International Distribution Institute

Dr. Raimond Emde
GvW Graf von Westphalen, Hamburg/Germany

Avoiding overriding mandatory rules through a choice of law and choice of forum

2017 IDI annual conference in Paris, 9 -10 June 2017

- **Invalidity of a Choice of Law Clause**

- The Ingmar decision of the European Court of Justice (ECJ)[1] has ruled on the action of a UK based company, active as a commercial agent, that a choice of law clause pointing to the law of California is void due to the internationally compelling character of Artt. 17-19 Council Directive (now also Article 3 (4), Article 9 (3), and possibly Article 21 of the Rome I Regulation).

1 ECJ, Judgement of 9.11.2000 - C-381/98, NJW 2001, 2007 with comment *Staudinger* (NJW 2001, 1974) = VersR 2001, 617 = ZIP 2000, 2108 = EWiR 2000, 1061 (*Freitag*) = EWS 2000, 550 = BB 2001, 10 with concurring opinion *Kindler* = DB 2001, 36 = EuZW 2001, 50 with comment *Reich* = RIW 2001, 133; also concurring *Horn,* SchiedsVZ 2008, 209, 217; *Hopt*, § 92c Marginal note 10; MünchKommHGB/*v. Hoyningen-Huene*, 3. Ed. 2010, § 92c Marginal note 7; *Genzow,* in: Ensthaler, Gemeinschaftskommentar zum HGB, 8. Ed. 2014, § 92c Marginal note 4; critical *Schwarz,* ZVglRWiss 101 (2002), 45. See *Emde* Verrtriebsrecht, 3. Ed., § 92c Marginal note 59 ff.

- In the case of a "strong connection" of an agency contract, e.g. in the case of an intra-European activity of the commercial agent, the choice of a non-EU law is ineffective insofar as the choice of law clause precludes mandatory indemnity rights of the Council Directive.

- Whereas in the past the mandatory German commercial agency law and in particular the indemnity claim of § 89b German Commercial Code (HGB), introduced only in 1953, was not regarded as international mandatory (since the German law could live very well without it until 1953), this was changed by the Ingmar decision and the implementation of Article 3 (4) Rome I Regulation.

- There is much to suggest that the same is true regarding the other mandatory provisions of the Council Directive: The justification for the internationally mandatory character of the directive is given in particular in marg. 21 of the Ingmar decision: on the one hand the protection of the commercial agents and on the other the harmonization and strengthening of commercial safety: This reasoning was not related in any way to the peculiarities of the claim to indemnity. Rather, "Ingmar" justified the mandatory character with general considerations on the purpose of the Council Directive.

- Article 9 (1) Rome I Regulation cannot be seen as a departure from Ingmar. "Ingmar" was based on the Council Directive and not the Rome I Regulation. Therefore, in view of the special importance granted by the ECJ to the mandatory rules of the Council Directive, it cannot be expected that the Court of Justice will have its jurisprudence changed as a result of the implementation of the Rome I Regulation.

- Argument: The European Court of Justice cited in Unamar[2] the Rome I Regulation but did not depart from it.

2 Judgement of 17.10.2013 – C 184/12 marginal note 48 f., IWS 2013, 422 = RIW 2013, 874.

- Mirroring „Ingmar“, also non-European law of the place of sale can be internationally mandatory. The chosen German law can therefore be dismantled or replaced by international-mandatory local law under Article 9 (3) of the Rome I Regulation.[3]

3 In favor *Birk,* ZVglRWisp. 79 (1980), 268, 283 (Italy); *Elwan,* ZVglRWisp. 80 (1981), 89, 145 f. (Egypt); *Krüger,* in: FS Kegel, 1987 P. 269 ff., 281 ff. (Arabia); MünchKommBGB/*Martiny,* 5. Ed. 2010, VO (EG) 593/2008 Art. 9 Marginal note 98; *Häuslschmid*, Marginal note 2230; other opinion OLG Köln, IPG 1977 Nr. 7, 58 (Egypt); *Noetzel,* DB 1986, 209, 212 (Arabia).

- The effectiveness of the choice of law or forum (or an arbitration) clause must therefore also be examined by local lawyers at the place where the sales agent is based.

- It is for instance the trade representation rights of Arab, but also of many South American and other countries, that are quite protective and, from their point of view, internationally compulsory. Thus, for example, it is discussed whether these laws are to be applied by way of Article 9 (3) of the Rome I Regulation.

- There can be absolutely no definite predictions as to how an arbitration court or a national court will decide this question.

- **Invalidity of a choice of jurisdiction or an arbitration clause**

- The Ingmar decision brought procedural consequences, therefore mandatory forms on the seat or distribution area of the representative, which the European Court of Justice did not have to deal with (in the case of Ingmar, there was no court clause pointing to an outside European court).

- German courts took the ineffectiveness of the arbitration and jurisdiction clause leading to a court situated outside Europe from a "procedural law continuation" of the Ingmar decision as well as the internationally compelling character of § 89b HGB and Art. 17-19 Council Directive.[4]

4 OLG Stuttgart, Court order of 29.12.2011, v. 16.1.2012 - 5 U 126/11, confirmed by BGH, court order of 5.9.2012 - VII ZR 25/12, BB 2012, 3103 with comment *Ayad/Schnell* and *Eckhoff,* GWR 2012, 486 and comment *Meyer,* ZVertriebsR 2014, 352, 358 – jurisdiction clause to state courts in Virginia; OLG München, Judgement of 17.5.2006 - 7 U 1781/06, WM 2006, 1556 = EWiR 2006, 621 (*Emde) with critical comment Rühl,* IPRax 2007, 294 – on the one hand arbitration clause referring to the AAA, on the other hand referring to state courts in California, question of lack of clarity was not discussed; Accentuate Ltd. v. Asgira Inc., Queen's Bench Division, (2009) EWHC 2655 (QB); *Emde* Vertriebsrecht, 3. Ed. , Vor § 84 Marginal note 505 f.; *Mankowski,* in: Yearbook of Private International Law, Vol. X, 2008, P. 19, 48 f.; Oetker/*Busche,* HGB, 4. Ed. 2015, § 92c Marginal note 3; other opinion *Dathe,* NJOZ 2010, 2196 = NJW 2010, 3194; *Quinke,* SchiedsVZ 2007, 246; *Rühl,* IPRax 2007, 294, 297 ff.; *Horn,* SchiedsVZ 2008, 210, 217 f.; *Michaels/Kamman,* EWS 2001, 301, 310; *Hopt* (Fn. 26), § 92c Marginal note 12; Cour d'appel de Paris, Judgement of 24.11.2005, Rev. arb. 2006, 770; BGH, Judgement of 30.1.1961, NJW 1961, 1061, 1062.*The belgian* Cour de Cassation of 16.11.2006 (Van Hopplynus Instruments P.A./Coherent Inc.), Rev. dr. com belge 2007, 889, 890 with comment *Mertens* as well as *Kleinheisterkamp,* RabelsZ 73 (2009), 818 made a similar decision.

- It can probably be assumed that other mandatory rules of the Council Directive have the same protection (see above).

- In order to lead to the ineffectiveness of a jurisdiction clause, it is sufficient, in the opinion of German courts, as well as the Ingmar decision, that there is an obvious danger that the third-country court will not apply the mandatory provisions of the Council Directive, provided that the legal system of the third country does not have any provisions which comply with the Council Directive.

- The clause may even be ineffective if the derogated third country law compensates for the indemnity claim or other mandatory Council Directive law for example by higher commissions.

- Reason: "Ingmar" has affirmed the internationally compelling nature of the Council Directive without differentiating by the content of the chosen third country law.

- A commercial agent acting for a Swiss company in Germany or Poland, for example, which accepted Swiss law in the commercial agency agreement may also invoke these judgements.

- It is argued that these rulings also apply to intermediaries which are not protected by the Council Directive, provided that the law applicable to these intermediaries is based on the Council Directive. Example: distributorship agreements.

- Argument in favor of an international mandatory character of other distribution agreements but commercial agency agreements: Full analogy to the council directive including its mandatory character if the Council Directive is applied, importance of the protection of the distributors, especially regarding the indemnity.

- Argument contra an international mandatory nature: No written European law, in many countries (especially Germany) no written distributorship- or franchise law. If the law is not written, then it can hardly be regarded as so important that it is international mandatory.

- This suggests that the protection granted by Ingmar also applies to intermediaries not covered by the Council Directive. This must then also be the case for the „procedural protection“.

- It is doubtful whether the invalidity of an arbitration clause can be derived from the internationally compelling character of national law or the Council Directive, since international-compelling law should also be applied by an arbitration court.

- Arguments in favor of the effectiveness of an arbitration clause referring to an non-EU arbitration panel: There are, therefore, arbitration judgments re the right of distribution, which respected the international-compelling national law.[5] The state court decisions cited above, on the other hand, make no difference between state court and arbitration clauses.

5 See for instance ICC arbitration court, Judgement of 22.04.2013 – 17733/JRF/CA, in which the Decree 78/71 of Guatemala was seen as international mandatory

- An outside European seat of the arbitration is not uncommon and a frequent compromise.

- Arguments contra: One might discuss the invalidtity of an arbitration clause if the arbitration court consists solely of members with knowledge of only the chosen law - a scenario difficult to imagine in the case of a three-person arbitration court.

- The combination of clauses, which determines both an outside European (arbitration) court and a foreign European law, represents a prima facie suspicion of the violation of compelling EU law.[6] In such cases, it is actually difficult to predict the decision of an arbitration tribunal outside the EU.

6 *Kleinheisterkamp,* The Impact of Internationally Mandatory Laws on the Enforceablitity of Arbitration Agreements, LSE Working Papers, 22/2009, P. 10

- The whole is a difficult issue, namely the prediction how a foreign court will decide.

- However, the parties can agree on EU substantive law and thereby safe the jurisdiction clause referring to a non EU-country. Then, the Non-EU court is bound to apply the mandatory European law.

- **Ingmar-forum**
- It could be discussed whether in analogy to Article 7 no. 1 lit. d) Bruessel's I a Regulation a "Ingmar-Forum" can be found on the place of distribution of the agent.

- **Can a jurisdiction clause referring to an EU court be void in the light of these judgements?**

- General Attorney Wahl was astonished that this question was not raised by the court in the case bringing the Unamar decision.[7] First of all, this question is of lesser importance as Article 7 Bruessel's I a Regulation would apply and constitute a venue in the EU. The question might be of higher relevance if it refers to an arbitration clause. General Attorney Wahl was astonished that this question was not raised by the court in the case bringing the Unamar.

7 Motions by the general attorney to the European Court of the European Court of Justice Wahl, dated 15.05.2013 – C – 184/12 – Unamar, marginal note 22.

- It would be a logical consequence of the Unamar decision that also the choice of an EU-forum would be void. On the other hand, Article 25 Bruessels I a Regulation guarantees the right to choose a forum and it can be expected that a European court would honor mandatory European law.

- Therefore, it is stated by Peschke[8] that a court would probably upheld a choice of jurisdiction clause referring the case to European state courts.

- **Protection by the law of standard clauses**

- Two German Higher Regional Courts (Oberlandesgerichte) took the ineffectiveness of an arbitration clause from the law of standard clauses (§ 307 BGB – German Civil Code): The OLG Düsseldorf[9] decided, a pre-formulated arbitration agreement between merchants is in principle fair and not void. According to § 307 BGB, however, its content was an undue disadvantage to a "subway franchisee", because the place of arbitration was New York and the recognition of the arbitration in the USA had failed in German courts.

9 Judgement of 12.7.2013 - VII - U (Kart) 1/13, BeckRS 2014, 12436.

- The Higher Regional Court Bremen[10] ruled in favour of a franchisee domiciled in Germany that it constitutes a gross disadvantage within the meaning of § 879 para 3 AustrianABGB (comparable to § 307 BGB), if he subordinated himself to a formal arbitration agreement, to settle disputes with the Dutch franchisee in New York. The seat of the US parent company does not justify the venue.

10 OLG Bremen, Court order of 30.10.2008 - 2 Sch 2/08, OLGR 2009, 155 (Subway).

International Distribution Institute

Your contact partner

- Dr. Raimond Emde
  - Attorney-at-law (Rechtsanwalt)
  - Distribution law
  - Commercial agency law
  - Insurance agent law
  - Dealership law and franchise law
  - r.emde@gvw.com
  - T +49 40 35922-149
  - F +49 40 35922-238

Graf von Westphalen Offices

- National
  - Berlin
  - Düsseldorf
  - Frankfurt am Main
  - Hamburg
  - Munich
- International
  - Brussels
  - Istanbul
  - Shanghai

IDI International Distribution Institute

Contact

Berlin
Potsdamer Platz 8
10117 Berlin
T + 49 30 726111-0
F + 49 30 726111-333
berlin@gvw.com

Düsseldorf
Königsallee 61
40215 Düsseldorf
T + 49 211 56615-0
F + 49 211 56615-123
duesseldorf@gvw.com

Frankfurt am Main
Ulmenstrasse 23-25
60325 Frankfurt/Main
T + 49 69 8008519-0
F + 49 69 8008519-99
frankfurt@gvw.com

Hamburg
Poststrasse 9 – Alte Post
20354 Hamburg
T + 49 40 35922-0
F + 49 40 35922-123
hamburg@gvw.com

München
Sophienstraße 26
80333 München
T + 49 89 689077-0
F + 49 89 689077-100
muenchen@gvw.com

Brüssel
9 Rond Point Schuman
1040 Brüssel
T + 32 2 54103-30
F + 32 2 54103-39
bruessel@gvw.com

Istanbul
Kanyon Ofis Binası Kat. 6
Büyükdere Cad. No. 185
34394 İstanbul, Türkiye
T + 90 212 38180-00
F + 90 212 38180-48
istanbul@gvw.com

Shanghai
Chong Hing Finance Center, Room 906
288 West Nanjing Road
Shanghai 200003
T + 86 21 6322-3131
F + 86 21 6322-2430
shanghai@gvw.com

IDI International Distribution Institute

Frédéric Fournier
Associé /Partner
Avocat / Attorney
Docteur en droit

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Redlink Société d'avocats

French regulation applicable to payment term (Article L441-6 Commercial Code: payment terms and Article L442-6 I Commercial Code: commercial abusive practices);

- **For Cour de cassation and French Advisory Commission on Commercial Practices (CEPC) : public order. Illegal workaround of legal rules, if a French company invoices another French company, through its foreign subsidiary.**

- **For trade control administration (DGCCRF), French payment should apply even when the debtor is abroad and enters into an agreement with a French company.**

However, CEPC (recommendation no 16-1) : when a clause of jurisdiction designating a foreign jurisdiction is provided in a international agreement) with a clause providing that such agreement will be governed by a foreign law, the foreign court does not apply French public order regarding payment terms.

French regulation on contractualisation of annual to tri-annual "unique distribution agreements" attaching initial saleT&Cs, listing discounts and service remuneration, and licit subject to the absence of significant imbalance between rights and obligations and "justified consideration" to any advantage (Article L.441-7 Commercial Code):

- **Violation of this legal obligation : €75000 administrative fine per violation, and potentially M€2**
- **Many situations where the foreign supplier or distribution stipulates that the distribution agreement shall be governed by foreign law (not French)**

Brutal termination of commercial relations (article L. 442-6-I, 5° Commercial Code) :

Tort liability under French law :

- **Principle: No choice but to file the claim before the defendant's court.**
- **Exception (recently made by Cour de Cassation): Still tort liability but subject to choice of jurisdiction clause(Januray 18, 2017).**
- **Other decision from Cour de Cassation, Octobre 22, 2008 : tort liability but choice of jurisdiction clause applicable if referring to « any claim arising from the Agreement ».**

- **But EUCJ : Decisions of July 14, 2016 : prejudicial question from Paris Appeals Court : Contractual liability : then choice of jurisdiction clauses apply (Brussels 1bis)**