

Cross-border business – cross-border legal procedures? or: Do you want to end up like Boris Becker?

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Boris Becker was sued by his ex-wife in a US court after their marriage had broken down. Although they had concluded a (German) contract which was to settle all legal issues in case of a divorce, the US court didn't feel bound by it – and Boris Becker ended up paying his ex-wife some millions more than actually stipulated in the contract. The outcome of these proceedings shows how important it is to clearly settle not only obvious but also seemingly far-fetched issues in contracts.

Over the last ten years, cross-border trade and services transactions have taken on dimensions that in the past would have been considered impossible. More and more countries become members of the WTO and thus obtain better access to the world market. Despite the opening of these markets, one has to bear in mind that, for example, Germany does the bulk of its export business with other EU countries or with the USA. However, not only the cross-border movement of goods has increased but also the acquisition of foreign companies or shares in these companies. If any difficulties arise with the winding up of the contract, in addition to the usual problems the question crops up under which law the contracts have to be assessed and before which court actions must or can be brought.

The following simplified real-life case is to illustrate the problems:

A Belgian made a German an irrevocable, albeit fixed-term, offer on conclusion of a licence agreement against payment of EUR 50,000. In order to save costs the German didn't call in an attorney but simply took his specimen contract for cross-border purchase and sale of goods and modified it a bit. The contract stipulated, for example, that German law should apply to the entire business.

Shortly before the deadline expired the Belgian withdrew his contractual offer; the German, however, declared his acceptance of the offer within the deadline and now demanded payment of the contractual sum.

The German felt he was on the safe side for he believed that he would be able to sue for the amount in a German court. To his great surprise, however, he received an official letter from Belgium a few days later. The letter read that the Belgian had filed a declaratory action against the German with the petition to have it declared that the Belgian was entitled to withdraw his offer and therefore didn't owe the German EUR 50,000. It was only now that the German called in his attorney and was surprised to learn that it was already too late:

Owing to an EU regulation no action for payment of the licence sum can be filed in Germany. Since the Belgian had taken legal action in the same matter all German proceedings were on hold until the Belgian court approved of or disclaimed its jurisdiction. Meanwhile the Belgian court reviewed its jurisdiction and also noted that the licence agreement was to comply with German law. However, in this context German law also means that the international treaties shall apply that Germany signed. These treaties stipulate, among other things, where certain claims can be sued for. Since the German wanted to convince the court that the action had to be heard in a German court he engaged the services of a Belgian attorney, whether he liked it or not, in order to argue his case in the Belgian court. In the end the Belgian court, however, came to the conclusion that the action could be filed in Belgium due to the agreement on German law.

As a result, the German could forget about his action for the recovery of money in Germany once and for all and he had to charge the Belgian attorney with his representation during the proceedings in a Belgian court.

This outcome would certainly have been avoidable for the German if an attorney had been involved in the drawing up of the contract right from the start. An attorney would have realized that the agreement on German law alone was not sufficient but that further restrictions would have been necessary. Besides, he would have been able to point out to the possibilities and consequences of a fast filing of an action.

The example shows that it is not possible to adopt arrangements from other contracts and use them to draw up a new contract. Considerable differences may arise depending on who the other party to the contract is and which type of contract it is (sale of goods, assignment of capital shares, etc.). The UN Convention on Contracts for the International Sale of Goods ("CISG"), for instance, has a limited scope of application so that it does not apply to all kinds of contracts. Moreover, the UN Convention on Contracts for the International Sale of Goods does not govern all contractual aspects so that it is necessary to fall back on national law – however, it is still unclear which national law has to be applied.

Besides, it has to be taken into account whether the other party to the contract is domiciled in an EU member state or not. In the case of non-European business partners the respective EU regulations do, of course, not apply, unless indirectly via the respective national law.

There are also dangers lurking for non-European business partners. When doing business with EU citizens they should have it checked whether EU law can "indirectly" be applied to the contract. This can only be checked by an attorney who works in the respective EU country for only he will know the relevant European regulations and the respective adjudication of the European Court of Justice on the interpretation of these regulations.

International business has increased and in step with it legal problems and traps have also increased. Entrepreneurs are therefore well-advised to seek the advice of an attorney prior to international as well as national business transactions. If the attorney is well-versed, he will at the same time clarify the respective distinctive tax provisions, like for example the problems relating to turnover tax with business within or outside the European Union. Once contracts are signed or goods are delivered, it is too late to correct any mistakes made.