



## New provision for international authority

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### Introduction

The validity and effect of an authority are not subject to the law of the contract concluded by the authorised person but to be determined autonomously in case a dispute arises out of a transaction in which an agent was involved. This generally results in uncertainties for those who conclude contracts with an authorised person e.g. a commercial agent and respectively those who authorise an agent to conclude contracts. The autonomous determination of the authority thus constitutes a risk for the international trade. Therefore, the German legislator found it necessary to codify the existing case law and principles as established by the scholars in terms of the law applicable to international authorities.

On 17th June 2017 the “Statute for the Amendment of Provisions in the Field of International Private Law und Civil Procedure” has come into force in Germany. By way of this statute i.a. a new Art. 8 was added to the Introductory Act to the Civil Code (IACC). This Article determines for the first time which law applies to an authority when the agent acts abroad on behalf of the person granting the authorisation.

In summary, the authority is to be determined – subject to a choice of law – in accordance with the law of the state in which the agent or the principal has his regular place of residence or usually makes use of the authority. The new provision of Art. 8 IACC thus establishes clear rules for the determination of the law applicable to an international authority and enables the parties to consider the scope of the authority. Nevertheless, for parties involved in international trade it is in the interest of legal certainty still favourable if principals choose a law that shall be applicable to the authority and inform the agent as well as the third party of this choice.

The provision of Art. 8 IACC can be summarised as follows:

### Choice of law

As per Art. 8 para. 1 IACC the principal’s choice of law has priority provided that this choice of law was known to the agent as well as to the third party. However, the parties are free to choose a law that is applicable to the authority by way of a tripartite agreement. Such a tripartite agreement can be concluded at any time and without observing any form requirements. A general choice of law clause in a contract (f.e. the one concluded between the agent and the third party) will not automatically determine the law applicable to the authority. The law applicable to the authority is to be determined autonomously. An explicit choice of the law applicable to the international authority is thus desirable.

#### 1. In the absence of a choice of law

In case such a choice of law is missing and the agent is acting as an entrepreneur Art. 8 para. 2 IACC provides that the law of the state in which the agent has his regular place of residence shall be applicable. For example, A is permanently located in Germany and was authorised by the Dutch company B to distribute B’s products as their commercial agent. As per Art. 8 para. 2 IACC German law would be applicable to the authority.

#### 2. Employees

If the agent is an employee of the principal, Art. 8 para. 3 IACC provides that the law of the principal’s regular seat is applicable. Thus, assuming that the employee of a Dutch company purchases office supplies for and on behalf of his employer in a German store, Dutch law will be applicable to the employee’s authority.

The determination of the applicable law as per Art. 8 para. 1-3 IACC always requires that the third party towards whom the authority is exercised is aware of the choice of law or the regular place of residence.



### 3. Art. 8 para. 4 IACC

Provided the authority was granted for a long-term period and there does not exist a choice of law and the agent neither acted as an entrepreneur nor as an employee of the principal (thus as a private person), the law of the state in which the agent usually makes use of the authority is applicable. This also requires that the third party is aware of the place of regular use of the authority.

### 4. Fallback

Art. 8 para. 5 IACC contains a “fall-back” regulation for cases in which the applicable law cannot be determined according to Art. 8 paras. 1-4 IACC. In this case the provisions of the state in which the agent makes use of the authorisation shall be applicable. If the third party and the agent were aware of a limitation of the authority according to which the authority was only to be used in a specific state then the law of this state is applicable. Should the place of use of the authority be unknown to the third party, the statutory provisions of the state in which the principal has his regular place of residence shall be applied.

### 5. Scope

However, this new provision solely determines the law applicable to the agent’s authority in the relation to third parties and has no effect on the internal relationship (usually mandate) between the principal and the agent or the law applicable to the transaction concluded by the agent. The provisions stipulated in Art. 8 IACC are limited to the authority granted by legal transactions and have thus no effect on authorities granted by statute.

### 6. Summary

The German legislator codified in the new provision of Art. 8 IACC which law applies to an international authority. If there is no choice of law the authority is to be determined in accordance with the law of the state in which the agent or the principal has his regular place of residence/seat or usually makes use of the authority.

The new provision of Art. 8 IACC thus provides legal certainty for parties contracting with an authorised person. Nevertheless, for parties involved in international trade it is still favourable if principals choose a law that shall be applicable to the authority and inform the agent as well as the third party of this choice.

A choice of law clause determining the law applicable to an international authority could read as follows: “*The authority granted to [person] is subject to [country] law.*”

#### **Disclaimer**

*The content of our JusLetter has been researched thoroughly. However, the general presentation of the legal situation cannot account for the specifics of an individual case. Should you have any further questions, please do not hesitate to contact us.*

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