

## English Contract Law: Choice of Law and Forum Trumped?

Beware (or at least be aware) of the Commercial Agents Regulations.

By Raymond L. Sweigart

*In Fern Computer Consultancy Ltd v Intergraph Cadworx & Analysis Solutions Inc [2014] EWHC 2908 (Ch) (29 August 2014), the English High Court analyzed the arguments for and against non-English forum selection and choice of law terms in commercial contracts involving English parties or performance in England, as well as permissive service of English court proceedings out of the jurisdiction. While the outcome was not final, it certainly sends a note of caution and a reminder to consult English qualified counsel before assuming that application of English law and English court proceedings can be avoided by contract.*

This decision was on an application by the defendant, Intergraph Cadworx & Analysis Solutions, to set aside an order giving permission to the claimant, Fern Computer Consultancy, to serve notice of court proceedings out of the jurisdiction. The main claim was based on indemnification and termination fees allegedly due Fern under The Commercial Agents (Council Directive) Regulations 1993 and also a claim for unpaid commissions under the parties' contract. Fern sought and obtained permission to serve its claim on Intergraph in Texas, on the basis that the contract was governed by English law, and/or that the contract was breached within the jurisdiction. It did so notwithstanding that the contract contained an apparently clear Texas law and Texas jurisdiction clause. Thus the application before the Court raised the tensions that can arise between such clauses and the Regulations. Texas-based Intergraph is the owner and/or licensee of certain software products. Fern, based in Derbyshire in England, acted as Intergraph's agent for selling those software products in Europe. A formal contract was entered into in December 2007, and the dispute in this case centered on the effect of that agreement. Under it, Fern was appointed to be a "partner" to solicit orders for the software throughout Europe. Any successful orders resulted in a license which operated directly between Intergraph and the purchaser/customer. Fern was to collect the fees paid by end users, deduct its commission and pass the balance to Intergraph. The agreement included a Texas law and Texas jurisdiction clause, specifically:

(c) THIS AGREEMENT SHALL IN ALL RESPECTS BE INTERPRETED AND CONSTRUED IN ACCORDANCE WITH AND GOVERNED BY THE LAWS OF THE STATE OF TEXAS USA (EXCLUDING ITS CHOICE OF LAW PROVISIONS) REGARDLESS OF THE PLACE OF ITS EXECUTION OR PERFORMANCE. For the benefit of [Intergraph], [Fern] hereby irrevocably agrees that any legal action, suit or proceeding arising out of or relating to this Agreement shall be brought in the courts of the State of Texas sitting in Houston, Harris County, Texas, or in the United States District Court for the Southern District of Texas. By the execution and delivery of this agreement, [Fern] hereby irrevocably consents and submits to the exclusive jurisdiction of such courts in any such action, suit or proceeding. [Fern] irrevocably waives any objection which it may now or hereafter have to the laying of venue for any action, suit or proceeding arising out of or relating to this Agreement in the courts of the State of Texas sitting in Houston, Harris County, Texas, or in the United States District Court for the Southern District of Texas, and irrevocably waives any claim that any such action, suit or proceeding brought in any such court has been brought in an inconvenient forum.

Intergraph terminated the agency agreement as of December 31, 2010. It is not clear what had occurred, if anything, between then and Fern's commencement of the English court proceedings in November 2013. In early January 2014, Intergraph became aware that Fern had commenced proceedings in England, and on January 14, 2014, it filed suit in a Texas court seeking declarations that the Texas jurisdiction clause is valid and enforceable, any dispute arising out of the agreement has to be brought in the Texas courts (state or federal), Texas law applies to any dispute arising out of or relating to the agreement, and no foreign judgment relating to the agreement would be recognized. Intergraph also sought declarations on the merits that it was entitled to terminate the agreement, any such termination would not entitle Fern to any monetary relief under Texas law or the agreement, and any foreign judgment arising out of or relating to the agreement would not be recognized in Texas.

Fern sought to challenge the jurisdiction of the Texas court, but was unsuccessful. A trial of the Texas litigation is scheduled to take place in mid-2015.

In the meantime, Fern obtained the English court's permission to serve its claim outside of England, and Intergraph then challenged the jurisdiction of the English court and sought to set aside the order permitting service.

Underpinning what may at first blush appear to be a rather pedestrian jurisdictional dispute are the Commercial Agent Regulations. They were made pursuant to Council Directive 86/653/EEC on the "coordination of the laws of Member States relating to self-employed commercial agents." The Directive recites the differences in national laws concerning commercial representation that substantially affect the conditions of competition and are detrimental to the protection available to commercial agents vis-à-vis their principals.

The Regulations provide rather detailed provisions regarding the relationship between commercial agents and their principals, including non-derogation provisions and an entitlement of commercial agents to indemnity or compensation on termination of an agency contract.

As a result, the applicability of the Regulations to any claim by Fern and the ability of Intergraph and Fern to contract out of the regulatory protections were central to the dispute between the companies.

The court found that Fern's characterization of its claims under the Regulations as sounding in contract governed by English law and breached in England was not well taken. It, therefore, ruled that permission to serve out of the jurisdiction should not have been granted. So far, so good, for Intergraph.

However, the court did not stop there. It held that the anti-derogation provisions in the Regulations should trump the contract's Texas law and venue provisions and that Intergraph should not be able to avoid the regulatory obligations to compensate Fern through such a simple gambit. It concluded that while in normal circumstances Fern's contract claims would lead to an order setting aside the permission to serve out of the jurisdiction, Fern might still advance an alternative case based on tort. Finding that it would be unfair to Fern to prevent it from raising those arguments—and likewise unfair to Intergraph to fail to give it a proper chance to argue the point—the court gave the parties an opportunity to make submissions on the appropriateness of restoring the matter for further argument.

Stay tuned, but keep in mind that contractual choice of law and jurisdiction clauses may not provide all the protections that the draftsman anticipated.

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If you have any questions about the content of this alert, please contact the Pillsbury attorney with whom you regularly work, or the author below.

Raymond L. Sweigart ([bio](#))  
London  
+44.20.7847.9607  
raymond.sweigart@pillsburylaw.com

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