SUMMARY

2012/7: German works council rules do not override lex loci labori (AT)

<p>An employee based in Austria was employed by a German company, which dismissed him. The dismissal was valid according to Austrian law but not according to German law because the employer had not informed its works council (in Germany) adequately in advance. Did the German works council rules override Austrian employment law? Based on German case law, the Austrian Supreme Court replied in the negative.</p>

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Facts

The plaintiff was employed in Austria by the German defendant. He was hired in 1995. His employment contract was silent on governing law. As he was the only person employed by the defendant in Austria, there was no works council there. In June 2007 the defendant dismissed the plaintiff after having informed its German works council of its intention to do so. However, the defendant did not provide that works council with information on the plaintiff's social and employment circumstances (his age, type of work, other opportunities of work for him within the company, comparison of his social circumstances with other employees) as required by German law. Had German law applied, the dismissal would have been void. It was

common ground between the parties that the plaintiff had no recourse under Austrian law, given that that law provides no dismissal protection to companies employing less than five people.

The plaintiff brought proceedings against his employer. He asked the court to declare that the termination of his employment contract was void and that, therefore, his contract was still ongoing. One of his arguments was that the employer had failed to inform its works council as required under German law. The employer argued that, according to the Austrian Act on International Private Law, given that there was no choice of law clause, only the *lex loci laboris* - in this case Austrian law - applied. The employer added that it had had no obligation to inform its works council, merely having done so out of habit.

Judgment

The Labour and Social Court of Vienna (*Arbeits- und Sozialgericht Wien*) dismissed the claim holding that the contractual relationship at hand was governed by Austrian labour law and that this included consideration of whether it would persist following a breach of the duty to inform the works council. As there was no works council established under Austrian law no obligation to inform existed and therefore, no breach was possible.

The plaintiff's appeal to the Appellate Court of Vienna (*Oberlandesgericht Wien*) succeeded: The court argued that the rules governing the participation rights of the German works council in the case of dismissals are overriding mandatory rules that apply to all cases that have some connection with Germany even if, according to international private law, the employment relationship is governed by foreign law. This is because the collective character of the participation rights of the German works council is such that the lawmaker intended the rules to be mandatory irrespective of whether the case had a cross-border element to it.

The Supreme Court (*Oberster Gerichtshof*) quashed the decision of the appellate court and upheld the decision of the court of first instance. It argued as follows:

The Rome Convention on the law applicable to contractual obligations of 19 June 1980 ("Rome Convention") does not apply to employment contracts concluded before 1 December 1998. This is a result of Article 17 Rome Convention, which states that it shall apply in a Contracting State to contracts made after the date on which the Convention has entered into force with respect to that State. In the case of Austria this was 1 December 1998. All former contracts were governed by the Austrian Act on International Private Law (*Internationales Privatrechtsgesetz – IPRG*), which does not include a provision similar to Article 7 of the Rome Convention. Article 7 says that nothing in that Convention shall restrict the application of the rules of the law of the forum, in a situation where they are mandatory irrespective of the law

otherwise applicable to the contract. Despite the lack of an explicit provision, unanimous opinion nevertheless holds that the Act on International Private Law does not cover overriding mandatory provisions (*Eingriffsnormen*).

As its next step, the Supreme Court examined whether the German provisions on information for works council in cases of dismissals should be considered, not only as overriding mandatory provisions, but as applying to employees whose employment contract is governed by Austrian law and who work in Austria. The German courts have ruled that this is only the case where the employee is temporarily but not permanently posted in Austria, as in the case at hand. If the employee works abroad for an indefinite time without any planned follow-up employment in Germany, he or she is not part of the staff represented by the German works council Ð and therefore the works council has no information rights concerning him or her.

In the end, the Austrian Supreme Court did not resolve the dispute on the merits of the case but resorted to a technical argument, namely that even if the German rules had applied, the claim was not raised within the time limit of three weeks provided for in German law and was therefore too late. The claim had to be rejected on this basis.

Commentary

The international dimension here is an old and familiar matter of dispute. It results from the rather unique fact that the Austrian dismissal protection rules are part of the collective labour law and, despite protecting the individual employee, are construed as an integral element of the legislation in respect of works councils. A heavily debated 1995 ruling by the Austrian Supreme Court (9 Ob A 183/95) held that protection against dismissal was not part of the individual rights of the employee governed by the rules of international private law but subject to the territorial principle - i.e. all employees working in Austria are automatically covered by this, whether or not their contract is subject to Austrian employment law. Conversely, protection against dismissals only applies to employees working abroad if they are subject to the Austrian works constitution, in other words, they are part of an Austrian organisational unit represented by an Austrian works council.

The second aspect of the case was the possible application of foreign works council rules concerning employees working in Austria whose employment contracts are governed by Austrian law as a result of the provisions of international private law. Although in the end, the Supreme Court based its ruling on a technicality (the expiry of the time period for raising the claim), it has provided some important arguments for solving the substantial questions.

The decision was based on the Austrian Act on International Private Law, which applies to all employment contracts concluded before 1 December 1998. For contracts concluded after this

date but before 17 December 2009, the Rome Convention applies and for employment contracts concluded after the latter date Regulation 593/2008 ("Rome I") applies. The Rome Convention and "Rome I" include an explicit provision for overriding mandatory provisions (respectively, Article 7 and Article 9), and, although the court in the case reported above took pains to stress that it did not consider either the Rome Convention or "Rome I", it seems to me that the outcome of the case would not have been different had the court applied either of those international instruments.

Subject: Miscellaneous, Governing law

Parties: Wolfgang K***** - v - B***** AG, D-****

Court: Austrian Supreme Court (*Oberster Gerichtshof*)

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