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Another Win for European Commercial Agents: Overriding Mandatory Austrian Law Provisions to Supersede Arbitration Agreement

Tobias Gosch · Thursday, August 10th, 2017 · Schoenherr

On 1 March 2017 the Austrian Supreme Court (*Oberster Gerichtshof*) ruled on whether potential claims under the Austrian Commercial Agents Act (*Handelsvertretergesetz*) can be brought before an Austrian court even if the underlying agency agreement contains an arbitration clause and is governed by the laws of New York (OGH 1.3.2017, 5 Ob 72/16y). The judgment addresses international overriding mandatory provisions on the compensation of commercial agents and builds on two related ECJ decisions.

As early as the year 2000, the European Court of Justice (“ECJ”) ruled in its judgment *Ingmar* (9.11.2000, C-381/98) that Articles 17 and 18 of Council Directive 86/653/EEC of 18 December 1986 on the coordination of the laws of the Member States relating to self-employed commercial agents (the “Directive”), “which guarantee certain rights to commercial agents after termination of agency contracts, must be applied where the commercial agent carried on his activity in a Member State although the principal is established in a non-member country and a clause of the contract stipulates that the contract is to be governed by the law of that country.” Thereby, the ECJ established the international overriding mandatory applicability of Articles 17 and 18 of the Directive.

However, as some Member States made use of the possibility to extend the scope of the Directive in their transposition into national law, the ECJ was eventually concerned with a follow-up question in that respect. In its judgment *Unamar* (17.10.2013, C-184/12) the ECJ declared that national law provisions which go beyond the scope of the Directive also may be regarded as overriding mandatory national law “if the court before which the case has been brought finds, on the basis of a detailed assessment, that the legislature of the State of the forum held it to be crucial, in the legal order concerned, to grant the commercial agent protection going beyond that provided for by [the Directive], taking account in that regard of the nature and of the objective of such mandatory provisions.” This principle shall also be relevant vis-à-vis Member States of the European Union which decided to transpose the minimum protection requirements laid down by the Directive.

In the case recently decided by the Austrian Supreme Court, an Austrian limited liability company (the “Agent”) entered into an agency agreement in order to provide for the procurement of sea freight business in Austria and other Member States of the European Union for a New York based principal (the “Principal”). The agency agreement contained a choice of law and an arbitration

clause stipulating that the agreement will be governed by the laws of New York and all disputes arising from it will be settled by an arbitral tribunal in New York in accordance with the rules of the Society of Maritime Arbitrators. The Principal terminated the agency agreement and filed a claim against the Agent for outstanding accounts and damages before a New York based arbitral tribunal. In the arbitral proceedings, the arbitral tribunal refused to consider the Agent's counter-claim for compensation as a commercial agent resulting from the allegedly wrongful termination of the agency agreement.

The Agent therefore filed a lawsuit against the Principal before an Austrian court, seeking compensation under Section 24 of the Austrian Commercial Agents Act, as the Principal allegedly terminated the agency agreement unlawfully. Section 24 of the Austrian Commercial Agents Act is rooted in Articles 17 and 18 of the Directive. Also, the Austrian legislator extended the scope of the applicability of the compensation provisions in its transposition of the Directive into national law. Whereas the Directive defines the term commercial agent as "a self-employed intermediary who has the continuing authority to negotiate the sale or purchase of goods on behalf of another person", the Austrian definition in Section 24 is broader and applies to anyone who is commissioned and authorised to convey or conclude business transactions in another person's name and account.

In accordance with Article II Paragraph 3 of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("NYC") and Section 584 Paragraph 1 of the Austrian Code of Civil Procedure, an Austrian court shall not abandon a lawsuit if it finds that the arbitration agreement is non-existent or unenforceable. An arbitration clause shall be unenforceable if it aims to circumvent the applicability of mandatory procedural or material law provisions to the governed contract. In the present case, the Austrian Supreme Court concluded that there "cannot remain reasonable doubt that the Agent, who mainly acted in the territory of the European Union, is entitled to a mandatory compensatory claim in accordance with Articles 17 and 18 of the Directive which have been transposed by Section 24 Austrian Commercial Agents Act." As the applicable laws of New York do not offer a comparable compensation regime for commercial agents and the arbitral tribunal refused to apply the relevant overriding mandatory Austrian law provision, the Austrian Supreme Court declared that "the refusal of recognition of the arbitration clause remains the only possibility to secure the international mandatory scope of application of Articles 17 and 18 of the Directive in favour of the Agent, who shall be protected by the provisions of the Directive and its transposition in Section 24 Austrian Commercial Agents Act." Therefore, the arbitration clause in the agency agreement must be deemed invalid and must not oppose the lawsuit filed by the Agent.

The Supreme Court's reasoning is not entirely uncontroversial. The Agent conducted the procurement of sea freight business in Austria and other countries of the European Union for the Principal. Whilst the territorial scope of the Agent's activities complies with the conditions for the international overriding mandatory applicability of the compensation provisions of the Directive as set out by the ECJ in *Ingmar*, the procurement of business is not covered by the relevant definition in the Directive, which only refers to the sale or purchase of goods. As already pointed out above, the ECJ in *Unamar* opened the door for Member States to consider transposed Directive provisions with an extended scope of applicability as national overriding mandatory principles if the national court holds such provisions to be crucial after a detailed assessment. As *Eckardt* (IHR 2017, 123 *et seq*) correctly remarks, no such detailed assessment can be found in the reasoning of the Austrian Supreme Court judgment. The court in fact based its judgment on the general statement of the ECJ that such provisions can be national overriding mandatory law if this is crucial in the relevant legal

order. Hence, the judgment does not provide an assessment and explanation of why it would be crucial, from an Austrian law perspective, that agents conducting the procurement of business should also be entitled to a compensatory claim on the basis of a national overriding mandatory provision. The justification that such a compensatory claim of the Agent is rooted in Articles 17 and 18 of the Directive is therefore not convincing.

The present case shows the power of overriding mandatory law, but also the power of national courts when interpreting such provisions in the context of international arbitration. Therefore, and especially when it comes to European Union law and the respective transposed national law provisions, it is advisable to look more closely and check whether international or national overriding mandatory law could be an issue.


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