SUMMARY

ECJ 12 September 2013, case C-64/12 (Anton Schlecker - v - Melitta Josefa Boedeker), Private international law, Applicable law

Facts

The plaintiff in this case, Ms Boedeker, was a German national. She was employed in Germany by the German defendant, Schlecker, from 1979 to 1993. Although her employment contract lacked a choice of law clause, it is obvious that during this time her contract was governed by German law. As from 1 January 1994, she entered into a new contract under which she worked for Schlecker in the Netherlands, although continuing to reside in Germany. This contract also lacked a choice of law clause. In 2006, Schlecker abolished Ms Boedeker's position and offered her an alternative position in Germany.

Although Ms Boedeker protested against what she saw as a unilateral decision by her employer to relocate her back to Germany, she did take up her new post there, but called in sick immediately afterwards. Ms Boedeker brought proceedings before a Dutch court under Dutch law.

National proceedings

The court awarded her a large amount of compensation, holding that Dutch law governed her contract, given that The Netherlands was the country where Ms Boedeker "habitually" performed her duties within the meaning of Article 6(2)(a) of the Rome Convention. Schlecker appealed to the Supreme Court, which referred two questions to the ECJ pursuant to the First Protocol to the Rome Convention, noting that Dutch law offers the employee greater protection than German law against unilateral changes by the employer to the employee's place of work.

ECJ's findings

1. The first question is 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 [*in this case, the Netherlands*], the national court may, under the concluding part of that provision, disregard the law of the country where the work is habitually carried out [*in this case, the Netherlands*] where it appears from the circumstances as a whole that the contract is more closely connected with another country [*in this case, Germany*] (§17).

2. Article 6 of the Rome Convention lays down specific conflict rules that derogate from the general rules laid down in Articles 3 (freedom to choose applicable law) and 4 (criteria for determining the applicable law in the absence of a choice). Article 6(2) identifies the specific connecting factors which, in the absence of a choice of law, enable the *lex contractus* to be determined. Those factors are, first and foremost, the country in which the employer "habitually carries out his work", and - in the absence of such a place - "the place of business through which he was engaged". However, these 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 (§ 22-26).

3. In the main proceedings, the Netherlands is the country where Ms Boedeker "habitually" worked, but the following circumstances could make for a closer connection of the case to German law:

- the employer is a German legal entity;

- prior to the introduction of the Euro, Ms Boedeker's salary was paid in German marks;

- Ms Boedeker was enrolled in a German pension scheme;

- Ms Boedeker continued to reside in Germany, where she paid her social security contributions;

- the employment contract referred to mandatory provisions of German law;

- Schlecker reimbursed Ms Boedeker's travel costs from Germany to the Netherlands (§ 29).

4. For the purpose 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 works. A different interpretation would be contrary to the objectives of Article 6, which is to

guarantee adequate protection to the employee. However, this interpretation must not automatically result in the application, in all cases, of the law most favourable to the worker (§ 32-34).

5. The referring court must take account of all the elements that define the employment relationship and single out one or more as being the most significant. Nevertheless, the referring court cannot automatically conclude that the rule laid down in Article 6(2)(a) [*i.e. the place where the employee habitually works*] 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. 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 (§ 41-42).

Ruling

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.

Creator: European Court of Justice (ECJ)
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