SUMMARY

2012/28: Choice of law clause in contract with temp unenforceable (AT)

<p>An Italian temp was hired out to a company in Austria. His contract provided that Liechenstein law applied and that there was a limitation of three months for bringing claims. After this period had expired he submitted a claim for unpaid bonuses for heavy and dirty work. The Austrian Supreme Court upheld the claim on the basis that the time limit was in breach of the Posting Directive and therefore invalid.</p>

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An Italian temp was hired out to a company in Austria. His contract provided that Liechenstein law applied and that there was a limitation of three months for bringing claims. After this period had expired he submitted a claim for unpaid bonuses for heavy and dirty work. The Austrian Supreme Court upheld the claim on the basis that the time limit was in breach of the Posting Directive and therefore invalid.

Facts

The plaintiff was an Italian citizen and resident who worked for a temporary agency having its seat in Liechtenstein. The agency hired him out to a client in Austria, where he worked from 3 October 2007 to 15 August 2008.

The employment contract contained a choice of law clause which said that the law of Liechtenstein governed the employment contract, with the exception of its conflict law provisions. Another clause provided for the forfeiture of all claims arising from the employment relationship unless they were asserted in writing within three months after their due date.

In August 2008 the plaintiff terminated his employment with the temporary agency. More than five months later he sent that agency a letter claiming bonuses for dirty and heavy work and related payments. It was not in dispute that the plaintiff was in principle entitled to the bonuses. The exact legal basis for it is not made clear in the facts of the case, but presumably, they were agreed in the employment contract. However, the employer replied that the claims had been forfeited because the plaintiff was out of time.

The plaintiff then sued the temporary agency in the Austrian courts, arguing that pursuant to the Austrian Hiring-Out of Workers Act (*Arbeitskräfteüberlassungsgesetz – AÜG*) the forfeiture clause was void. Section 11(2)(5) of the AÜG explicitly outlaws contractual clauses that shorten any preclusion periods that would otherwise apply. He argued that this provision was a "mandatory rule", as provided in Article 6 of the Rome Convention (now Article 8 of "Rome I"), which states that a choice of law clause in individual employment contract may not have the result of depriving the employee of the protection afforded to him by provisions that cannot be derogated from by agreement under the law that, in the absence of choice, would have applied.

The defendant argued that Section 11(2)(5) of the AÜG was not a "mandatory rule" within the meaning of Article 6 of the Rome Convention. It said that Section 11(2)(5) AÜG did not form part of the "hard core" of protective rules defined by Article 3(1)(c) of the Posting Directive (96/71/EC), which reads, "*Member States shall ensure that, whatever the law applicable to the employment relationship, the undertakings referred to in Article 1(1) guarantee workers posted to their territory the terms and conditions of employment covering the following matters which, in the Member State where the work is carried out, are laid down by […] collective agreements […] which have been declared universally applicable […] insofar as they concern […] (c) the minimum rates […]*".

The court of first instance rejected the claim on the ground that the choice of law clause in the employment contract was valid, given that Section 11(2)(5) of the AÜG does not constitute a "mandatory rule" within the meaning of Article 6 of the Rome Convention.

The Appellate Court of Innsbruck (*Oberlandesgericht*) reversed the judgment, holding that Section 11(2)(5) of the AÜG (providing for the invalidity of preclusion clauses in an employment contract) was clearly a mandatory rule within the meaning of Article 6 of the Rome Convention. In its reasoning it referred to Article 3(1)(c) of the Posting Directive, which lists "minimum rates of pay" as part of the "hard core" of protective rules that must be observed irrespective of the applicable law. These rules were also to be considered as mandatory rules within the meaning of Article 6 of the Rome Convention. The Appellate Court went on to find that the same applied to statutory rules ensuring the enforcement of

minimum rates of pay and its constituent elements (such as bonuses for dirty, heavy or dangerous work) and based this finding on the ECJ's ruling in *Commission - v - Germany*, case C-341/02.

The temporary agency appealed this decision to the Supreme Court (*Oberster Gerichtshof*).

Judgment

The Supreme Court upheld the Court of Appeal's judgment, but on the basis of different legal reasoning. Following an analysis of *Commission - v - Germany*, it rejected the view that Article 3(1)(c) of the Posting Directive also contains rules regarding the due date and enforcement of bonuses for dirty and heavy work.

In *Commission - v - Germany* the ECJ had to decide what kinds of payments must be taken into account in order to establish whether the posted worker has received the "minimum rates of pay" as laid down in a statute or a univerally applicable collective bargaining agreement. In this context the ECJ pointed out that allowances and supplements paid for additional work or for work under particular conditions cannot be taken into account for the purpose of calculating the minimum wage (par 39 et seq.). The Supreme Court also concluded that limitation periods for bonuses for dirty and hard work cannot be considered to be covered by Article 3(1)(c) of the Posting Directive.

However, the Supreme Court then referred to Article 3(1)(d) of the Posting Directive, which also forms part of the "hard core" of protective rules that apply irrespective of the governing law. This provision refers to the "conditions of hiring-out of workers, in particular the supply of workers by temporary employment undertakings". The Court also cited Article 3(9) of the Directive under which the host state may provide that employers must guarantee posted workers same the terms and conditions as apply to temporary workers in that state. It concluded that Section 11(2)(5) of the AÜG was such a rule and that it must therefore be applied to the relevant employment relationship, even though the parties had chosen the law of Liechtenstein. The same applies to the other provisions of the AÜG.

The Supreme Court also noted that Article 3(1) of the Posting Directive takes precedence over the more general rules laid down by Article 6 of the Rome Convention. However, it added that the application of the latter Article would have led to the same result, since the employee had his regular place of work in Austria and the parties could therefore not contract out of the mandatory rules of Austrian law, such as Section 11(2)(5) of the AÜG (which transposes Article 6(1) of the Rome Convention).

Due to the application of Section 11(2)(5) of the AÜG the employer could not rely on the

forfeiture clause in the employment contract. Therefore, the plaintiff was entitled to the outstanding bonuses for dirty and heavy work and the related payments.

Commentary

The Supreme Court rightly pointed out that the Austrian Hiring-Out of Workers Act (AÜG) applies also to hiring-out scenarios from abroad to Austria, irrespective of which law governs the employment relationship in general. Therefore, it even applies if the employee's regular place of work is not in Austria and thus the "mandatory rules" of Austrian law within the meaning of Article 6 of the Rome Convention (Article 8 of Rome I) do not "bite".

However, the Court's view that Article 3(1)(c) of the Posting Directive does not encompass bonuses for dirty and heavy work or rules regarding the due date and enforcement thereof is questionable. In *Commission - v - Germany* the ECJ had to decide what kinds of payments by the foreign employer must be taken into account in order to establish whether the posted worker has received the "minimum rates of pay" as laid down in a national rule of the host country.

That is not the same issue as whether a national rule may define such payments as components of "minimum pay" within the meaning of Article 3(1)(c) of the Posting Directive. According to Article 3(1)(last subparagraph) of the Posting Directive the concept of minimum pay is defined by the national law and/or practice of the host state. Therefore, the Supreme Court has gone too far in holding that bonuses for dirty and heavy work are not caught by Article 3(1)(c). One could even argue

that national rules regulating the enforcement or due date of minimum pay must be considered as being part of the rules on minimum pay and must therefore be treated in the same way.

Subject: Posting of workers and expatriates, Applicable law

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