International Distribution Institute

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To what extent is it possible to establish a model agency contract that would conform to all domestic legislations of the EU?

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To what extent is it possible to establish a model agency contract that would conform to all domestic legislations of the EU?

1. Uniform European Distribution Contracts?

a. Agency Law

Uniform distribution contracts seems to be of interest only for the commercial agency law, as the commercial agency law is codified by the Council Directive.

b. Other Distribution Contracts

However, the problem is a general one. Principals and distributors could have an interest in stipulating a uniform distribution contract, even outside the law of commercial agents.

Indeed, such uniform contracts exist, even worldwide: contracts used by large firms, which will be adapted to national needs.

Distribution contracts (dealership contracts), however, could be drafted according to the model of the block exemption 330/10.

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1. Uniform European Distribution Contracts?

c. Mandatory Law

Uniform contacts will interfere with national and international mandatory law.

According to the "Unamar" decision of the European Court of Justice of 17.10.2013 – C 184/12, even national law which protects one party to a larger extent as the Council Directive 1986 can be international mandatory and override national law of another member State. Furthermore, mandatory national law has to be obeyed.

As stipulated by the judgement of the European Court of Justice of 04.12.2015 – C 338/14, there is no reason why a national law may not give a better protection than the Council Directive 1986.

Therefore, each "European" or "worldwide" contract has to be examined by a local council for its conformity with such mandatory law. This gives us all work.

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c. Mandatory Law

By the way: We all think of law protecting the agent or distributor and perhaps you think of the notorious Belgian law. However, there might also be national rules and even international mandatory law which protects the principal. Insofar, I refer to Article 3 section 1 Council Directive, according to which the agent is obliged to take care of the interests of the principal, a provision which is mandatory according to Article 5 Council Directive.

It might be well argued that the law protecting the principal is also international mandatory law. The same might be true for many of the mandatory provisions of the Council Directive. "Ingmar" (judgment of 09.11.2000 – C 381/98) did not restrict the international mandatory character to the Articles 17 to 19 Council Directive (indemnity).

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1. Uniform European Distribution Contracts?

d. Conclusion

Therefore, a uniform contract had to be in accordance with the strongest national and international mandatory law of all nations where the agreement is intended to be used.

As explained, this could be law protecting the principal or the agent/distributor.

That causes problems. No interest groups and especially no large firm, who distributes its products worldwide or EU-wide, has an interest to a "race to the top" and therefore to draft a standard contract which has the highest protective level of all nations.

By the way: The German law might be of interest for international firms, at least for contracts used outside the EU and the EEA: § 92c HGB (German Commercial Code) allows a deviation from all mandatory rules of the distribution law, if the agent/distributor acts outside the EU/EEA. This even allows an exclusion of the indemnity of Articles 17 to 19 Council Directive.

2. Can the Parties agree on the Council Directive as Governing Law?

The question needs to be answered in the light of the Rome I-Regulation.

There are some legal authors who believe that Article 3 section 1 Rome I-Regulation only allows the choice of law of a national state (Staudinger/Magnus, 2011, Article 3 Rome I-VO, marginal note 40).

What "law" means is not defined in the Rome I-Regulation.

According to Article 2 Rome I-Regulation, any law specified by this regulation shall be applied whether or not it is a law of a member state.

Article 2 Rome I-Regulation therefore speaks in favor of the possibility of choosing EU-law, which is not the law of a member state.

2. Can the Parties agree on the Council Directive as Governing Law?

Furthermore, Article 3 section 4 Rome I-Regulation stipulates that, when all other elements relevant to the situation at the time of the choice, are located in one or more member states, the parties' choice of applicable law other than that of a member state shall not prejudice the application of provisions of community law.

This is ambivalent: On the one hand, the first part of the sentence sounds as if only the law of a member state can be chosen ("other than that of a member state").

On the other side, this Article clearly provides for the choice of a "law other than that of a member state" and names the community law as an applicable.

Furthermore, the Rome I-Regulation is EU-law and it would be astonishing if its regulations were applicable as EU-law but should be construed in a way that it prohibits the express choice of EU-law.

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Finally: Recital 13 Rome I-Regulation confirms that the Rome I-Regulation does not preclude the parties from incorporating by reference into the contract a non-state-body of law or an international convention.

On the other hand, recital 13 refers to "incorporating", but not a "choice".

Furthermore, recital 14, according to which in the case the community adopts an appropriate legal instrument, rules of substantive contract law, including standard terms and conditions, such instrument may provide that the party might choose to apply these rules, may be construed in such way that the named rules can only be chosen if that instrument expressly provides for such possibility.

All in all, I deem the choice of EU-law and therefore the Council Directive as theoretically possible (wording of Article 3, recital 13 Rome I-Regulation).

2. Can the Parties agree on the Council Directive as Governing Law?

Whether such choice of the Council Directive as the applicable law is wise is another question.

First of all, the choice of the Council Directive is only feasible if that directive gives good and suitable law. This is only the case for agency contracts.

As far as it concerns other distribution contracts, the Council Directive has no suitable regulations.

Furthermore, the Council Directive leaves several questions open and up to the national law, such as termination for good cause, statute of limitation, power of attorney, Del credere and parts of the law of commission.

These “gaps” need to be closed, probably by the national law, which is applicable according to the Rome I-Regulation.

2. Can the Parties agree on the Council Directive as Governing Law?

Furthermore, if such choice of law clause is included in standard terms, in the light of these gaps one could question whether the choice of law clause is clear enough (transparency) and could stand the test of equity under the law of standard terms (§ 307 BGB – German Civil Code and similar provisions of other states).

Finally, the question of mandatory law remains. There could be national or international mandatory law which is "stronger" than the Council Directive and which needs to be obeyed, if the agent/ distributor acts within the state which enacted that international mandatory law.

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