EELA EUROPEAN EMPLOYMENT LAWYERS ASSOCIATION

SUMMARY

2015/13 Implied choice of law in international employment contracts (AT)

<p>Whether, and in favour of which jurisdiction, the parties to an employment contract with a cross-border dimension have made an implied choice of law, must be decided on a case by case basis. Essential indicators of an implied choice of law include direct references in the employment contract or related documents to concrete provisions and practices of a specific jurisdiction and the use of typical terms and clauses used by this jurisdiction</p>

Summary

Whether, and in favour of which jurisdiction, the parties to an employment contract with a cross-border dimension have made an implied choice of law, must be decided on a case by case basis. Essential indicators of an implied choice of law include direct references in the employment contract or related documents to concrete provisions and practices of a specific jurisdiction and the use of typical terms and clauses used by this jurisdiction.

Facts

The plaintiff in this case was an Austrian sales representative employed by a company with its seat in Germany. The plaintiff was responsible for the management and support of Austrian customers. He worked four days a week travelling in Austria and one day a week from home (on administrative work). He never worked in Germany. The company employed six sales representatives in Austria, but had no formal office or warehouse in Austria.

There was no explicit choice of law clause in the employment contract. However, it contained several clauses referring to German labour law, including a reference to a German collective bargaining agreement. It also used certain legal expressions that are more common in Germany than in Austria.

The employment relationship was terminated by the company by way of ordinary termination. The termination letter referred to the German term "Kündigungsschutzklage". This is a term not known in Austrian law. It connotes the employee's right under the German Employment Protection Act (the 'KSchG') to file a claim against termination. The letter specified the deadline for filing this claim under German labour law, which is longer than the equivalent Austrian deadline.

The employee filed an action in the Austrian court system against his former German employer, claiming that the requirements of the German KSchG had not been met, that the dismissal was therefore ineffective and that his employment relationship therefore continued as if he had not been dismissed.

The main question in this case was whether the parties had made an implied choice of law. The plaintiff argued that there was an implied choice for applicability of German labour law. The company argued that Austrian labour law applied and that the termination was lawful under Austrian law.

Judgment

The Courts of the first and second Instance rejected the claim and reasoned that due to the lack of sufficient links to the German operation, German termination protection law did not apply (and that the relevant provision of German labour law was not a mandatory provision within the meaning of Articles 6/7 of the Rome Convention (now Articles 8/9 of the Rome I Regulation).

The Austrian Supreme Court (the 'OGH') ruled that taking all the circumstances and contractual provisions into account, the parties had made an implied choice of law clause in favour of German law. Important indicators were references in the contract to special national provisions and the use of typical German legal expressions, wording and clauses. The Supreme Court paid special attention to the fact that the contract did not merely reference specific provisions of German law ("static reference") but also referenced a German collective agreement ("dynamic reference"). Another strong argument for the choice of law in favour of German law was the fact that the termination letter made reference to a German law (the KSchG) and to the fact that the employer had consulted its (German) works council regarding the matter. Criteria such as place of work, place of conclusion of the contract, residence or

seat, on the other hand, are no more than nondecisive indicative factors.

Since the German termination protection rules are more advantageous for the employee than the Austrian rules (in that there is a longer period to make a claim), the Supreme Court held that German termination protection law is applicable. It remitted the case to the Court of First Instance, which will now have to adjudicate the matter based on German law. In particular, that court will need to determine whether the plaintiff has satisfied the requirements for filing a (German) Kündigungsschutzklage. Given that Austria and Germany share a common language and that information on German law is readily available for Austrian judges, this should not be an insurmountable obstacle.

Commentary

The events in this case occurred before the 1980 Rome Convention was replaced by the Rome I Regulation (EC Reg. 593/2008). The Convention provided, and the Regulation provides, that the parties to an employment contract are, in principle, free to choose the applicable law, provided that that choice of law does not have the result of depriving the employee of the protection afforded to him by the provisions of the law that would apply in the absence of a choice of law. The Rome I Regulation does not specify how a choice of law should be made, so implied choices of law are possible, especially if they result in the application of more favourable provisions for the employee. The question of applicable law is of great importance in drafting, negotiating and executing cross-border employment agreements. As this decision of the OGH illustrates, it is better to make an explicit choice of law in order to avoid long and complex discussions about which law applies.

Comments from other jurisdictions

Germany (Dagmar Hellenkemper): It is very likely that a German court would have come to the same conclusion. In the German interpretation of Article 8 Rome I, references to German collective bargaining agreements are a strong indication of a tacit choice of law. Further, the law chosen implicitly by the parties should not disfavour the employee ('Günstigkeitsprinzip'). Because German law was the more favourable choice in this case, a similar outcome in Germany is very likely.

Note however, that if a German court had concluded that Austrian law applied, the German court would have had to apply Austrian law to the case, rather than referring the case to an Austrian court. This usually involves obtaining an expert opinion on Austrian law from a public institution.

Subject: Private international law, Applicable law

Parties: not known

Court: Oberster Gerichtshof (Austrian Supreme Court)

Date: 25 November 2014

Case number: 8 ObA 34/14d

Hardcopy publication: none

Internet-publication: https://www.ris.bka.gv.at/Jus/ > type case number in "Geschäftszahl"

Creator: Oberster Gerichtshof (Supreme Court)
Verdict at: 2014-11-25
Case number: 8 ObA 34/14d