaces contract formation. Article 19, Paragraph 1 and 2, first alternative of Regulation (EG) No. 593/2008 does not apply, if the country according to that Article is not identifiable by the third party.