Exclusionary Periods in Standard Contract Clauses - a Legal Nursing Case

INTRODUCTIONS

The problem of how to validly draft exclusionary periods in employment contracts, which have an important significance as an instrument for reducing economic risks, has recently come under renewed scrutiny. In our Client Newsletter 01/2016 we had already reported on the reformation of Sec. 308 No. 13 German Civil Code, which will come into effect on October 1, 2016, and the resulting need for adjustments.

In a judgment of August 24, 2016 (File no. 5 AZR 703/15), the Federal Labor Court has once more ruled on the validity of an exclusionary period. The decision, which is currently only available in the form of a press release, is also of interest in cases other than the one decided because it provides further clarification, particularly regarding the question, which has been discussed ever since the Minimum Wage Act came into effect, of whether the statutory claims to minimum wages must be explicitly excluded from the scope of application of an exclusionary period in standard terms and conditions of contract.

THE FACTS OF THE JUDGMENT

The plaintiff was employed by the defendant, an ambulatory nursing service, as a nursing assistant. The employment contract contained, as a standard term of contract, the quite typical, two-tier exclusionary clause that all of the claims of either party would expire if they were not asserted to the other party to the contract in writing within three months upon becoming due. In the event of the refusal or the failure to respond on the part of the other party within two weeks after the claims were asserted, the claims would then expire, provided they were not filed in court within three months from the refusal or the expiration of the period. The Regulations concerning Mandatory Employment Conditions for the Nursing Industry (*PflegeArbbV*) were applicable; Section 2 of the Regulations contained a provision concerning minimum wages.

In 2013 a conflict arose between the parties to the employment contract concerning the claim to continued pay during sickness raised by the employee. The employer maintained, amongst other things, that the claim raised by the plaintiff had expired, at least in light of the exclusionary period in the employment contract.

Both the labor court and the superior labor court, however, upheld the claim in the ensuing litigation. In the view of the superior labor court, the exclusionary clause violated Sec. 9 Posted Workers Act (*AEntG*), under the terms of which exclusionary periods for asserting a claim to a minimum wage can only be regulated in certain provisions, but not in the employment contract. Aside from this, it deviated from the binding minimum period of six months in Sec. 9 Posted Workers Act to the detriment of the plaintiff. Thus, the clause was to be considered invalid due to several infringements of statutory provisions. Furthermore, the superior labor court held that the clause is not severable and thus cannot be preserved with regard to the claims other than to a minimum wage. Even if one wanted to assume its severability, the rest of the clause violates the transparency requirement under Sec. 307 (1) sentence 2 German Civil Code as it does not clearly state the claims to which the exclusionary period does and does not refer. In the absence of a valid exclusionary period, the complaint was thus successful before the superior labor court.

DECISION OF THE FEDERAL LABOR COURT

The Federal Labor Court confirmed this view of the superior labor court concerning the relevant issue in its judgment of August 24, 2016. It also concluded that the clause is invalid as a whole due to the violation of Sec. 9 Posting of Workers Act and that the clause cannot be preserved in its parts because this is prevented by the transparency requirement.

PRACTICAL SIGNIFICANCE OF THE RULING

The judgment as presented until now in the form of a press release already provides valuable information for drafting exclusionary periods in standard employment contracts, even without the exact grounds of the judgment.

It is not surprising that the clause has no effect on the minimum wage resulting from Sec. 2 Regulation concerning Mandatory Employment Conditions for the Nursing Industry. Of greater interest, however, is the fact that, in the view of the Federal Labor Court, the overall invalidity of the exclusionary period results from the transparency requirement. In another context, namely with respect to claims arising from intentional damage, the court has been more lenient in the past. Although there

were also statutory provisions in that case to prevent an expiration of claim due to contractual exclusionary periods, the court did not deem the exclusionary period to be invalid because those claims had not been removed from the scope of application of that clause, but the clause was "saved" by interpreting it in accordance with its intent and purpose (Federal Labor Court, judgment of June 20, 2013 – File no. 8 AZR 280/12).

However, the superior labor court refused to apply this ruling in the present case because, in contrast to the claims at issue at that time, the ones in the present case were claims that the parties to an employment contract are typically considering when drafting the contract.

This decision is by no means merely of significance for employers in the nursing industry. Sec. 3 Minimum Wage Act (*MiLoG)* generally provides that agreements are invalid "to the extent" that they fall below the statutory minimum wage or limit or exclude a claim to the minimum wage. Until now, the use of the expression "to the extent" has partially been explained to mean that not removing the claims to a minimum wage under the Minimum Wage Act does not lead to the total invalidity of the exclusionary period. Whether this is correct has already been the subject of controversy and appears very doubtful in light of the most recent judgment of the Federal Labor Court.

And then there is the following issue: Employment law contains other rules that restrict the opportunity to negotiate exclusionary clauses in employment contracts with regard to certain claims. Sec. 77 (4) Works Constitution Act (*BetrVG*) provides that exclusionary periods for asserting rights under works agreements can only be provided for in collective bargaining agreements or in a works agreement. A very similar provision is found in Sec. 4 (4) Collective Bargaining Act (*TVG*) with respect to rights in collective bargaining agreements. There have already been voices in judicial rulings that deem exclusionary clauses to be non-transparent and thus invalid even if such claims are not expressly excluded from the scope of application of exclusionary periods in standard conditions of contract (Labor Court of Berlin, judgment of November 6, 2015 – File No. 28 Ca 9517/15). It remains to be seen if this very strict view will prevail and what consequences it will yet have for exclusionary clauses in employment contracts. Because employment law sets down mandatory and indispensable minimum standards in very different places, the consequences could be far-reaching.

This development in the case law on exclusionary clauses in standard employment contracts and the revision of Sec. 309 No. 13 German Civil Code that will come into effect on October 1, 2016 should thus definitely be a (renewed) reason to subject the templates used in a business to a critical review and to adapt them to the greatest degree possible to custom-fit the changes in the legal parameters.

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