EELA EUROPEAN EMPLOYMENT LAWYERS ASSOCIATION

SUMMARY

2020/37 Can the exception clause of Article 8 Rome I save a Turkish airline company from the application of Dutch dismissal law in a dispute with an Amsterdam home-based co-pilot? (NL)

The central question in this case was what was the objectively applicable law to an employment contract concluded between a Turkish airline and a Dutch co-pilot, in accordance with Article 8 Rome I. The ruling is particularly interesting for the relation between the habitual place of work and the exception clause and points to the elements that should be taken into account.

Summary

The central question in this case was what was the objectively applicable law to an employment contract concluded between a Turkish airline and a Dutch co-pilot, in accordance with article 8 Rome I. The ruling is particularly interesting for the relation between the habitual place of work and the exception clause and points to the elements that should be taken into account.

Facts

Turistik Hava is an airline company having its statutory seat in Turkey. A Dutch co-pilot entered into an employment agreement with Turistik Hava on 1 November 2015. The employment contract stipulated that Turkish law governed the agreement, and that Turkish courts had jurisdiction over possible disputes. However, that same contract nominated Amsterdam (the Netherlands) as the co-pilot's 'base residence'.

On 30 October 2016, Turistik Hava terminated the employment contract as per 15 November 2016 for business reasons. Termination in case Turistik Hava "ceases to carry on business or meet its financial obligations" on a 15-day notice was provided for in the employment contract, but this is not in accordance with Dutch law. In the Netherlands, there is extensive employee protection when it comes to termination of the employment agreement on the employer's initiative. The co-pilot took the view that mandatory provisions of Dutch law applied to his employment agreement and asked the Dutch court to annul his termination accordingly and summoned Turistik Hava to pay various heads of compensation with respect to Dutch law. Turistik Hava asserted that Turkish law was applicable.

Legal framework: Article 8 Rome I

The conflict rules in this dispute are governed by Article 8 of Regulation (EC) 593/2008 ("Rome I" – all further references to provisions in this case report must be understood as referring to Rome I). Under Rome I, in principle, parties are free to choose the law applicable to their employment contract (Article 3). However, Article 8(1) limits the effect of a choice of law, since such a choice by the parties cannot deprive the employee of the protection afforded to him by mandatory provisions of the law applicable in absence of this choice (the 'objectively applicable law'). Dutch dismissal law is embodied in such mandatory provisions.

The objective applicable law is determined by Article 8(2)-(4). According to Article 8(2), the employment contract is governed in principle by the law of the country in which or, failing that, from which the employee habitually carries out his work in performance of the contract – i.e. the habitual place of work. Article 8(3) contains an alternative reference rule in case the country where the work is habitually carried out cannot be identified. In that case the contract shall be governed by the law of the country where the place of business through which the employee was engaged is situated.

Under Article 8(4), both pre-established connecting factors – the habitual place of work and the engaging place of business – may be set aside where it appears from the circumstances as a whole that the contract is more closely connected with another country, in which case the law of that other country shall apply.

Judgment

Both the Haarlem First Instance Court and the Amsterdam Court of Appeal acknowledged that Turkish law was the chosen law and held that the Netherlands was the habitual place of work. These aspects were not disputed before the Dutch Supreme Court.

Turistik Hava turned to the Supreme Court arguing that the Court of Appeal had not correctly assessed Article 8(4). Turistik Hava had argued that the habitual place of work – the Netherlands – should have been put aside as from the circumstances as a whole the contract was more closely connected to Turkey, so that Turkish law should apply. It put forward several circumstances supporting this claim. Amongst these arguments were the claim that the co-pilot paid his wage taxes in Turkey, that he paid his social security contributions in Turkey and that the salary was set in accordance with Turkish law. According to Turistik Hava, the Court of Appeal should have considered all these factors in its decision, but had failed to do so.

The Supreme Court, with regards to the question whether a contract is more closely connected with a country other than that in which the work is habitually carried out, referred to the ECJ ruling in *Schlecker* (12 September 2013, C|64/12). According to the ECJ ruling in *Schlecker*, the national court must take account of all the elements which define the employment relationship. Among the significant factors suggestive of a close connection with a country are, in particular, the country in which the employee pays taxes on his income and where 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. [See ECJ 12 September 2013, Case C-64/12, Schlecker/Boedeker, ECLI:EU:C:2013:551, paras. 40-41.]

The Supreme Court observed that the Court of Appeal had taken into account the same circumstances to deny that the contract was more closely connected to Turkey than to the Netherlands (Article 8(4)) as it did to decide that the Netherlands was the habitual place of work (Article 8 (2)). The Court of Appeal had mentioned some of the arguments that were put forward to support Turistik Hava's claim that the contract was more closely connected to Turkey. However, the Court of Appeal had not explicitly taken into account these arguments (where the co-pilot paid his wage taxes, the social security of which country he was covered by and the parameters relating to the salary determination) in its ruling on the matter of whether or not Article 8(4) would be triggered. Hence, the Court of Appeal had failed to take into account some of the elements suggestive of a close connection to Turkey. The case was referred back to a different Court of Appeal (The Hague).

Commentary

This is an interesting case as the Supreme Court applied the ECJ's Schlecker judgment quite carefully. The Advocate General's opinion (ECLI:NL:PHR:2019:1467) is perhaps even more interesting, as he tried to color the ECJ's criteria introduced in that judgment.

Schlecker application

The Court of Appeal had taken a subset of the facts that parties had put forward, based on which it found that mandatory provisions of Dutch law applied as the Netherlands were the habitual place of work and thus the objectively applicable law following Article 8(2). The same subset of facts did not suggest that the contract was more closely connected with Turkey so that Article 8(4) was not triggered. However, the Court of Appeal had not explicitly explained the weight of various elements the ECJ had brought forward in *Schlecker*. In line with *Schlecker*, the Supreme Court rightly found that the Court of Appeal had failed to properly take these considerations into account, the more because Turistik Hava had put forward relevant statements on the matter.

This is the second time in a short period that the Supreme Court called a Court of Appeal to order. In a similar way, in November 2018 (ECLI:NL:HR:2018:2165) it overturned a judgment from the Den Bosch Court of Appeal which had unjustly based the application of both Article 8(2) and (4) on the same subset of facts. [This ruling was addressed in another EELC case report. See: A. Zwanenburg and J.H. Even, 'How to interpret the Posting of Workers Directive in the cross-border road transport sector? Dutch Supreme Court asks the ECJ for guidance (NL)', EELC 2019/20.] This suggests that courts must treat each subsection of Article 8 separately and that it should consider the relevant elements for each subsection explicitly and separately – and that the relevant elements taken into account in the respective tests – and their weight – are different.

The Supreme Court referred the case back to the The Hague Court of Appeal, which must verify the parties' statements on taxes, social security contributions and the parameters relating to salary determination and other working conditions and then decide again which is the objectively applicable law. This will boil down to the question whether or not the contract is more closely connected to Turkey than to the habitual place of work, which is no longer disputed as being the Netherlands. In his opinion, the Advocate General already shed his light on some of the issues that can be taken into consideration.

For example, he noted that the ECJ speaks about taxes "on the income from [the employee's] activity". This is relevant as the employee had asserted that he paid income tax in the Netherlands, whereas the employer had stated that the actual wage taxes were deducted in Turkey. The Advocate General rightly pointed out that income tax is a broad concept which, for example, also includes revenue from capital, thereby suggesting that the Court of Appeal must investigate this.

Regarding the parameters relating to salary determination, the Advocate General noted that in this case parties had agreed on a net salary, which is highly uncommon in the Netherlands, where employment contracts almost invariably refer to gross salaries.

Hierarchy between Article 8(2) and 8(4) and the ratio of employee protection?

Even though not specifically questioned in this ruling before the Supreme Court (which boils down to the question whether the Court of Appeal took into account the relevant elements in applying the different factors of Article 8), the case does give rise to the discussion on a possible hierarchy between Article 8(2) and 8(4). Should Article 8(4) be construed narrowly? Especially the Advocate-General in his opinion argues that this is the case. In his view, there is only limited room for the applicability of Article 8(4), which he considers the exception to the rule of the habitual place of work.

To support his view, the Advocate-General points to the choice of wording in the Supreme Court's previous decision from November 2018. In this ruling, the Supreme Court stated that when there is a habitual place of work, it should be clear from the circumstances that there is a closer connection to another country that justifies an exception to the rule that the law of the habitual place of work is applicable. The Supreme Court seems to suggest that the fundamental relationship between Article 8(2) and 8(4) is that of the rule and exception. The closer connection with another country should be obvious, and requires weighty circumstances according to the Advocate-General.

This hierarchy does not necessarily seems apparent from Schlecker, where the ECJ held that the habitual place of work must be established before the rule of (the contemporary) Article 8(4) is applied "where a contract is more closely connected with a State other than that in which the work is habitually carried out" [paragraphs 35-36] but does not explicitly mention nor suggest a hierarchy between these two subsections. What's more, Advocate-General Wahl even explicitly prevailed the view of no hierarchical relationship between art. 8(2) and 8(4) over the view that the relationship is that of 'rule and exception' in paragraphs 42-44 of his opinion in Schlecker/Boedeker.

Nevertheless, the wordings of the Dutch Supreme Court rulings and the Advocate-General in this case law seem to suggest a hierarchy between Article 8(2) and 8(4) after all. The reasoning is that employees should be protected as the weaker party, for which the Advocate-General refers to the Koelzsch judgment (ECJ 15 March 2010, C-29/10).

In deciding whether the purpose of employee protection should determine the objectively

applicable law, the Advocate General considered it relevant where the employee is protected from. He noted that Article 8(2) can protect employees against 'artificial arrangements', where a worker is (only) formally employed by an employer established in a low-wage country. [Perhaps a better example would have been a country with weak employee protection, for example against dismissal.] With the term 'artificial arrangements', the Advocate General seems to suggest that employers' tries to invoke the Article 8(4) exception by setting up a construction in which all administrative formalities (such as taxes and social security payments) point to a desirable applicable law system, be reviewed critically. Even though the Advocate-General does not elaborate on this further, we understand this observation in the light of the assumption that employers have the possibility to steer (to a certain extent) the country where social security contributions and taxes are being paid, which are according to *Schlecker* significant factors suggestive of a close connection to another country. [Relevant for the EU coordination of social security are the social security coordination rules as laid down in Regulation no. 883/2004 and Regulation no. 987/2009. The rules on the country were taxes are being paid stem from tax conventions, often inspired on the OECD Model Convention on Income and Capital. And of course, a choice for a country and its law system may be dictated by other considerations as well, both legal (e.g. aviation regulations) and business-wise (e.g. preference to have the payroll centralized).]

However, it seems that the Advocate-General is not letting employee protection prevail in all situations. After his consideration set out in the previous paragraph, he noted that courts should refrain from trying to protect achievements of Dutch employment law at all costs. He illustrated this with the highly employee-protective Dutch dismissal law. Imagine an employee taking a job with a foreign rather than a domestic employer, because his net income will be higher solely because of taxes and social security contributions. The Advocate General wondered whether such employee deserves the same protection against dismissal as an employee who is directly employed by a Dutch company. He further suggested that the employee's nationality or place of residence should not matter in this situation. After all, if the co-pilot would have been a UK or German citizen who simply happened to live in Amsterdam already because of a prior job, would the need for Dutch protection against dismissal have imposed itself in a similar way?

These considerations suggest that the Advocate-General values the ratio of employee protection when determining the objectively applicable law, but not at all costs: no gain without pain.

Comment from other jurisdiction

Austria (Hans Georg Laimer and Lukas Wieser, Zeiler Floyd Zadkovich): No Austrian Supreme Court case law currently exists regarding the application of Article 8(4) Rome I. Austrian legal scholars argue that Article 8(4) only applies as an exception to the general rules under Article 8(2), (3) Rome I (*cf. Wolfsgruber-Ecker* in Neumayr/Reissner,ZellKomm3 Art 9 Rom I-VO Rz 17).

For an assessment whether Article 8(4) Rome I applies as an exception to the general rules it is our view also that all facts which define the employment relationship are to be taken into account by a court. Hence, it is in our view comprehensible that the Dutch Supreme Court referred the case back to the lower instance court to base its decision on all facts which define the employment relationship.

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