

Damages for breach of an exclusive jurisdiction clause

January 2020

Authors: [Dr. Markus Burianski](#), [Carolyn Binder](#)

A recent judgment by the German Federal Court of Justice strengthens the position of companies concluding a forum selection clause in favor of German courts. If German courts are selected as the exclusive forum, bringing an action in a US court could result in a claim for damages against the party breaching the forum selection clause.

The case¹

The Claimant, a US telecommunications company, and the Respondent, a German telecommunications company, concluded an 'Internet Peering Agreement' (the "Agreement") by which the parties committed to collect the data traffic of the respective other party at "peering points" and to forward it to their customers. The Agreement was governed by German law and provided for Bonn, Germany, to be the place of jurisdiction ("Bonn shall be the place of jurisdiction").

Nonetheless, the Claimant filed a claim at a US federal court. The US court declared the suit inadmissible due to a lack of jurisdiction. Based on the "American Rule of Costs", the Respondent suffered financial damage due to the legal costs it spent on its defense against the action in the USA, which – under US procedural rules – were not reimbursable.

The Claimant then sued the Respondent in the District Court in Bonn. The Respondent countersued for reimbursement of the legal costs in connection with the US proceedings. The Bonn District Court awarded damages, but the Appellate Court overturned the decision. The Federal Court of Justice partially re-established the first instance judgment, referring the case back to the Appellate Court regarding the exact quantum.

Jurisdiction clauses can have substantive legal effects

The Federal Court of Justice held that forum selection clauses are not limited to producing procedural effects, but can also have substantive effects the breach of which may lead to damages.

The ECJ case law on the incompatibility of anti-suit injunctions with EU law does not militate in principle against damages claims based on breaches of forum selection clauses in cases where the first court rejected its jurisdiction. This applies a fortiori in relation to a non-EU court where the principle of "mutual trust" does not apply to the same extent as among EU Member States.

Whether a forum selection clause contains a substantive obligation to sue only in the selected forum with the consequence that a breach creates a secondary obligation to make good the damage, is a matter of interpretation. Even if the contract, like the Agreement in this case, does not expressly provide for an obligation to pay damages, the purpose of the forum selection clause, in connection with the choice of law, may speak in favor of such an obligation. A forum selection clause as well as the choice of law, serves the

¹ German Federal Court of Justice, Decision of 17 October 2019, docket no. Az. III ZR 42/19.

interest of the parties to make litigation more predictable. It does not matter whether the forum selection clause refers to “exclusive” jurisdiction.

Governing law clause plays decisive role

The choice of German law was considered an expression of the parties' desire to submit to German law and the principles following from it. Under German law, breaches of ancillary contractual obligations (Section 241 Civil Code) may lead to claims for damages, even if no principal obligation exists.² Another relevant German law principle is that the losing party must reimburse the (statutory) costs of the other party for its legal defense (Section 91 Code of Civil Procedure).³ Thus, the purpose of the governing law clause would also be undermined if a claim for damages was denied.

The Consequences

The case provides teeth to forum selection clauses in favor of German courts in cross-border commercial relations with the USA. In the future, contract partners will consider more carefully whether to sue the other party in a US court if this may lead to damages amounting to the – usually considerable – legal costs necessary to defend against a case in US courts.

The Federal Court of Justice's reasoning would seem to be transferable to court actions in breach of a German forum selection clause in any court outside the EU in which the winning party is not entitled to reimbursement of its defense costs.

Arguably, the reasoning is also transferable to court actions brought in the USA in breach of an arbitration agreement providing for the application of arbitral rules that require the reimbursement of costs of the winning party.

White & Case LLP
Bockenheimer Landstraße 20
60323 Frankfurt am Main Germany
T +49 69 29994 0

In this publication, White & Case means the international legal practice comprising White & Case LLP, a New York State registered limited liability partnership, White & Case LLP, a limited liability partnership incorporated under English law and all other affiliated partnerships, companies and entities.

This publication is prepared for the general information of our clients and other interested persons. It is not, and does not attempt to be, comprehensive in nature. Due to the general nature of its content, it should not be regarded as legal advice.

² German Federal Court of Justice, Decision of 17 October 2019, docket no. Az. III ZR 42/19, mn. 29.

³ German Federal Court of Justice, Decision of 17 October 2019, docket no. Az. III ZR 42/19, mn. 43.