Reports of Cases

JUDGMENT OF THE COURT (Third Chamber)

12 September 2013*

(Rome Convention on the law applicable to contractual obligations — Contract of employment — Article 6(2) — Applicable law in the absence of a choice made by the parties — Law of the country in which the employee 'habitually carries out his work' — Contract more closely connected with another Member State)

In Case C-64/12,

REQUEST for a preliminary ruling under the First Protocol of 19 December 1988 on the interpretation by the Court of Justice of the European Communities of the Convention on the law applicable to contractual obligations from the Hoge Raad der Nederlanden (Netherlands), made by decision of 3 February 2012, received at the Court on 8 February 2012, in the proceedings

Anton Schlecker, trading as 'Firma Anton Schlecker',

v

Melitta Josefa Boedeker,

THE COURT (Third Chamber),

composed of M. Ilešič, President of the Chamber, E. Jarašiūnas, A. Ó Caoimh, C. Toader (Rapporteur) and C.G. Fernlund, Judges,

Advocate General: N. Wahl,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

— M.J. Boedeker, by R. de Lange, advocaat,

— the Netherlands Government, by C. Wissels, acting as Agent,

— the Austrian Government, by A. Posch, acting as Agent,

— the European Commission, by M. Wilderspin and R. Troosters, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 16 April 2013,

* Language of the case: Dutch.

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 6(2) of the Convention on the law applicable to contractual obligations, opened for signature in Rome on 19 June 1980 (OJ 1980 L 266, p. 1; 'the Rome Convention').

2 The request has been made in proceedings between, on the one hand, A. Schlecker, trading as 'Firma Anton Schlecker' ('Schlecker'), a company established in Ehingen (Germany) and, on the other, Ms Boedeker, residing in Mülheim an der Ruhr (Germany) and working in the Netherlands, regarding the fact that Schlecker – Ms Boedeker's employer – had unilaterally changed her place of work, and, in that respect, regarding the law applicable to the employment contract.

Legal context

The Rome Convention

3 Article 3(1) of the Rome Convention provides:

'A contract shall be governed by the law chosen by the parties. The choice must be expressed or demonstrated with reasonable certainty by the terms of the contract or the circumstances of the case. By their choice the parties can select the law applicable to the whole or a part only of the contract.'

4 Article 6 of that convention, entitled 'Individual employment contracts', provides:

'1. Notwithstanding the provisions of Article 3, in a contract of employment a choice of law made by the parties shall not have the result of depriving the employee of the protection afforded to him by the mandatory rules of the law which would be applicable under paragraph 2 in the absence of choice.

2. Notwithstanding the provisions of Article 4, a contract of employment shall, in the absence of choice in accordance with Article 3, be governed:

(a) by the law of the country in which the employee habitually carries out his work in performance of the contract, even if he is temporarily employed in another country; or

(b) if the employee does not habitually carry out his work in any one country, by the law of the country in which the place of business through which he was engaged is situated,

unless it appears from the circumstances as a whole that the contract is more closely connected with another country, in which case the contract shall be governed by the law of that country.'

Regulation (EC) No 593/2008

5 Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I) (OJ 2008 L 177, p. 6; 'the Rome I Regulation') replaced the Rome Convention. The Rome I Regulation applies to contracts concluded as from 17 December 2009.

6 Article 8(4) of the Rome I Regulation, entitled 'Individual employment contracts', states:

'Where it appears from the circumstances as a whole that the contract is more closely connected with a country other than that indicated in paragraphs 2 or 3, the law of that other country shall apply.'

The dispute in the main proceedings and the questions referred for a preliminary ruling

7 Ms Boedeker was employed by Schlecker, a German undertaking with branches in a number of Member States which is engaged in the retailing of cosmetics, healthcare and household products. After working in Germany from 1 December 1979 until 1 January 1994, Ms Boedeker entered into a new employment contract, under which she was appointed as Schlecker's manager in the Netherlands. In that capacity, she managed Schlecker's business in the Netherlands, overseeing approximately 300 branches and some 1 250 employees.

8 By letter of 19 June 2006, Schlecker informed Ms Boedeker, inter alia, that her position as manager for the Netherlands was to be abolished with effect from 30 June 2006 and invited her to take up, under the same contractual conditions, the post of Head of Accounts ('Bereichsleiterin Revision') in Dortmund (Germany) with effect from 1 July 2006.

9 Ms Boedeker lodged a complaint against her employer's unilateral decision to change her place of work, but she presented herself in Dortmund on 3 July 2006 to take up her new post. She then declared herself unfit for work on medical grounds on 5 July 2006. Since 16 August 2006, Ms Boedeker has been in receipt of benefits from the German health insurance fund.

10 In that context, Ms Boedeker brought various actions before the courts in the Netherlands. In one such action, before the Kantonrechter te Tiel (Cantonal Court, Tiel), she claimed, inter alia, that Netherlands law should be declared applicable to her employment contract, that her second employment contract should be annulled, and that she should be awarded damages. In an interim judgment on the merits, subsequently upheld on appeal, the Kantonrechter te Tiel annulled the second employment contract with effect from 15 December 2007 and awarded Ms Boedeker compensation in the amount of EUR 557 651.52 (gross). However, that decision could not become final unless it was recognised that the employment contract was governed by Netherlands law. On that point, the Kantonrechter te Tiel handed down another judgment finding that Netherlands law applied.

11 In appeal proceedings brought by Schlecker, the Gerechtshof te Arnhem (Regional Court of Appeal, Arnhem) upheld the judgment of the Kantonrechter te Tiel relating to the law applicable to the contract, finding that German law could not have been chosen tacitly. The Gerechtshof te Arnhem found in particular that, under Article 6(2)(a) of the Rome Convention, the employment contract was governed by Netherlands law, which is the law of the country in which the employee habitually performed her duties. The Gerechtshof te Arnhem accordingly found that the various factors relied on by Schlecker – relating in particular to membership of various pension, sickness insurance and invalidity schemes – did not support the inference that the employment contract was more closely connected with Germany and that, in consequence, it could not be held that the contract was governed by German law.

12 Schlecker brought an appeal on a point of law before the Hoge Raad der Nederlanden (Supreme Court of the Netherlands) against the decision of the Kantonrechter te Tiel on the applicable law.

13 In that regard, Ms Boedeker claims that Netherlands law should be declared applicable to the agreement signed by the parties and that Schlecker should be ordered to reinstate her as 'manager for the Netherlands'. Schlecker, on the other hand, contends that German law is applicable because it appears from the circumstances as a whole that the contract is more closely connected with Germany.

14 In the order for reference, the Hoge Raad der Nederlanden notes that, in the circumstances, Netherlands law offers the employee greater protection than German law against the change in place of work made by the employer. That court is accordingly uncertain as to the interpretation to be given to the concluding part of Article 6(2) of the Rome Convention, under which it is possible to disregard the law which must otherwise be applied on the strength of one of the connections expressly referred to in Article 6(2)(a) or (b) of that convention, in the event that it appears from the circumstances as a whole that the contract is more closely connected with another country.

15 In those circumstances, the Hoge Raad der Nederlanden decided to stay proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) Is Article 6(2) of the Rome Convention on the law applicable to contractual obligations to be interpreted in such a way that, if an employee carries out the work in performance of the employment contract not only habitually but also for a lengthy period and without interruption in the same country, the law of that country should be applied in all cases, even if all other circumstances point to a close connection between the employment contract and another country?

(2) Does an affirmative answer to the first question require that, when concluding the contract of employment, or at least at the commencement of the work, the employer and the employee intended – or were at least aware of the fact – that the work would be carried out over a long period and without interruption in the same country?'

Consideration of the questions referred

16 As a preliminary point, it should be noted that, in accordance with Article 1 of the First Protocol of 19 December 1988 on the interpretation of the 1980 Convention by the Court of Justice (OJ 1998 C 27, p. 47), which entered into force on 1 August 2004, the Court has jurisdiction to give rulings on the present request for a preliminary ruling. Furthermore, under Article 2(a) of that protocol, the Hoge Raad der Nederlanden may ask the Court to give a preliminary ruling on a question raised in a case pending before it and concerning the interpretation of the provisions of the Rome Convention.

17 By its first question, the referring court is asking, in substance, whether Article 6(2) of the Rome Convention must be interpreted as meaning that, even where an employee carries out the work in performance of the contract not only habitually but also for a lengthy period and without interruption in the same country, the national court may, under the concluding part of that provision, disregard the law of the country where the work is habitually carried out where it appears from the circumstances as a whole that the contract is more closely connected with another country.

18 The Court is accordingly called upon to give an interpretation in relation to the 'country where the work is habitually carried out', the connecting factor referred to in Article 6(2)(a) of the Rome Convention, in the light of the possibility under the concluding part of Article 6(2) of applying to the employment contract the law of the country with which the contract is more closely connected.

19 In that regard, Ms Boedeker, the Austrian Government and the European Commission submit that the court called upon to rule in a particular case must, in order to determine the applicable law, undertake an assessment of all the various facts and evidence in the case and that the duration of the period during which the employee in fact habitually carried out his work could be decisive for the purposes of that assessment. Accordingly, where it is established that the work was essentially carried out in a single place for a long period, that finding would constitute a decisive factor in determining the applicable law.

20 More specifically, Ms Boedeker submits, on the basis of Article 6(2)(a) of the Rome Convention, that the law to be applied is Netherlands law, which offers greater protection in the case before the referring court against a unilateral change, made by the employer, in the place of work. In that regard, Ms Boedeker argues in particular that the exception provided for under the concluding part of Article 6(2) must be narrowly construed and applied in the light of the principle of protection of the employee, on which that provision is based, in order to ensure that the law applied is the law which is substantively most favourable.

21 To contrary effect, the Netherlands Government contends that, where the contract is more closely connected with a country other than that in which the work is carried out, the law to be applied is the law of the country more closely connected – in the case before the referring court, German law. To recognise the rule laid down in Article 6(2)(a) of the Rome Convention as applicable to such a contract even where the circumstances as a whole point to another legal system would have the effect of rendering meaningless the exception provided for under the concluding part of Article 6(2). The Netherlands Government accordingly contends that, when the exception is applied, account must be taken of all the legal and factual circumstances of the particular case, whilst at the same time the importance of the applicable social security law must be acknowledged.

22 It should be noted at the outset that Article 6 of the Rome Convention lays down special conflict rules relating to individual contracts of employment and that those rules derogate from the general rules laid down in Articles 3 and 4 of that convention concerning, respectively, the freedom to choose the applicable law and the criteria for determining that law in the absence of such a choice (see, to that effect, Case C-29/10 *Koelzsch* [2011] ECR I-1595, paragraph 34, and Case C-384/10 *Voogsgeerd* [2011] ECR I-13275, paragraph 24).

23 Admittedly, Article 6(1) of the Rome Convention provides that the choice made by the parties regarding the law applicable to the employment contract cannot lead to the employee being deprived of the guarantees laid down by the mandatory provisions of the law which would be applicable to the contract in the absence of any such choice.

24 However, Article 6(2) of the Rome Convention identifies the specific connecting factors which, in the absence of a choice made by the parties, enable the *lex contractus* to be determined (see *Voogsgeerd*, paragraph 25).

25 Those factors are, first and foremost, the country in which the employee 'habitually carries out his work', as indicated in Article 6(2)(a) of the Rome Convention, failing which, in the absence of such a place, 'the place of business through which he was engaged', as indicated in Article 6(2)(b) of that convention (see *Voogsgeerd*, paragraph 26).

26 Furthermore, under the concluding part of Article 6(2), those two connecting factors do not apply where it appears from the circumstances as a whole that the contract of employment is more closely connected with another country, in which case the law of that other country is to apply (see *Voogsgeerd*, paragraph 27).

27 In the case before the referring court, as is apparent from the order for reference, the parties to the contract did not expressly opt for the application of a specific law. Furthermore, it is not disputed by the parties to the main proceedings that, over the course of performing her obligations under the second employment contract with Schlecker, entered into on 30 November 1994, Ms Boedeker had habitually carried out her activity in the Netherlands for more than 11 years and without interruption in that same country.

28 However, the referring court finds that all the other relevant connecting factors suggest that the employment contract is more closely connected with Germany. Consequently, it is asking whether Article 6(2)(a) of the Rome Convention must be broadly construed as compared with the concluding part of Article 6(2).

29 As emerges from the order for reference, German law could be applicable because a closer connection with Germany is suggested by the circumstances as a whole, that is to say, by the following facts: the employer is a legal person governed by German law; the remuneration was paid in German marks (prior to the introduction of the euro); the pension arrangements were made with a German pension provider; Ms Boedeker had continued to reside in Germany, where she paid her social security contributions; the employment contract referred to mandatory provisions of German law; and the employer reimbursed Ms Boedeker's travel costs from Germany to the Netherlands.

30 In the circumstances, it is therefore necessary to establish whether the connecting factor referred to in Article 6(2)(a) of the Rome Convention may be disregarded only where that factor is not genuinely indicative of a connection or also where the court finds that the employment contract is more closely connected with another country.

31 In that regard, it should be borne in mind that, in analysing the relationship between the rules set out in Article 6(2)(a) and (b) of the Rome Convention, the Court has held that the criterion of the country in which the employee 'habitually carries out his work', referred to in Article 6(2)(a) of that convention, must be broadly construed, whereas the criterion of 'the place of business through which [the employee] was engaged', referred to in Article 6(2)(b) of the convention, can apply only in cases where the court hearing the case is not in a position to determine the country in which the work is habitually carried out (see *Koelzsch*, paragraph 43, and *Voogsgeerd*, paragraph 35).

32 Thus, for the purposes of determining the applicable law, priority must be given to the nexus between the employment contract at issue and the country where the employee habitually carries out his work; the application of that criterion precludes consideration of the secondary criterion of the country in which the place of business through which the employer was engaged is situated (see, to that effect, *Koelzsch*, paragraph 43, and *Voogsgeerd*, paragraphs 32, 35 and 39).

33 A different interpretation would be contrary to the objective of Article 6 of the Rome Convention, which is to guarantee adequate protection to the employee. As emerges from the Giuliano and Lagarde Report on the Convention on the law applicable to contractual obligations (OJ 1980 C 282, p. 1), Article 6 of the Rome Convention was intended to provide 'a more appropriate arrangement for matters in which the interests of one of the contracting parties are not the same as those of the other, and … more adequate protection for the party who from the socio-economic point of view is regarded as the weaker in the contractual relationship' (see *Koelzsch*, paragraphs 40 and 42, and *Voogsgeerd*, paragraph 35).

34 In so far as the objective of Article 6 of the Rome Convention is to guarantee adequate protection for the employee, that provision must ensure that the law applied to the employment contract is the law of the country with which that contract is most closely connected. However, as the Advocate General pointed out in point 36 of his Opinion, that interpretation must not automatically result in the application, in all cases, of the law most favourable to the worker.

35 As is apparent from the wording of Article 6 of the Rome Convention and from its objective, the court must first determine the applicable law by reference to the specific connecting factors under Article 6(2)(a) and (b) respectively, which satisfy the general requirement of predictability of the law and accordingly of legal certainty in contractual relationships (see, by analogy, Case C-133/08 *ICF* [2009] ECR I-9687, paragraph 62).

36 However, as the Advocate General pointed out in point 51 of his Opinion, where it is apparent from the circumstances as a whole that the employment contract is more closely connected with another country, it is for the national court to disregard the connecting factors referred to in Article 6(2)(a) and (b) of the Rome Convention and to apply the law of that other country.

37 According to the Court's case-law, the referring court can take other elements of the employment relationship into account where it appears that the elements relating to one or other of the two criteria set out in Article 6(2) of the Rome Convention suggest that the contract is more closely connected with a State other than the State suggested through application of the criteria referred to in Article 6(2)(a) or (b) (see, to that effect, *Voogsgeerd*, paragraph 51).

38 That interpretation is consistent also with the wording of the new provision on the conflict rules relating to contracts of employment, introduced by the Rome I Regulation, although that regulation is not applicable to the main proceedings *ratione temporis*. Under Article 8(4) of that regulation, where it appears from the circumstances as a whole that the contract is more closely connected with a country other than that referred to in Article 8(2) or 8(3), the law of that other country is to apply (see, by analogy, *Koelzsch*, paragraph 46).

39 It is apparent from the foregoing that it is for the referring court to determine the law applicable to the contract by reference to the connecting factors identified in the first part of Article 6(2) of the Rome Convention and, in particular, by reference to the habitual place of performance of the work, the factor identified in Article 6(2)(a). However, under the second part of Article 6(2) of the Rome Convention, where a contract is more closely connected with a State other than that in which the work is habitually carried out, the law of the State where the work is carried out must be disregarded in favour of the law of that other State.

40 Accordingly, the referring court must take account of all the elements which define the employment relationship and single out one or more as being, in its view, the most significant. Nevertheless, as the Commission emphasised and the Advocate General pointed out in point 66 of his Opinion, the court called upon to rule in a particular case cannot automatically conclude that the rule laid down in Article 6(2)(a) of the Rome Convention must be disregarded solely because, by dint of their number, the other relevant circumstances – apart from the actual place of work – would result in the selection of another country.

41 On the other hand, among the significant factors suggestive of a connection with a particular country, account should be taken in particular of the country in which the employee pays taxes on the income from his activity and the country in which he is covered by a social security scheme and pension, sickness insurance and invalidity schemes. In addition, the national court must also take account of all the circumstances of the case, such as the parameters relating to salary determination and other working conditions.

42 It follows from the foregoing that Article 6(2) of the Rome Convention must be interpreted as meaning that, even where an employee carries out the work in performance of the contract habitually, for a lengthy period and without interruption in the same country, the national court may, under the concluding part of that provision, disregard the law applicable in that country, if it appears from the circumstances as a whole that the contract is more closely connected with another country.

43 In those circumstances, there is no need to answer the second question referred for a preliminary ruling.

44 In the light of all the foregoing considerations, the answer to the first question is that Article 6(2) of the Rome Convention must be interpreted as meaning that, even where an employee carries out the work in performance of the contract habitually, for a lengthy period and without interruption in the

same country, the national court may, under the concluding part of that provision, disregard the law applicable in the country where the work is habitually carried out, if it appears from the circumstances as a whole that the contract is more closely connected with another country.

Costs

45 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Third Chamber) hereby rules:

Article 6(2) of the Convention on the law applicable to contractual obligations, opened for signature in Rome on 19 June 1980, must be interpreted as meaning that, even where an employee carries out the work in performance of the contract habitually, for a lengthy period and without interruption in the same country, the national court may, under the concluding part of that provision, disregard the law of the country where the work is habitually carried out, if it appears from the circumstances as a whole that the contract is more closely connected with another country.

[Signatures]