Beware of foreign contract templates

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Introduction

Imagine that a foreign entity employing Austrian staff for distribution and sales activities in Austria asks its Austrian employees to sign a standard employment agreement template and then tries to terminate one of those Austrian employment relationships under Austrian law.

Those were the facts underlying a recent Supreme Court decision, wherein the court concluded that the termination of an employment relationship was governed by the stricter dismissal rules provided by the laws governing the foreign employer, rather than Austrian law. Consequently, the foreign employer could not terminate the employment relationship as it planned under Austrian law.

Supreme Court reasoning

The German employer used a German contract template for its Austrian staff. According to the court, this employment agreement was "too German" to conclude that the parties wanted Austrian law to govern the employment relationship for the following reasons:

- It made various references to the application of a German collective agreement for retail and wholesale in the Hamburg area – particularly in relation to working time, holiday and special premiums.
- The legal terms used for notions and concepts (eg, 'employment agreement', 'special premiums', 'overtime work' and 'pension entitlements') were not in Austrian German, but in legal jargon usually used only in Germany.
- It contained several provisions that were unenforceable under Austrian employment legislation (pertaining to holiday entitlements and the repayment of earned salaries under certain circumstances) or highly uncommon in Austrian employment practice (eg, breach of contract as a precondition for termination by the employer and the amount of paid holiday).

In the absence of an express choice of law, the court interpreted this to mean that, based on these clear indications (eg, referencing the German collective agreement and German legal terms), the parties to the employment agreement tacitly chose German law as the law governing the Austrian employment relationship.

This was bad news for the employer, as it is much harder to terminate employment relationships under German legislation than under the comparable Austrian legal framework. Under Austrian law, when challenging a dismissal before the court an employee must prove that his or her material interests were adversely affected by the termination; however, there is no comparable legal requirement under the respective German statute. In addition, the deadline for filing such suits is three weeks in Germany, compared to two weeks in Austria. The Austrian deadline would already have lapsed, while the three-week German deadline was still open when the employee filed his complaint.

Comment

This decision underlines that it can be costly to try to save money by not employing local counsel to review foreign employment contract templates. Had the employer performed a short review and added a short choice of law clause, this costly legal battle could have been avoided.

As such, foreign employers should adapt their contract templates to encompass the fundamental principles of Austrian employment law.

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