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Martin Rothermel

Cliffhangers in International Distribution Agreements

Applicable Law – Mandatory Provisions – Competent Courts: avoiding suspenseful moments in Litigating International Distribution Agreements when using your standard set of Terms and Conditions.

Internationale Geschäfte erfordern internationale Verträge, die perfekt auf Ähnlichkeiten, Unterschiede und Besonderheiten der nationalen Rechtsordnungen abgestimmt sind. Dies kann je nach Land und Region (z.B. innerhalb oder außerhalb der EU), in denen Ihr Unternehmen tätig ist, mehr oder weniger schwierig sein. Internationale Konventionen, das geltende nationale Recht und das zuständige Gericht geben die Richtung vor; dennoch haben national und/oder international zwingende Bestimmungen starken Einfluss. Sie müssen die Basics richtig machen, um spannende Momente in Rechtsstreitigkeiten vor nationalen Gerichten oder in internationalen Schiedsverfahren zu vermeiden.

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[Rz 1] We often see – as a pragmatic approach[1] – national standard agreements and general terms and conditions being used for international agreements. Entrepreneurs, companies and their legal departments may strive for a unification and standardization with their most familiar choice of law at their proven place of venue[2], e.g. with the national law of their home countries at their district courts at the registered place of business. But: does this really work? What are the pitfalls? What has to be considered?[3]

[Rz 2] This article will first describe the typical questions (see below I.) and then provide general answers within the EU (see below II.) and outside the EU (see below II.). The Swiss law perspective is mentioned as well (see below III.). Then the author outlines details within the EU (see below V.), touches Arbitration (VI.), explains the concept of internally mandatory and internationally mandatory provisions (see below VII.) and highlights details on agency, distribution and franchise in the EU (see below VIII.) and abroad (see below IX.).

I. Preface – General Questions

[Rz 3] Cross-border business – as in international purchase, sales, supply and distribution agreements – is perceived as being less secure and predictable than national business. This especially is true with countries outside of at least partly legally harmonised areas such as the European Union (EU), the European Economic Area (EEA) or where international conventions (such as the Lugano Convention) for Switzerland do not exist[4] or do not apply.

[Rz 4] Companies, businesspersons and their advisors, whether they are in-house lawyers or external counsels, have to answer a number of general or even detailed critical questions, such as:

- Which law is applicable?
- Which provisions do we have to fear in the law of the contracting party?
- Are there any unfamiliar or disadvantageous provisions that are nationally (un)avoidable / internally mandatory or internationally mandatory?

1 Seen from a German practitioner's perspective and maybe also from a Swiss perspective.

2 Which might determine the choice of law clause without even considering differences, advantages and disadvantages of other national law or other places of venue.

3 Taken from *Martin Rothermel*, Internationales Kauf-, Liefer- und Vertriebsrecht, 2016 – 415 pages, Handbook offering Basics and Details on Applicable Law (Rom I & II Regulation, [Inter-]National Conflict of Law Rules), Competent Courts (Brussels I & Ia Regulation, Lugano Convention [Inter-]National Competence Rules), Mandatory Provisions in Distribution (for 50 regions and countries) and Antitrust Law (EU plus 13 countries), retention of title in 54 countries, Major Similarities and Differences between German Law, Swiss Law, CISG and Common Law, et al.

4 According to the website Eidgenössisches Departement für auswärtige Angelegenheiten EDA, Internationale Verträge, https://www.eda.admin.ch/eda/de/home/aussenpolitik/voelkerrecht/internationale-vertraege.html, Switzerland has a number of bilateral international treaties in the field of alimonies and custody but very few except of the Lugano Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matter dated October 30, 2007 (Lugano-Übereinkommen, LugÜ; SR 0.275.12). Most treaties with EU countries were replaced by the Lugano Convention. Beyond that, there is a treaty with Liechtenstein from 1968 and there are treaties respectively corresponding letters with procedural content with Pakistan, Turkey and other countries; see: Bundesamt für Justiz, Die internationale Rechtshilfe in Zivilsachen, Wegleitung, 3. Auflage 2003 (Stand Januar 2013), https://www.rhf.admin.ch/dam/data/rhf/zivilrecht/wegleitungen/wegleitung-zivilsachen-d.pdf. The same or similar applies for Germany for example as beyond EU Regulations there are only very few international treaties such as with Israel, Norway and Tunisia.

- Which court is competent in case a dispute arises?
- How does the trial take place - especially if it is a procedure abroad?
- Can/shall we avoid certain jurisdictions?
- Can a judgement be enforced anywhere?
- Does it bring any advantages or disadvantages to have an international arbitral tribunal to decide instead of an ordinary court?
- What should I do?
- What can go wrong?
- What is the most pragmatic approach?

[Rz 5] One pragmatic approach can be: «*You take your standard contracts and choose your national law and a competent court at your place of business*». This article shall elaborate as to what extent this pragmatic approach answers the questions above and to what extent this is feasible within the EU and/or even outside of the EU.

II. General Answers within the EU

[Rz 6] **Within the EU, the pragmatic approach works for cross-border business** but it does not work for domestic cases**:**

- **Choice of law** is largely possible in the EU when it comes to cross-border business, according to the Rome I Regulation (Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations). If there is a **domestic case**, you can choose another law as well, but then **nationally unavoidable rules, respectively internally mandatory**[5] **rules** (they cannot be derogated from) apply (Art. 3 (3) Rome I Regulation) – so-called *ius cogens* (see below V.1.b. and VII.).

- According to the national laws of EU countries affecting **purchases, sales and deliveries**, there are **relatively few internationally mandatory provisions which could undermine a choice of law** (see Art. 9 Rome I Regulation) on such purchase, sales and delivery agreements within the EU (see below VII.). And there are no prominent national EU provisions in this field that violate ***ordre public*** considerations of other EU member states (Art. 21 Rome I Regulation).

- For **distribution (agency, distribution and franchise) agreements**, however, there are **internally mandatory rules** in EU countries (see below VIII.) and considerable **internationally mandatory** provisions in EU countries (see below VIII.).

- When choosing a national law of an EU country, the choice of a court of such country may seem practical; such a **choice of court agreement** is possible according to the formal requirements of the Brussels Ia Regulation (see V.2. below). Due to the same regulations, within the EU, a decision of a national court of an EU country is easily **enforceable**.

5 See Ulrich Magnus/Peter Mankowski/*Mankowski*, Rome I Regulation (2017) Art. 3 margin 378 (the author of the respective paragraph is in italics).

- **Arbitration agreements** are also **possible** and arbitral awards are **enforceable** in every EU country (see below VI.).

- If the choice of national law and the agreement of a national court is chosen in **general terms and conditions or standard contracts**, these terms and conditions must be effectively included and valid in accordance with the law chosen or applicable to the agreement and the terms and conditions (see below V.1.). For the choice of a court agreement or an arbitration clause, nevertheless, some formalities must be fulfilled (see below V.2.b.).

III. General Answers outside the EU

[Rz 7] **Outside the EU, the choice of a national law and a national court which is not the law and/or court of the contractual partner may pose a problem** (see below IX.). Due to the lack of general harmonisation (as in the EU), this might differ from one country to another; e.g. there are countries which have concluded international treaties with other countries and more or less reciprocally accept choice of law and choice of court agreements even if the law and/or court chosen is not the one of the contractual partner:

- In many cases, **no choice of law is possible at all** or is subject to certain additional requirements.

- Where choice of law is possible, it is nevertheless sometimes difficult to determine whether the legal consequences of a provision of the chosen law (even EU country's national law) violate the **public policy (*ordre public*)** of another law.

- In many cases, there are also **internationally mandatory provisions** in countries outside the EU and this sometimes appears to be similar to or is even mixed with *ordre public*.

- Sometimes no **choice of court agreement** is possible or special form requirements in the country of the contractual partner must be met, so it might be the case that you cannot prevent a certain court from accepting the file and/or you cannot achieve the competency of your court of choice.

- In addition, the choice of a national court in any other country than that of the counterparty would often be impractical because national court judgments **may not be enforceable** in the counterparty's country outside the EU; therefore, arbitration clauses should be given consideration (see VI. below). At times, however, even **arbitration clauses** are difficult or **arbitral awards** in the country of the contracting party are not enforceable.

IV. The Swiss Law Perspective

[Rz 8] Fom a Swiss law perspective the questions are similar: Is it possible to use the pragmatic approach, which means – under the Swiss Federal Law on International Private Law (Swiss IPRG) – to agree to a certain law and to the competence of a certain court in Switzerland? Do national unavoidable (internally mandatory) provisions or even internationally mandatory pro-

visions exist which have to be applied by a Swiss court (or not)? Would a Swiss court decision be enforceable in the country of the contractual partner and/or are any Swiss rules incompatible with *ordre public* of another country? And/or is it possible to agree to Swiss law (or any other law) if the trial takes place in another country besides Switzerland and would the court apply internationally mandatory provisions in this case, respectively, can such a trial be generally avoided and/or or is the outcome of such a trial enforceable in Switzerland?

[Rz 9] Swiss Provisions on applicable law, choice of law, mandatory provisions, competent court, choice of court and enforcement are to be found in Swiss IPRG. For international sales of goods, the Hague Convention on the Law Applicable to International Sales of Goods from 1955 applies (Art. 118 IPRG). These provisions may be structured differently (for example, it might appear peculiar to have all these topics in one legal act) than those in the comparable EU Regulations (Rome I, Brussels Ia), but the content is similar. In relation to the EU, Norway, Iceland the Lugano Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters of 30 October 2007 apply.

[Rz 10] This article shall focus on other than Swiss sources of law, which might be of relevance if the contractual partner is not located in Switzerland, especially when another court than a Swiss court is seized and the other law than Swiss law is *lex fori*.

V. Details within the EU

[Rz 11] In the EU, the harmonisation of law pertaining to choice of law and applicable law as well as choice of court and competent court and enforcement gives reliable and predictable answers to a number of questions that are dealt with here.

1. Choice of Law within the EU

[Rz 12] **Choice of law** is largely possible in the EU[6] when it comes to cross-border business, due the EU-wide (except for Denmark and some of the shore regions of EU Member States) synchronized conflict of laws rules in the Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I Regulation)[7]. Such choice of law requires a substantive law referral contract (no petrification or stabilization clauses) for the whole agreement or parts of it (even floating choice of law clauses are possible – but might be impractical). It is possible to choose neutral law (not soft law) but there are internally mandatory provisions (in domestic affairs) and international mandatory provisions. The choice of law must be express or sufficiently certain in general terms and conditions (where the battle of forms is won) and should be in the language of the negotiations.

6 See *Rothermel*, Footnote 3, Section C.III.

7 On 7 December 2007, the Council of Ministers of Justice endorsed the text of the Rome I Regulation adopted by the European Parliament on 29 November 2007. The Rome I Regulation was published in the Official Journal of the European Union on 4 July 2008 (Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I)) and applies to all contracts concluded from 17 December 2009.

a. Applicability, Exceptions and Scope of the Rome I Regulation

[Rz 13] The Rome I Regulation **applies to contractual obligations in civil and commercial matters that are linked to the law of different states** (Art.1 (1) Rome I Regulation) **when the contract is closed after 16 December 2009** (Art. 29 Rome I Regulation). It is binding on all Member States of the EU except on Denmark (Art.1 (4), recital 46 Rome I Regulation) and is directly applicable to those states, Art.288 (2) TFEU (Treaty of the functioning of the European Union). However, for certain Rome I Regulation provisions, Denmark must be regarded as a Member State within the meaning of the Regulation - Art.3 (4), (7) Rome I Regulation (Art.2 (4) Rome I Regulation). The **matters do not have to be linked to the Member States**. Beyond that, the law specified by the Rome I Regulation does not have to be a law of a Member State (Art. 2 Rome I Regulation); the Rome I Regulation is therefore a so-called ***loi uniforme***.

[Rz 14] **Exceptions** to the scope of application are laid down in Art. 1 (2) Rome I Regulation and include, in particular, questions involving the status or legal capacity of natural persons (lit. a), family relationships (lit. b) matrimonial property regimes (lit. c), obligations arising from bills of exchange, checks, bank drafts and other tradable notes (lit. d), arbitration and choice of court agreements (lit. e), questions concerning company law (lit. f), substitution questions (g) and obligations arising from negotiations before concluding a contract (i).

[Rz 15] According to Art. (1) para. 2 lit. e) Rome I Regulation, the Regulation **does not apply to arbitration and choice of court agreements**[8] (see below VI.).

[Rz 16] Arbitration tribunals can apply the Rome I Regulation, but they do not have to (see below VI.)[9].

[Rz 17] The Rome I Regulation does also not apply to the **conflict of laws rules**. In international contract law, the ***renvoi***, i.e. the question of whether there can also be a referral, have different rules compared to the general conflict of laws (for other subjects). Art. 20 Rome I Regulation stipulates that the referrals of Rome I Regulation are always references to material law. However, the contracting parties may also choose the conflict of laws rules of a particular country. Therefore, the choice of law of the parties is in principle understood as a choice of substantive law. A referral back or further is therefore irrelevant unless the parties explicitly include the right of conflict in the choice of law.

[Rz 18] In principle, the prerequisites of the conflict of laws rules in the Rome I Regulation are to be determined according to the terms of the court appealed, the so-called ***lex fori*** principle. However, as a legal act of the European Union, the Rome I Regulation must nevertheless be **interpreted in an autonomous manner**. Therefore, the results should be harmonized, but there is no guarantee for that.

[Rz 19] The **scope** of the Rome I Regulation comprises (in accordance with its Art. 12) the **interpretation of the contract**; the **fulfilment** of its obligations; the **consequences of full or partial**

8 The reason for this is that these agreements have not only substantive, but also procedural effects and are covered by other EU and international regulations such as Art. 25 of the Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels Ia) or Art. 23 of the Lugano Convention or the UN Convention on Choice of Court Agreements and the 1958 New York Convention on Arbitration and others.

9 This is a repeating, frequently discussed and unsolved issue: do arbitration tribunals have to apply international provisions as Rome I Regulation or Brussels Ia Regulation or other bodies of law understood as *lex fori* in cases where national courts would decide.

failure to comply with these obligations, including **damage assessment**; the ways in which the **obligations are extinguished** as well as the **limitation period** and the **legal losses** at the **expiry of limitation periods** and the **consequences of the nullity** of the contract.

[Rz 20] Pursuant to Art. 18 (1) Rome I Regulation, the law applicable is also **relevant for questions of presumptions of law and the burden of proof**. However, the *lex fori* and the statute of form according to Art. 11 Rome I Regulation determine which types of evidence are admissible, Art. 18 (2) Rome I Regulation.

b. Choice of Law under Rome I Regulation

[Rz 21] The Rome I Regulation basically provides for freedom of choice (Art. 3 Rome I Regulation); the principle of party autonomy applies. The choice of law is made by a so-called **conflict of law referral contract** *(kollisionsrechtliche Verweisung)*. This must be distinguished from the **substantive law referral contract** *(materiellrechtliche Verweisung*[10]*)*; the former refers to a legal system as such, the latter merely refers to rules that are applicable in addition to the existing legal system.

[Rz 22] In principle, it is also possible that the contract is subject to a choice of law only in parts which leads to split choice of law within one contract (Art. 3 (1) of the Rome I Regulation) – a so-called ***Dépeçage***[11].

[Rz 23] But in the case of so-called **national domestic affairs**, when all elements relevant to the situation at the time are located in one country, the choice of law of another country is only valid as a substantive law referral contract, because of Art. 3 (3) and (4) of the Rome I Regulation, which provides, that «*the choice of the parties shall not prejudice the application of provisions of the law of that other country which cannot be derogated from by agreement*» – so-called *ius cogens*[12] or internally mandatory provisions (for internationally mandatory provisions see below VII., Art. 9 Rome I Regulation). There are also **EU-wide-domestic affairs**, where compulsory EU law applies (Art. 3 (4) Rome I Regulation).

[Rz 24] It is also possible to subject the contract to a so-called **neutral law**[13], which means to choose a law that has nothing to do with the agreement or its parties. Limits are, however, again set for domestic affairs (Art. 3 (4) Rome I Regulation) and in the principle of the application of **overriding mandatory provisions** (Art. 9 Rome I Regulation – see VII. below).

[Rz 25] Sometimes you also see so-called **floating choice of law clauses**[14], according to which the applicable law is determined by who files a lawsuit first or who is about to become the defendant. This is possible, even if it leads to uncertainties in detail, e.g. what law is applicable if there is no lawsuit what type of counterclaims and other constellations exist.

[Rz 26] Another question is whether **soft law** (not national state law), such as the UNIDROIT Principles, the Lando Principles or the lex mercatoria, can be chosen. For the most part, in such cases, only a so-called substantive law reference is assumed, which means that the aforementio-

10 Magnus/Mankowski/*Mankowski*, Footnote 5, Article 3 margin 79.

11 Magnus/Mankowski/*Mankowski*, Footnote 5, Article 3 margin 313 et al.

12 Magnus/Mankowski/*Mankowski*, Footnote 5, Article 3 margin 381.

13 Magnus/Mankowski/*Mankowski*, Footnote 5, Article 3 margin 201.

14 Magnus/Mankowski/*Mankowski*, Footnote 5, Article 3 margin 344–360.

ned soft law regulations can only be applied if the rules of the state law which are to be applied (the law of the country where the party required to effect the characteristic performance of the agreement has his domicile – the **characteristic connection or objective determination**) are not unavoidable or mandatory but dispositive.

[Rz 27] **Petrification and stabilization clauses**[15] are doubtful. Such clauses attempt to freeze the state of the chosen law at a specific time. Such clauses are usually rejected by courts or understood as substantive law references.

[Rz 28] Sometimes the parties want to deselect all state legal systems. However, such **self-regulatory contracts** or *contrats sans lois*[16] go beyond the framework of private autonomy and are no longer covered by Art. 3 Rome I Regulation. A **negative choice of law clause**[17] is, however, permissible in which the parties expressly opt out of a specific national law. This is often used in a practical manner in the context of the CISG (Convention on the International Sale of Goods[18]), as this is part of the national law of the Convention's Member States, unless expressly voted out.

[Rz 29] Thus, in the following cases, there are exceptions to the principle of free choice of law:

- Purely domestic national issues: Art. 3 (3) Rome I Regulation;
- Purely domestic EU issues: Art. 3 (4) Rome I Regulation;
- Passenger transport contracts: Art. 5 para. 2 Rome I Regulation;
- Consumer protection: Art. 6 (2) Rome I Regulation;
- Insurance agreements: Art. 7 (3) Rome I Regulation;
- Employee agreements: Art. 8 Rome I Regulation;
- Mandatory provisions: Art. 9 Rome I Regulation;
- *Ordre public*: Art. 21 Rome I Regulation.

c. Formalities for Choice of Law under the Rome I Regulation

[Rz 30] The choice of law must be included **expressly or prove to be sufficiently certain** from the terms of the contract or from the circumstances of the case (Art. 3 (1) of the Rome I Regulation). The conclusion and the effectiveness of the agreement are governed by the law that has been selected or should have been selected (Art. 3 (5), 10 and 11 Rome I Regulation). The existence and validity of a contract or general terms shall be determined by the law which would govern it under the Rome I Regulation if the contract or terms were valid. Nevertheless, a party, in order to establish that it did not consent, may rely upon the law of the country in which it has its registered place of business if it appears from the circumstances that it would not be reasonable to determine the effect of its conduct in accordance with the other law (Art. 10 (2) Rome I Regulation). This is especially of relevance in case of **tacit**[19] **acceptances of general terms and conditions** which are very critical in national and international transactions[20].

[Rz 31] In the interest of the validity of the contract (***favor negotii***), Art. 11 (1) Rome I Regulation regulates the cases in which the contract is concluded in the same state (then formal provisions

15 Magnus/Mankowski/*Mankowski*, Footnote 5, Article 3 margin 79–80.

16 Magnus/Mankowski/*Mankowski*, Footnote 5, Article 3 margin 305–307.

17 Magnus/Mankowski/*Mankowski*, Footnote 5, Article 3 margin 308.

18 United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980) – see www.uncitral.org.

19 Magnus/Mankowski/*Mankowski*, Footnote 5, Article 3 margin 104–192.

20 See Rothermel/Dahmen, Schweigen ist Silber, in: Recht der internationalen Wirtschaft, 2018, S. 179 ff.

at this location or the Rome I Regulation shall apply - ***lex loci actus***), Art. 11 (2) Rome I Regulation concerns formalities in distance business, Art. 11 (3) addresses unilateral legal transactions, Art. 11 (4) applies special rules for consumer contracts and Art. 11 (5) has special provisions for land agreements. For **consumer contracts**, Art. 11 (4) of the Rome I Regulation must be observed and consumer contracts that fall under Art. 6 Rome I Regulation are subject to the law of the state in which the consumer has his habitual residence; for a different choice of law, the principle of favourability in Art. 6 (2) Rome I Regulation must be applied, which means that consumers can always rely on their national law whenever it provides better protection.

[Rz 32] A **tacit choice of law** may be derived from certain factual circumstances (indicia)[21]. These include, for example:

- agreement on a single place of jurisdiction (recital 12 Rome I Regulation) or arbitration as well as a common place of performance;
- consistent process behaviour with regard to the applicable law;
- reference to provisions of a specific law with reference to usages;
- the use of terms and conditions or forms based on a legal system.

[Rz 33] An **express choice of law** is assumed, if the parties have established by individual agreement or in terms and conditions a specific law that is to be applied to their contract. Thus, if the choice of foreign law is made, the formal requirements of this law must be met.

[Rz 34] The **choice of law in terms and conditions**[22] requires that they are effectively included and are also effective in terms of content (e.g. in German law: the «famous» §§ 305 ff. BGB include strict control of content of general terms and conditions). In particular, with choice of law clauses in general terms and conditions, it frequently happens that buyers and sellers each refer to their own terms and conditions, each containing their own national law as a choice of law - then the choice of law contradicts. This is called a «**battle of forms**». How should the parties proceed then? Generally, the principles of the law which has been elected or should have been chosen should be used for the conclusion of a choice of law agreement. But what happens if such an election is not clear because contradictory statements are being made? Many laws have turned away from the «theory of the last word» or «**last shot doctrine**» and treated conflicting conditions in a way that both of the contradicting provisions in the terms and conditions law are irrelevant, according to the so-called «**knock-out rule**». Then, if no law has been chosen, none can «step in» instead of the ineffective clauses in terms and conditions. The law that would apply in that case would be the law of the country where the party required to effect the characteristic performance of the agreement has its registered place of business (the objective determination), Art. 4 Rome I Regulation (see the catalogue in Art. 4 (1) Rome I Regulation). However, this may be judged differently in different countries because, for example, the «last shot doctrine» prevails in some countries (as in the UK, for example) whereas most countries adhere to the «knock-out rule».

[Rz 35] In international business transactions, the so-called **language risk** is also a regular topic. In principle, it is decided by the law applicable to the agreement according to the objective determination or choice of law in which language the contract must be concluded or whether such contract has been concluded. In most cases, however, it should be sufficient for the general terms and conditions to be available in the language of negotiation – sometimes it is based on a world

21 Magnus/Mankowski/*Mankowski*, Footnote 5, Article 3 margin 104 et al.

22 Magnus/Mankowski/*Mankowski*, Footnote 5, Article 3 margin 468–477.

language or a world trading language, of course, without saying which languages fall into this category.

2. Choice of court within the EU

[Rz 36] **Choice of court** is largely possible (with exclusive effect) due to the Brussels I (now Ia or Ibis) Regulation in civil and commercial matters in the EU[23] when it comes to cross-border business and the defendant or the court designated by a choice of court agreement is located in a Member State. Due to formal requirements, a choice of court agreement should be in written form (even in general terms and conditions), and still, in such cases due to the «new conflicts rule», the prorogated court's law governs the material validity of the choice of court agreement. Besides choice of court agreements, a designated place of performance can be determining for the competent court as well.

a. Applicability, Exceptions and Scope of the Brussels Ia Regulation

[Rz 37] The former EU Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters – (Brussels I), was **valid for all Member States** (except for Denmark) with effect from 1 March 2002 replacing the Brussels Convention from 1968. The long-discussed **revision of the regulation** was adopted on 12 December 2012 and has been in force since 10 January 2015 – Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 (Brussels Ia)[24]. Denmark has only «acceded» to the old version on 19 October 2005 with effect from 1 July 2007 and was free to apply the amendments in the recast. Denmark has already stated that it intends to apply the changes.

[Rz 38] Generally, **Brussels Ia Regulation applies in the relationship between the Member States** (Art. 68 Brussels Ia Regulation – for Denmark see above) including the overseas departments of France (excluding Saint-Pierre-et-Miquelon and Mayotte) Madeira, the Azores, the Canary Islands, the Balearic Islands, Gibraltars and the Åland Islands; it does not apply to the British Channel Islands, the Isle of Man and the sovereign territories of the United Kingdom of Great Britain and Northern Ireland on Cyprus.

[Rz 39] The **Scope** covers **civil and commercial matters**, Art. 1 Brussels Ia Regulation. The term is not defined in the regulation itself. The European Court of Justice has already opted for a so-called European concept of civil and commercial matters (concerning the distinction between civil and commercial matters on the one hand and public disputes on the other hand – *Eurocontrol*[25]). The Brussels Ia Regulation does not apply to questions of civil status, legal capacity, legal representation of natural persons, matrimonial property regimes, the area of inheritance law, insolvency proceedings, social security and arbitration (Art. 1 (2) Brussels Ia Regulation).

[Rz 40] The Regulation applies to all **persons (including legal persons) who have their domicile or their registered office in a member state** of the Regulation (with special features in Art. 7 No.

23 See *Rothermel*, Footnote 3, Section C.I and Section C.IV.

24 See Magnus/Mankowski, Brussels Ibis Regulation (2016).

25 Judgment of ECJ C-29/76 – Eurocontrol, 14 October 1976, NJW 1977, 489 f.

2, Art. 9 (1) (b), Art. 18 (1) – for definition, see Art. 62, 63 Brussels Ia Regulation). The defendant must be domiciled in a Member State (Art. 6 and Recital 14 Brussels Ia Regulation) and there must be a **cross-border situation**, what is now stated in recital 13 of the Regulation. However, the external link does not have to be one to another Member State, it is sufficient to have a foreign connection with a third country, as long as the basic condition of the place of residence is fulfilled in a Member State[26].

[Rz 41] So, contrary to the intention of the EU Commission, even after its update, the Regulation has not become a universally applicable regulatory framework – i.e. not a ***loi uniforme:*** But: **Jurisdiction agreements were also included in the scope of the regulation, which were concluded by parties that are not domiciled in the EU, but in which a court of a Member State was chosen as competent court** (Art.25 (1) of the Brussel Ia Regulation).

[Rz 42] Despite the original Commission proposal, the scope of the Brussels Ia Regulation was not extended to **arbitration agreements** (same as the Rome I Regulation – see above V.1.a.) following the reform. As is apparent from Recital 12 of the recast, the Regulation is not intended to prevent the courts of a Member State from referring the parties to arbitration under national law or reviewing an arbitration agreement.

[Rz 43] Arbitration tribunals might consider (even if the topic might be very special in such a case) consulting the Brussels Ia Regulation, but they are not obligated to do so (see below in Sec. VI. on Arbitration)[27].

b. Choice of Court Agreements the Brussels Ia Regulation

i. Scope

[Rz 44] The Brussels Ia Regulation provides for the possibility of a jurisdiction clause or choice of court agreement in Art. 25; but such clauses or agreements are subject to special requirements within the scope of the Brussels Ia Regulation. Also, jurisdiction clauses in insurance matters, consumer and labour law matters as well as in international exclusive jurisdictions must comply with special regulations (Art.25 (5) Brussels Ia Regulation).

ii. Formalities

[Rz 45] Of particular importance for choice of court agreements under the Brussels Ia Regulation are the formalities[28]:

- **Written form** (Art. 25 (1) (a) alt. 1 Brussels Ia Regulation) states that both parties must sign a jurisdiction clause; separate documents are sufficient if the agreement with regard to the chosen place of jurisdiction is sufficiently clear. However, it is questionable whether a mere acknowledgment of a pre-formulated clause is sufficient.

26 See Magnus/Mankowski/*Magnus*, Brussels Ibis Regulation (2016), Introduction margin 89 – see margins 42 et all for general application and details in every Member State.

27 This is a repeating, frequently discussed and unsolved issue: do arbitration tribunals have to apply international provisions as Rome I Regulation or Brussels Ia Regulation or other bodies of law understood as *lex fori* in cases where national courts would decide.

28 See Magnus/Mankowski/*Magnus*, Footnote 24, Art. 25 margin 27–64.

- **Electronic transmissions** (Art. 25 (2) Brussels Ia Regulation) in a form permitting a permanent record of the agreement are equivalent to the written form; this applies to e-mail and Internet business transactions, if printable, but not if the terms and conditions are only confirmed by clicking on a box.

- **Written confirmation of an oral agreement** (so-called half-written form, Art. 25 (1) (a) alt. 2 Brussels Ia Regulation) in the case of prior contract conclusion and subsequent written confirmation in full (in part also by the party which introduced the choice of court agreement): here it is questionable how objection to confirmation must be considered.

- In a **form that corresponds to the practices that have arisen between the parties** (Art. 25 (1) (b) Brussels Ia Regulation) customs or habits can replace the written form, but not the agreement.

- In a **form that corresponds to a commercial custom or habit in international trade** (Art. 25 (1) (c) Brussels Ia Regulation) that the parties knew or should have known and generally know and that is regularly observed by the parties to this type of contract and to the business concerned. The existence of appropriate commercial practices is to be judged autonomously under EU law (widely accepted for commercial confirmation letters)[29].

[Rz 46] The purpose of the required formalities is that they should above all ensure that jurisdictional agreements do not go unnoticed in the content of a contract. However, the jurisdiction agreement can be valid independently from the main contract - the ineffectiveness of the main contract does not automatically indicate the ineffectiveness of the jurisdiction agreement.

iii. Effectiveness according to the law of the court – the «new conflict rule»

[Rz 47] For the first time, the new version of the Brussels Ia Regulation introduced a provision on the substantive validity of the choice of court agreement. It is sometimes called «**the new conflicts rule**».[30] Pursuant to Art.25 (1) sentence 1 last half sentence of the Brussels Ia Regulation, the prorogated court's law governs the material validity of the choice of court agreement. It is modelled in accordance with Art.5 (1) of the Hague Convention on Choice of Court Agreements. Recital 20 Brussels Ia Regulation says that this is not a so-called substantive reference, but an overall referral; thus, the conflict of laws of the respective Member State must be taken into account. However, this should not lead to a standardization because the Rome I Regulation (for the law applicable to contractual obligations) on jurisdiction agreements is explicitly silent (Art.1 (2) (e) Rome I Regulation)[31].

[Rz 48] The question is: what does that mean? This still cannot be clearly answered at the moment. On the one hand, there is the hope that the relevant court will come to the decision that its conflict of law rule is applicable to the other contract (possibly agreed or objectively attached).

29 See Rothermel/Dahmen, Footnote 20, page 179 ff.

30 See Magnus/Mankowski/*Magnus*, Footnote 24, Art. 25 margin 77 et al.

31 Some advocate the analogous application of the Rome I Regulation, see Magnus/Mankowski, Brussels Ibis Regulation (2016), Art. 25 margin 81a.

On the other hand, it is to be feared that a court will use the rules of its state law which could lead to anti-autonomous decisions.

iv. Terms and conditions

[Rz 49] It is possible to have jurisdiction agreements in general terms and conditions. It is unlikely that such clauses in general terms and conditions would be controlled under national law, because generally Art. 25 Brussels Ia Regulation is to be interpreted in accordance with European law[32] – but see «the new conflicts rule» above.

[Rz 50] In principle, the **written form requirement can also be satisfied by reference to the general terms and conditions**. It is probably necessary that the contract signed by the parties expressly refers to the general terms and conditions with the jurisdiction clause and that the terms and conditions are present to the other part at the time of the conclusion of the contract. However, an explicit reference shall be deemed unnecessary if the terms and conditions in question have been the basis for the business relationship between the parties for many years, their validity is therefore that of a practice established between them, or if the terms and conditions are of a type commonly used in an industry accepted by a recognized organization or body, which had to be known to the parties.

v. Place of Performance as Place of Jurisdiction

[Rz 51] Instead of choosing a court of competent jurisdiction, the parties may reach an **agreement on the place of performance and this will then determine the place of jurisdiction** in accordance with Art. 7 (1) Brussels Ia Regulation. The agreement on place of performance does not have to fulfil the formal requirements of Art. 25 Brussels Ia Regulation – since it is not exclusive to one jurisdiction, but only an additional, special jurisdiction. Their effectiveness is judged solely by the *lex causae*.

vi. Consequence of a Choice of Court Agreement

[Rz 52] Pursuant to Art. 25 (1) Brussels Ia Regulation, **the elected court has exclusive jurisdiction** (except in the case of place of performance agreements).

vii. Strengthening of choice of court agreements after the reform of the European Convention

[Rz 53] One of the objectives of the reform of the European Convention was to strengthen the effectiveness of choice-of-court agreements by **stopping torpedo lawsuits**[33]. Torpedo suits work

32 See case law and a list insufficient form with Magnus/Mankowski, Footnote 24, Art. 25 margin 96 et al.

33 See Magnus/Mankowski/*Magnus*, Footnote 24, Art. 25 margin 1.

like this: Instead of waiting for a performance claim of the opponent, one submits a negative declaratory action (possibly even in an incompetent court) – and preferably with a court in the EU, which does not decide too quickly (such as Italy – the Italian torpedo). Because of the Brussels Ia Regulation-specific prohibition of double *lis pendens* (Art. 27 Brussels Ia Regulation) the possibly favoured by the opponent, e.g. a more acquainted, faster court would have to wait until the court first seized decides (even if it is not competent) – and that may take time. Now, according to the new Regulation (Art. 31 (2) and (3) Brussels Ia Regulation), it is no longer always the court first seized – instead, in the case of a choice of court agreement, the agreed court has the right to declare its jurisdiction (regardless of whether appealed first or second).

VI. Arbitration

[Rz 54] **Arbitration** is always a considerable alternative in cross-border business agreements since enforceability of an arbitral award is much better than such of a state court (especially outside legally harmonized areas such as the EU). Also, arbitration might be faster, more cost efficient, less public and more influenced (and even decided) by specific experts (maybe even under specifically chosen law without internal or international mandatory provisions) than state court decisions; but, this – of course – depends on the single case and the nominated arbitrators. Crucial, therefore, is an apt arbitration clause in the agreement, the choice of the right arbitrators and effective influence on the procedural rules before the proceedings begin.

1. General about Arbitration

[Rz 55] An arbitral tribunal is a **private court** that meets solely by agreement of the respective parties without the influence of a state and makes a decision, a so-called arbitral award. There is virtually only one instance, i.e. only one arbitral award, which can only be reviewed by a state court with regard to very few questions.

[Rz 56] The **regulations on the procedure are under strong influence of both parties** and if the parties do not take influence, the arbitrators have great freedom in the procedure; if no special regulations are made, then mostly national procedural law (as for example in Art. 176 et seq. Swiss International Private Law, IPRG, for international arbitration and Art. 353 et seq. Swiss Code of Civil procedure for national arbitration or §§ 1029 et seq. of the German Code of Civil Procedure, ZPO) of the country where the procedure takes place applies.

[Rz 57] National laws are often based on the UNCITRAL Model Law[34] of 1985; a certain first impression can be derived from this.

[Rz 58] If the parties have not made any special arrangements, this is referred to as an *ad hoc* arbitration court. In addition to ad hoc arbitration courts, there are also permanent and **institutional arbitration** courts. These are set up by institutions, e.g. the Chambers of Commerce and Industry, the Bar Associations, etc. Examples are the DIS (German Institution of Arbitration, www.disarb.org) or the ICC (International Chamber of Commerce, www.iccwbo.org) or the Swiss Chambers' Arbitration Institution, SCAI (www.swissarbitration.org). These institutions have al-

34 See www.uncitral.org.

so issued rules of arbitration. However, such arbitration rules regularly have gaps or give the arbitrators a relatively wide discretion as to how they conduct the proceedings.

[Rz 59] The **number of arbitrators** may be determined by the parties themselves. If the parties do not come to an agreement, the tribunal often consists of three arbitrators – but this depends on the applicable arbitration rules. In a tribunal of three arbitrators, each party usually appoints one arbitrator, and – depending on the rules – the two nominated arbitrators then agree on a chairperson or the institution appoints the chairperson. If no agreement is reached, the chairperson is often appointed by an appointing authority. All arbitrators must be independent. In some cases, the arbitration rules specify certain other requirements (nationality, profession, etc.); in some cases, the arbitrators must also be selected from a list.

2. Advantages, Disadvantages, Reflections on Arbitration

[Rz 60] The **advantages** of private arbitration are usually an acceleration of proceedings (also due to the lack of litigation) and possibly cost advantages in proceedings with a very high amount in dispute. In addition, arbitral awards are internationally better enforceable due to international conventions such as the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10 June 1958 (the so-called New York Convention or the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards) to which more than 150 states have acceded[35]. Furthermore, «your lawyers» might directly act as counsel and no registered attorney before a specific state court is needed. Also, the appointment of arbitrators by the parties makes it possible to appoint specifically competent arbitrators (e.g. with special industry experience, special nationality, special legal or technical training, etc.). It is also sometimes seen as an advantage that arbitration proceedings are not public and disputes do not necessarily become public. It should also not be underestimated that the language of the proceedings can be determined in arbitration courts (in national courts, mostly all documents have to be translated into the national language first). Sometimes the relative freedom of the arbitrators in the conduct of proceedings is also particularly welcomed.

[Rz 61] **Disadvantages** include the fact that, depending on the amount in dispute, an arbitral tribunal can appear disproportionately expensive (this may be true especially in the case of amounts in dispute that do not exceed 250,000.00 Euros); however, when comparing the costs between ordinary and arbitration proceedings, it should be borne in mind that ordinary proceedings can have several instances and arbitration proceedings cannot (unless the parties have agreed otherwise). Sometimes the relative freedom of the arbitrators in conducting proceedings is criticised – depending on their nationality and training as well as the mental attitude of the arbitrators, there may be unpleasant surprises for one or the other, e.g. discovery proceedings and similar – which is at least not known in the German ZPO.

[Rz 62] Ultimately, the advantages and disadvantages of arbitration and the satisfaction or dissatisfaction that one associates with it depend on four factors:

- The actual circumstances – certain constellations simply inevitably lead to unpleasant procedures (these can be: of factual and legal nature, geography, political developments, participants, etc.).

35 www.uncitral.org

- The selection of the arbitrators – one cannot be careful enough and should not be afraid to consider the worst scenario before deciding (all personal characteristics such as nationality, gender, age, intellect, education, competence, experience, accuracy, diligence, readiness for conflict, assertiveness, communication skills, vanity, pragmatism, organisational talent, etc.).
- The more experience one has with arbitration proceedings, the more time and effort one usually invests in the agreements before the arbitration case occurs in order, for example, to reach or avoid certain contents of the arbitration rules, to make certain staffing and procedural guidelines, etc.
- You can do everything right and still have bad luck, but this may also be true in state courts.

[Rz 63] When dealing with cliffhangers in litigating international agreements on Distribution in the EU and abroad, arbitration is specifically interesting since (1) on a worldwide basis, enforceability and acceptance of a choice of venue clause (arbitration clause) is generally spoken better and broader than such of a national court, (2) admissibility of choice of law may or may not be influenced by national conflicts of law rules (see above V.1.a), (3) overriding mandatory provisions might not be considered in an arbitration to the same extent as before a national court with its *lex fori* (see above V.1.b and below VII.), (4) «your lawyer» can act as worldwide counsel and (5) arbitrators may be selected.

VII. Nationally unavoidable (internally mandatory) und internationally mandatory provisions and ordre public within the EU

[Rz 64] Even if the choice of law is admissible by Rome I Regulation (see above V.1.) and the chosen place of venue is accepted by Brussels Ia Regulation (see above V.2.), there might be nationally unavoidable (internally mandatory[36]) and internationally overriding mandatory provisions in the EU that could or should be applied by the court in accordance with Art. 3 (3) and/or Art. 9 Rome I Regulation. The application of such provisions might differ if one court decides or another (since there is a difference between domestic or foreign intervention norms); also, it might help to avoid such norms by choosing arbitration instead of state courts (as above VI.).

1. Nationally unavoidable – internally mandatory provisions

[Rz 65] Internally mandatory provisions result from the lack of choice of law possibilities in domestic affairs (see above V.1.b.) as in Art. 3 (3) and (4) Rome I Regulation.

2. Overriding mandatory provisions – intervention norms

[Rz 66] Art. 9 (1) Rome I Regulation contains a **definition** of the overriding mandatory provision (so-called *loi de police*). It is a provision *«the respect for which is regarded as crucial by a country for safeguarding its public interests, such as its political, social or economic organisation, to such an extent that they are applicable to any situation falling within their scope, irrespective of the law other-*

36 See Magnus/Mankowski/*Mankowski*, Footnote 5, Art. 3 margin 378.

wise applicable to the contract under this Regulation». Such so-called «intervention norms» are thus characterized by their compelling nature, by the protection of overriding public interests and by their claim to be applied without regard to the applicable law. Furthermore, a sufficiently strong domestic or Union reference is required in that specific case.

[Rz 67] In the case of the intervention norms, a distinction must be made between the following types: **domestic intervention norms** (*lex fori* intervention norms – Art. 9 (2) Rome I Regulation) and **foreign intervention norms**, the latter being *lex causae* (as the applicable law under choice of law or characteristic connection) or the place of performance (*lex loci solutionis* intervention norms – Art. 9 (3) Rome I Regulation).

[Rz 68] Art. 9 (2) Rome I Regulation stipulates that the *lex fori's* intervention norms remain unaffected. Intervention norms at the place of performance are only considered under Art. 9 (3) Rome I Regulation under certain circumstances.

[Rz 69] The fact that the intervention standards are among the most controversial issues in international contract law can be seen, for example, by the fact that the United Kingdom vehemently opposed the EU Commission's original proposal and threatened not to accede to the regulation. The EU Commission's original proposal provided that mandatory third-country intervention rules should also be taken into account, which the United Kingdom perceived as a threat to legal certainty and an obstacle to incalculable deviations from the Treaty.

[Rz 70] According to Art. 9 (3) of the Rome I Regulation, such intervention norms of the place of performance are to be observed, which **concern the lawfulness of the fulfilment**. The prerequisites (rule of intervention, place of performance, effect of the unlawfulness of the performance of the contract) are difficult to decide on. For this purpose, the court still has some discretion to take into account the nature and purpose of the standard and the consequences of its application and non-application (Art.9 (3) of the Rome I Regulation). But these are not standards derived from the country of the court (these fall under 9 (2) Rome I Regulation), but foreign rules of law. So obviously, the task the state judge has to undertake is difficult and questionable results are inevitable – this again might influence the choice of venue clause[37].

[Rz 71] Furthermore, in the case of arbitration before an arbitral tribunal, the question arises as to whether this is at all tied to the Rome I Regulation. This is anything but clear (see above VI)[38].

[Rz 72] Sometimes it is also criticized that Art. 9 of the Rome I Regulation does not regulate intervention norms of the *lex causae* (i.e. the applicable law). According to one opinion, the intervention norms of the *lex causae* can only be applied if they fulfil the requirements of Art. 9 (3) Rome I Regulation. As claimed by a second opinion, they do not have to fulfil any special conditions of application. According to a third point of view, the *lex causae* intervention norms always apply when they meet the general requirements of such rules and do not exceed the limits of either the right of intervention at all or the public policy of the court hearing them. It is not an exaggeration to call that complicated.

[Rz 73] Although Art. 9 of the Rome I Regulation now provides a theoretical definition of overriding mandatory provisions (as above), it is **often uncertain which national statutory provisions**

37 See Magnus/Mankowski/*Romano Bonomi*, Footnote 5, Art. 9 margin 193–206.

38 This is a repeating, frequently discussed and unsolved issue: do arbitration tribunals have to apply international provisions as Rome I Regulation or Brussels I a Regulation or other bodies of law understood as *lex fori* in cases where national courts would decide.

have the corresponding international compulsory character. Although such overriding mandatory provisions must be interpreted in a way that is autonomous in terms of European law, there are differences between the different legal systems in the EU when assessing whether a standard has an overriding character. For example, French case law tends to apply rules of intervention more often than German jurisdiction. And since Rome I Regulation has a broad international reach (art. 2 Rome I Regulation), overriding mandatory provisions of Non-Member States would/could apply as well.

[Rz 74] The problem of such overriding mandatory provisions for agreements with distributors, sales agents and in the field of franchise law is particularly relevant. A leading case is, for example, the Ingmar ruling of the European Court of Justice in the *Ingmar* decision[39], according to which the compensation claim for commercial agents under the EU Commercial Agents Directive is of international mandatory nature. In addition, for example, the rupture-brutal cases in French distribution law or the 1961 Belgian law on exclusive traders must be mentioned.

3. Ordre public

[Rz 75] The concept of the overriding mandatory provisions is to be distinguished from the concept of public order (*ordre public*)[40]. According to Art. 21 Rome I Regulation, the application of the law governed by the regulation (choice of law or objective determination) may be refused if it is incompatible with the public policy (*ordre public*) of the forum – the *lex fori*.

[Rz 76] Most likely, *ordre public* should neither play such a large role in contract law nor in distribution law – but there are, of course national differences[41].

VIII. Details for Distribution in the EU

[Rz 77] In the EU, one must differentiate between Agency Law, Distribution Law and Franchise Law[42].

[Rz 78] Generally spoken, choice of law and choice of court is admissible in the EU for Agency, Distribution and Franchise due to the Rome I Regulation (see above V.1.) and the Brussels Ia Regulation (see above V.2.). However, the law itself might provide for some differences.

39 Judgment of ECJ C-381-98 – Ingmar GB Ltd. V. Eaton Leonard Technologies Inc., 9 November 2000, ECR 2000-1, p. 9305.

40 See Magnus/Mankowski/*Bonomi*, Footnote 5, Art. 9 margin 42–44.

41 See *Rothermel*, Footnote 3, Sec. H for 50 regions and countries, where sources have been used that cannot be found in book form – e.g. country reports by lawyers in various organisations such as the IDI (www.idiproject.com) or the AIJA (www.aija.org) or lawyer reports in other publications such as Getting The Deal Through (www.gettingthedealthrough.com), etc. Some countries (80 in total) are very shortly described (on 20 pages) in Klaus Detzer/Claus Ullrich, Internationale Vertriebsvereinbarungen 2014, 1. Auflage, with references to further sources such as German Trade and Invest (GTAI), www.gtai.de; WKO country reports at www.wko.at; statements on country groups can also be found there. Some (19) countries are dealt with in Michael Martinek/Franz-Jörg Semler/Eckhard Flohr, Handbuch des Vertriebsrechts 2016.

42 See *Rothermel*, Footnote 3, Sec. H for 50 regions and countries.

1. Agency Law

[Rz 79] All EU countries basically have the same Agency Law on the basis of the **Council Directive of 18 December 1986** on the coordination of the laws of the Member States relating to self-employed commercial agents (Council Directive of 18 December 1986 on the coordination of the laws of the Member States relating to self-employed commercial agents 86/653 / EEC, Commercial Agents Directive).

a. Similarities and Differences

[Rz 80] Only where the Commercial Agent Directive gives the Member States the freedom of choice, differences arise[43].

[Rz 81] In some cases, there are **differences** in the notice periods in the EU: according to the Directive, a notice period of three months is to be respected from the third year of the contractual relationship, but the Member States may waive the deadlines (with one month per year of contract duration) and increase to six months (Art.15 (3) Directive). Many EU Member States have adopted this model: Belgium, Denmark, Finland, Greece, Italy, Croatia, Luxembourg, Austria, Romania, Sweden, Slovenia, Spain, Cyprus. In Germany, the notice period between the third and the fifth year of the contractual relationship is three months and after the fifth year – six months, § 89 German Commercial Code. In Latvia and Lithuania, the notice period is four months from the fourth year of the contractual relationship. In the Netherlands, the minimum notice periods are as prescribed by the Directive; however, if the contract does not regulate this explicitly, longer deadlines apply – four months during the first three years of the contractual relationship, five months between the fourth and sixth years and six months thereafter.

[Rz 82] The Commercial Agency Directive also allows Member States to choose between two instruments for the post-contractual compensation of the commercial agent: indemnity, Art. 17 (2) Directive or compensation, Art. 17 (3) Directive. Prerequisite for the compensation claim is that the sales representative has increased the customer base of the principal and the principal still benefits from it. In the case of a claim for damages, on the other hand, it is examined whether the commercial agent escaped commission claims which he would have granted if the legal relationship continued, and whether he suffered disadvantages due to the non-amortization of costs and expenses. Member States must include one of the two claims in their national regulations. While most have opted for the right to compensation, some countries ensure the claim for damages – such as France and Ireland. Other countries – e.g. Greece and Malta – grant both claims in parallel. In Lithuania and the UK, the sales representative can choose between the two claims. In Slovakia and Spain, in addition to the right to compensation, the commercial agent is entitled to a claim for compensation under specific conditions – in Slovakia if he does not receive commissions, and in Spain if the principal unilaterally terminates a contract of indefinite duration. In addition, a claim for damages under general civil law can be asserted in the case of an unlawful termination.

[Rz 83] Some jurisdictions grant the agent a right of retention or lien on property and documents of the principal until he settles the claims arising from the agency agreement: Lithua-

43 Of course there are even more differences outside the EU.

nia (Art.2.161 of the Lithuanian Civil Code), Poland (Art.763 of the Polish Civil Code), Slovenia (Art.829 of the Slovenian Law on Obligations) and Norway (Art.16 Norwegian Agency Law).

[Rz 84] Registration obligations[44] within the EU, however, are rare and the ECJ has already decided that registration requirements as a condition for the effectiveness of the agency agreement within the EU are incompatible with the Commercial Agents Directive[45]. Nevertheless, in Italy, commercial agents have to be registered with the state agency Enasarco and the principal has to pay social security for them. However, the registration requirement does not apply to principals who are not Italian or who have neither a registered office nor a branch in Italy – they have the option of registering.

[Rz 85] In certain countries, particular care must be taken when differentiating the commercial agency agreement and the actual legal relationship with the employee – for example, in France it is very important to differentiate between the employee and the *voyageur représentant placier* (VRP); for the latter, the labour law regulations apply, but he also has an indemnity claim.

b. Internally Mandatory Law

[Rz 86] In the EU, internally mandatory rules result from the Commercial Agency Directive (see below for internationally mandatory provisions in Ingmar cases). Such typically mandatory rules in favour of the commercial agent in the EU include:

- the right to **compensation/indemnity** at the end of the contractual relationship, which may amount to an average annual commission of the commercial agent (§ 89b German Commercial Code, Art. 17 Directive);

- the provision that the commercial agent receives **commission** even if the solicited transaction is not carried out for reasons for which the principal is responsible (§ 87a (3) German Commercial Code, Art. 10, 11 Directive);

- the right to a commission **advance** if the principal has executed the transaction (§ 87a (1) German Commercial Code, Art. 10, 11 Directive); **Billing and payment periods of max. three months** (§§ 87a (4) and 87c (1) German Commercial Code, Art. 12 (1) Directive);

- **Mutual fiduciary duties** (§§ 86 et seq. German Commercial Code, Art. 3, 4 para. 1 Directive);

- the right to **information and book excerpt** as well as book inspection (§ 87c para. 2 to 5 German Commercial Code, Art. Art. 12 para. 2 to 4 Directive);

- **Minimum notice periods** (depending on the duration of the contract between one and six months, § 89 German Commercial Code, Art. 15 Directive);

- as prerequisites for a post contractual non-competition agreement: written form, extension to the district or clientele assigned to the commercial agent as well as to contractual objects

44 Such are outside of EU specially known in the Middle East and South America.

45 Judgment of ECJ C-215/97 – Barbara Bellone and Yokohama SpA, 30 April 1998.

and limitation to max. two years with payment in advance (§ 90a German Commercial Code, Art. 20 Agency Directive) etc.

[Rz 87] Exceptions – from a German law perspective – to the mandatory rules are possible – even when choosing German law (§ 92c German Commercial Code) – if the commercial agent operates **outside the EU and the EEA**.

c. Internationally Mandatory Law

[Rz 88] With respect to internationally mandatory rules for the protection of commercial agents, the Ingmar decision of the European Court of Justice[46] is of fundamental importance.

[Rz 89] ***Ingmar* decision:** Californian law was the agreed choice of law between a commercial agent in the UK and a Californian company. Californian law does not know goodwill compensation claims at termination of commercial agency contracts (unlike the Commercial Agency Directive). Nevertheless, the sales representative claimed compensation under Section 1 of the UK Commercial Agents Regulations (1993), which transposed Articles 17 and 18 of the Agency Directive. The court stated that Art. 17 and Art. 19 of the Directive seeks to protect the commercial agent and thus constitutes an internationally mandatory provision. The Directive serves to protect the freedom of establishment of the commercial agent and to protect undistorted competition in the internal market. Adherence to Art. 17-19 of the Directive is indispensable for the achievement of this objective. If the facts are strongly related to the European Community (e.g. activity of the commercial agent in a Member State), it is of fundamental importance to the Community legal order that those provisions, even in contracts with third-country nationals, cannot be circumvented by a choice of law[47].

[Rz 90] It can therefore be assumed that many of the standards set out in commercial agency law for the protection of the agent (such as provision of commission, commission billing, termination, lien, compensation claim, and competition agreements) cannot be circumvented by choice of law.

[Rz 91] The ECJ has, however, ruled that the principles of the Ingmar decision cannot simply be transferred to purely EU internal affairs (***Unamar* Decision**[48]). If the parties to a commercial agency contract have chosen the law of a EU Member State which provides the minimum protection required by the Agency Directive, the court seized of another Member State may derogate from that right in favour of the mandatory provisions of its *lex fori* only if the court seized substantiates that the legislator of its State considered it essential, in the context of transposing the Directive to grant protection to the commercial agent in the relevant legal order beyond that provided for in that Directive, taking into account the nature and subject-matter of those mandatory rules. The starting point for the problem was the fact that the Agency Directive causes a minimum harmonization. Thus, the Belgian *lex fori*, which guarantees a more comprehensive protection than the Directive, and the (chosen) Bulgarian law, which, while correctly transposing the Directive, faced (only) the minimum level of protection required by the Directive, faced each other.

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46 Judgment of ECJ C-381/98 – Ingmar GB Ltd and Eaton Leonard Technologies Inc., 9 November 2000.

47 See Magnus/Mankowski/*Bonomi*, Footnote 5, Art. 9 margin 48 and 49 to *Ingmar* and *Unamar* and Art. 9 Rome I Regulation (at the time Art. 7 Rome Convention which was not even mentioned in the *Ingmar* decision but in the *Unamar* decision).

48 Judgment of ECJ C-184/12 – United Antwerp Maritime Agencies (Unamar) NV v Navigation Maritime Bulgare, 17 October 2013.

d. Implications on Choice of Court Agreements

[Rz 92] Within the EU the Brussels Ia Regulation applies (see above V.2.), according to which the parties can choose a place of jurisdiction and, failing that, can sue either at the place of performance (Art. 7 No. 1 Brussels Ia Regulation or at the domicile of the defendant (Art. 4 (1) Brussels Ia Regulation). The possibility of arbitration on disputes arising from distribution agreements exists, basically, in both the EU and in the common law legal systems. However, a jurisdiction or arbitration clause in a supply and distribution contract does not *per se* encompass all possible disputes that may arise between the contracting parties. For example, it is decided[49] that a jurisdiction clause or arbitration clause in the supply contract only includes claims for antitrust damages if this is expressly stipulated.

[Rz 93] From the above-mentioned ***Ingmar*** decision of the European Court of Justice and the mandatory nature of the EU law protection regulations for commercial agents, however, **consequences were drawn in e.g. German jurisdiction for the choice of venue clauses**; the Higher Regional Court of Munich[50] decided that an arbitration agreement in a commercial agency agreement between a US manufacturer and a German commercial agent would be ineffective against the background of mandatory European agency law if the law at the place of arbitration (here: California) does not comply with any provisions of European goodwill compensation provisions. This follows from the fact that, in individual cases, a choice of court agreement serves the purpose and should practically lead to the application of the law of the country whose exclusive place of jurisdiction has been agreed. Since, however, according to the *Ingmar* ruling of the European Court of Justice, the choice of non-EU law cannot deprive a commercial agent operating in the EU of the mandatory provisions applicable in its favour, it was decided to be consistent in considering an arbitration agreement leading to an arbitration outside the EU ineffective. In that specific case, it is seriously doubtful that California courts, in view of the choice of law, would apply to the application of the German rules on commercial agent compensation, in particular because California (arbitration) courts are not bound by EU directives or the case law of the ECJ.

[Rz 94] The German Federal Court[51] left the question open as to whether Articles 17 to 19 of the Agency Directive contain mandatory provisions for the recognition of choice-of-court agreements to the Member States with which the exclusive jurisdiction of the courts of a third state is agreed. In any event, those provisions of the Directive do not prevent the denial of recognition of a right to compensation of the commercial agent in favour of a third state if the law chosen by the parties does not know the right to goodwill compensation and the court of the third country does not apply the mandatory European law. The refusal to recognize the choice of court agreement ensures the internationally binding nature of Art. 17 – 19 Agency Directive.

[Rz 95] In a more recent ruling, the Munich Higher Regional Court also determined[52] that the possibility that foreign mandatory laws are not taken into account in a German arbitration award is no reason to deny the admissibility of arbitration proceedings. The court argued that the possible non-recognition of the German arbitral award abroad must be accepted in the interest of the

49 Judgment of ECJ C-352/13 – Cartel Damage Claims (CDC) Hydrogen Peroxide SA v Akzo Nobel NV et al., 21 May 2015.

50 Higher Regional Court of Munich, 17 May 2006 – 7 U 1781/06.

51 German Federal Court, 5 September 2012 – VII ZR 25/12.

52 Higher Regional Court of Munich, 7 July 2014 – 34 SchH 18/13.

uncomplicated application of German arbitration law. However, the judgment did not deal with the recognition of the arbitration agreement but with the issue of arbitrability.
[Rz 96] Besides the peculiarities in *Ingmar* cases (as set out above), for agency agreements, there are no special provisions on choice of court clauses in EU countries due to the Brussels Ia Regulation.

2. Distribution Law

a. Similarities and Differences

[Rz 97] The law on distributors is not regulated by law in most EU Member States[53]. One of the few countries expressly regulated by the law on dealerships is (the almost notorious) Belgium – where the Law of 27 July 1961 on authorized dealers regulates the unlimited, exclusive rights of the distributor; since 2014, the law has been incorporated into the Belgian Commercial Code (Book X, Title 3, Art. X.35 to X.40). In Greece, for example, the analogous applicability of the Agency Directive is regulated by law; in France and Lithuania there are some legal regulations; in Spain there are already proposals on the codification of distribution contracts.
[Rz 98] But within the EU, **commercial agency law is applied by analogy** to different degrees by the courts (e.g. Belgium, Germany, Denmark, Finland, Greece, Austria, Portugal, Slovenia and Spain).

b. Internally Mandatory Law

[Rz 99] In some Member States (especially in Germany, for example) there is an extensive and foreseeable jurisdiction, according to which **commercial agency law applies analogously** when the distributor is integrated into the supplier's sales organization in such a way that, economically speaking, it is to a considerable extent comparable with the tasks a commercial agent has to fulfil. Specifically, according to the German case-law, two conditions must be met for the analogous application of the equalization claim under § 89b German Commercial Code: (i) the distributor is integrated into the supplier's sales organization and (ii) it must provide the customer data to the supplier during or at the end of the cooperation to transfer. An explicit obligation to provide the customer base is not required, but it is sufficient if the distributor was obliged to keep the manufacturer or supplier informed of the names and addresses of customers during the contract period – or even if that was the case at all. Such a compensation claim may amount to an annual average remuneration (gross profit) of the distributor. If the analogy conditions are met, the claim is mandatory. But up to now, this analogous application of agency law is **not considered internationally mandatory**. There are similar rules in Denmark, Greece, Netherlands, Austria, Portugal, Spain.
[Rz 100] According to the German case law, there are also **other distributor rights** to be observed – regardless of whether commercial agency law is applied analogously or not, whereas it is not clear if these are internally mandatory (but it should be clear that these provisions are not internationally mandatory):

53 See *Rothermel*, Footnote 3, Sec. H for 50 regions and countries.

- For example, the distributor is entitled to return the **warehouse** (if one had to maintain it) at the end of the collaboration. Such an obligation for the supplier to take back (packaging?) also exists if a service contract (repair and maintenance agreement) between the same parties is concluded immediately after the dealer contract (which contains a return clause) is terminated.

- When determining the permissible **notice periods**, e.g. the distributor's interest in continuing its business relationship with the manufacturer as well as its investments should be taken into account – the periods of notice may be longer due to greater dealer investment than they are for agency agreements.

- There are **special loyalty and information requirements**.

[Rz 101] There are other internally mandatory provisions (see below for the internationally mandatory provisions as well) for distributors in Austria, Belgium, Bulgaria (might be considered internationally mandatory as well), Denmark, Finland, France, Greece, Italy, the Netherlands, Spain.

c. Internationally Mandatory Law

[Rz 102] Even within the EU, internationally mandatory provisions of some countries must be observed:

- For example, distribution law in **Belgium**: It is considered by the national courts to be internationally binding and also contains certain restrictions on the choice of law and jurisdiction: The exclusive or quasi-exclusive Belgian distributor is entitled to a compelling compensation claim that not only takes into account «goodwill» but also expenses, incurred in the execution of the distribution agreement and sums that the distributor may have to pay their employees for dismissals due to the termination of their contracts; for a long time, the law also provided for a mandatory Belgian jurisdiction before it was declared ineffective against the background of the Brussel I Regulation (but only in 2013).

- **France**, for example, only regulates certain aspects of the distribution contracts by law, and only with respect to the exclusive and quasi-exclusive distributor. Interesting is e.g. Art. L330-1 of the French Commercial Code, according to which the maximum duration of the contract is ten years; however, the parties are free to conclude a new contract after this time has passed. Even when concluding a distribution agreement, pre-contractual information obligations must be fulfilled, Art. L330-3 of the French Commercial Code. Furthermore, Art. L442-6-I-5 of the French Commercial Code has to be observed, according to which a terminated business relationship without a justified cause is entitled to a claim for damages («*rupture brutale*») – if notice periods of 36 months or more are not considered; this can drive a claim for compensation to almost insane heights. This standard is considered by French jurisdiction to be internationally mandatory («*loi de police*»).

- In **Greece**, for instance, the analogous applicability of the commercial agency law to distributor contracts is regulated by law – in Art. 14 § 3 L. 3557/2007, whereby the conditions for the analogy are similar to those in Germany: An exclusive dealer agreement must be

present and exclusive and the dealer is integrated into the supplier's sales organization. Whether this is an overriding mandatory provision, is not clear, yet.

[Rz 103] The *Ingmar* Decision is not (yet) considered internationally binding – this is at least the prevailing understanding in German legal text books. The main argument is that the interpretation of the ECJ relates solely to commercial agency law. The counter-argument is based on ECJ's Volvo ruling[54], according to which the principle of a directive-compliant interpretation of EU rules applies not only to the direct scope of application of those rules but also to their analogous application. But it can be argued that it leads to a restriction of the principle of freedom of choice.

[Rz 104] There are other internationally mandatory provisions for distributors in Bulgaria as well as in other countries[55].

d. Implications on Choice of Court Agreements

[Rz 105] For distribution, there are no special provisions on choice of court clauses in EU countries, due to the Brussels Ia Regulation. But French courts, for example, might be considered competent in any cases of *rupture brutale.*

3. Franchise Law

a. Similarities and Differences

[Rz 106] Franchise law is not specifically regulated in many legal systems in the world – not even in Germany[56]. In countries where there are legal regulations, one can distinguish between two broad categories of laws: the **Franchise Disclosure Laws**, which regulate the pre-contractual information obligation, and the **Franchise Relationship Laws**, which govern the legal relationship between the parties to an existing franchise agreement. In some states, there are legal norms that cover these two aspects of the franchise legal relationship. In some cases, however, only the pre-contractual information obligations (e.g. in Belgium, Spain) are regulated and in some cases only the legal relationship with an already concluded contract (e.g. in Lithuania) is regulated. There are comprehensive franchise laws worldwide that can serve as blueprints in some of the states of the USA and Canada, in China, Indonesia, Japan and Australia etc. In some other countries such as the Dominican Republic, Saudi Arabia and the United Arab Emirates, the same rules apply as for commercial agents and authorized dealers.

[Rz 107] In countries where there is no expressed regulation of pre-contractual information requirements, these obligations are derived from the general principle of good faith conduct, and termination rights and claims for damages are derived from the same principles and from the legal institution of *culpa in contrahendo*, e.g. in Germany, Austria, Finland, Switzerland, Turkey.

[Rz 108] There are also franchise associations in many countries that set up a code of ethics. While such codes of ethics are not legally binding (unless if at all for members of the organization); they are often used as guidelines for the proper conduct of the parties. The European Union also has

54 Judgment of ECJ C 203/09 – Volvo Car Germany GmbH v Autohof Weidensdorf GmbH, 28 October 2010.

55 See *Rothermel*, Footnote 3, Sec. H for 50 regions and countries.

56 See *Rothermel*, Footnote 3, Sec. H for 50 regions and countries.

a European Franchise Federation (EFF) and Code of Ethics. The EFF, along with over 40 other franchise associations, is a member of the World Franchise Council.
[Rz 109] The Unidroit has issued a model law on pre-contractual information requirements: The Model Franchise Disclosure Law of Unidroit of 2002.
[Rz 110] In some countries' jurisdictions (such as Germany[57]) agency law analogously applies to franchise agreements, if the basic idea behind a specific provision is the equality of interests and if it applies to the relationship between franchisor and franchisee. Also in Austria and in Switzerland – for example – an analogous application of commercial agent law is possible under similar conditions.

b. Internally Mandatory Law

[Rz 111] Franchise law in the EU[58] is deemed to be internally mandatory (see below for internationally mandatory provisions in Sweden, Spain and eventually in Belgium, France, Italy) in the following countries (whereas such countries marked here with «*» have no special franchise laws but general principles) in Germany[59], Austria[60], Belgium, Estonia*, Finland*, Latvia*, Lithuania*, Portugal*, Romania*.

c. Internationally Mandatory Law

[Rz 112] Internationally mandatory provisions on franchise agreements within the EU[61] apply in Sweden and Spain and might be considered mandatory in Belgium, France, Italy.

d. Implications on Choice of Court Agreements

[Rz 113] For franchises, there are no special provisions on choice of court clauses in EU countries, due to the Brussels Ia Regulation.
[Rz 114] Arbitration clauses might be critical in franchise agreements. Even in Germany, which is fundamentally arbitration-friendly, an arbitration clause can be declared ineffective if it constitutes a disadvantage for the franchisee as the weaker distribution partner. Three German Higher Regional Courts have each decided on the recognition and enforcement of arbitral awards against German franchisees, which had been issued in the US state of Connecticut. All three franchise agreements involved a Dutch company acting as a franchisor in Europe for its American parent

57 German Federal Court, 17 July 2002 – VIII ZR 59/01.

58 See *Rothermel*, Footnote 3, Sec. H for 50 regions and countries.

59 In Germany, four decisions of the Higher Regional Court Munich are fundamental for the pre-contractual information obligations and the duty to inform or to disclose; on 13 November 1987 (8 U 2207/87), the court decided that a franchisor must inform about the real situation of the system and that the franchisor bears the burden of proof for the correctness of his information. On 16 September 1993 (6 U 5495/92), the court further developed these principles and, in particular, ruled on the calculation of the damages payable for breach of the information requirements. On 24 April 2001 (5 U 2180/00), the court held that liability for forecasts was in principle ineligible and that the franchisee was able to make a contributory negligence. On 1 August 2002 (8 U 5085/01), the court then held that liability for forecasts may intervene in exceptional cases (for example, if there was insufficient basis for the forecast).

60 Similar to Germany.

61 See *Rothermel*, Footnote 3, Sec. H for 50 regions and countries.

company. According to the franchise agreements, the law of Liechtenstein was applicable, which in turn prescribes the validity of the Austrian General Civil Code. According to the arbitration clause, the arbitration was to be conducted in New York. In all three cases, the German Higher Regional Courts[62] considered this arbitration clause ineffective under applicable Austrian law because it constituted a gross disadvantage for the franchisees.

IX. Details for Distribution outside the EU

[Rz 115] Outside the EU and other areas with a certain degree of harmonisation and judicial cooperation, the validity of a choice of law and choice of court agreement is difficult to predict since it depends on the national law of the contractual partners. It is therefore conceivable that choice of law is not admissible at all or only for the application of the law of the contractual partner or the weaker partner, etc. Also, it is conceivable that a choice of court agreement is not accepted by the court that shall not be competent neither the court that shall be competent and no court of both (or even more courts) held themselves competent.

1. Choice of law outside the EU

[Rz 116] Choice of law is largely possible in the EU when it comes to cross-border business. Nevertheless, there are peculiarities and differences[63].
[Rz 117] In some countries for distribution matters (agency, distribution, franchise) a choice of law is simply inadmissible: Columbia (unless combined with arbitration), Lebanon (for exclusive agencies and distributors), Saudi Arabia.
[Rz 118] In some countries, choice of law in general is very closely linked to questions of *ordre public:* Russia, Brazil (in agency matters, unless combined with arbitration), USA (in franchise matters), China (in franchise matters), Indonesia (in franchise matters), United Arab Emirates (for registered agents, distributors and franchisees).
[Rz 119] In some other countries, a choice of law might be possible but would trigger problems in enforcement of decisions: Turkey, Ukraine.

2. Choice of court outside the EU

[Rz 120] Choice of court outside of the EU depends on the national law as there is hardly any harmonization in national jurisdiction matters outside the EU (since there is nothing comparable to the Brussels Ia Regulation). So, it is very well conceivable, that a choice of court agreement is inadmissible in the country of the contractual partner or that national law provides for mandatory competence of local courts or that even two parallel lawsuits can be initiated and pursued and that a decision of a court in one country cannot be enforced in another country.

62 Dresden Higher Regional Court, 7 December 2007 – 11 Sch 8/07; Bremen Higher Regional Court, 6 October 2008 – 2 Sch 2/08; Celle Higher Regional Court, 4 December 2008 – 8 Sch 13/07.

63 See *Rothermel*, Footnote 3 Sec. H for 50 regions and countries

a. Hague Convention on the Choice of Court Agreements

[Rz 121] Therefore, generally it might be deemed a progress that institutions and organisations work on more worldwide harmonization in jurisdiction matters. Thereafter, the Hague Conference adopted the Convention on Choice of Court Agreements («CCC») on 30 June 2005, which emerged as a compromise from the failed negotiations in 2001 on a comprehensive jurisdiction and enforcement agreement.
[Rz 122] This convention represents a real step forward, as there is currently no legal certainty on jurisdiction agreements with contracting parties in non-EU or Lugano countries. That would change. Instead of comprehensively regulating the conditions of international responsibilities, as originally planned, the CCC only deals with jurisdiction agreements. The conditions for the recognition and enforcement of foreign judgments are not fully regulated; however, judgments of a court of another contracting state are to be recognized and enforced if they are based on an effective choice of court agreement – this is reminiscent of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 (UNU). First, only the US and the EU (19 January 2009 and 1 April 2009, respectively) signed this Convention, but did not ratify it; Mexico has ratified, but not signed. Most recently, Singapore signed the agreement on 25 March 2015. On 4 December 2014, the Council adopted Decision 2014/887 / EU, by which the EU authorizes the CCC. The Convention entered into force on 1 October 2015 for all EU Member States (with the exception of Denmark) and Mexico, while the US is still fighting on the domestic front with questions of responsibility for ratification – although the US was the initiator of the negotiations; in the USA, the question of whether federal law is needed or whether each individual federal state implements the convention in its own law while taking account of the peculiarities of its own law is disputed.

b. Other Details for Countries outside the EU

[Rz 123] There are countries[64]: where a choice of court is inadmissible: Columbia, Egypt, Lebanon (exclusive agents and distributors), Saudi Arabia, United Arab Emirates.
[Rz 124] There are countries where choice of court is very closely linked to *ordre public*: Canada (for franchisees), USA (for agents, distributors, franchisees).
[Rz 125] There are countries where a choice of court may not prevent double competencies or enforcement issues: Canada (agents and distributors), Argentina (agents and distributors), China, Russia, Brazil (agents), India, Ukraine, Chile, Indonesia, and Australia.

3. Nationally unavoidable and internationally mandatory provisions outside the EU

[Rz 126] There are internally and internationally mandatory provisions in countries outside of the EU; it must be reviewed in detail on a country-per-country basis. For some countries[65], this can be outlined as follows:

64 See *Rothermel*, Footnote 3, Sec. H for 50 regions and countries.

65 See *Rothermel*, Footnote 3, Sec. H for 50 regions and countries.

[Rz 127] In some countries, the national law is practically mandatory since not choice of law is admissible (NCL) or nor choice of venue (NCV) can be met and or enforceability is critical (E). This leads the following impressions:

a. Agency

[Rz 128] Internationally mandatory are the provisions for protection of the agent in Norway, Columbia (NCL), Egypt (NCV, E), Lebanon (NCL, NCV), Saudi Arabia (NCL, NCV), United Arabian Emirates; the provisions for protection of the agent might be internationally mandatory in Russia, Argentina, Brazil, Indonesia (E).

b. Distribution

[Rz 129] Internationally mandatory are the provisions for protection of the distributor in Columbia (NCL), Egypt (NCV, E), Lebanon (NCL, NCV), Saudi Arabia (NCL, NCV); the provisions for protection of the distributor might be internationally mandatory in Russia, Argentina, Brazil, Indonesia (E).

c. Franchise

[Rz 130] Internationally mandatory are the provisions for protection of the franchisee in Canada (5 districts), Columbia (NCL), Lebanon (NCL, NCV), Saudi Arabia (NCL, NCC), United Arabian Emirates, Indonesia (NCL); the provisions for protection of the franchisee might be internationally mandatory in Mexico, USA, Brazil, China, Australia.

X. Summary and Recommendation

[Rz 131] As outlined in the beginning, the frequently used and very pragmatic approach «we simply use our standard agreements and general terms and conditions for our national and international business» may work within the EU. It is more difficult abroad. Crucial is a smart combination of choice of law and choice of court in order to avoid surprises like unenforceable decisions, incompetent courts or unexpected overriding mandatory provisions.

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