Anonymised version

Case C-595/20

Request for a preliminary ruling

Date lodged:

13 November 2020

Referring court or tribunal:

Oberster Gerichtshof (Austria)

Date of the decision to refer:

28 September 2020

Appellant:

UE

Respondents:

ShareWood Switzerland AG

VF

REPUBLIC OF AUSTRIA […]

OBERSTER GERICHTSHOF (SUPREME COURT OF JUSTICE, AUSTRIA)

The Supreme Court of Justice, sitting as the court of appeal on points of law under labour and social legislation […] in the case between the appellant, UE, […], […] and the first respondent, ShareWood Switzerland AG, […], Zurich, […] and the second respondent, VF, […], […], the value in dispute being EUR 202 045.38 plus interests and costs, further to the appeal on a point of law lodged by the appellant against judgment given on 25 February 2020 by the Oberlandesgericht Wien (Higher Regional Court, Vienna), sitting as appeal court, […] upholding judgment given on 9 September 2019 by the Handelsgericht Wien (Commercial Court, Vienna) […], […],

makes the following

O r d e r:

I. The following question is referred to the Court of Justice of the European Union for a preliminary ruling pursuant to Article 267 TFEU: **[Or. 2]**

Is Article 6(4)(c) of Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations to be interpreted as meaning that a contract for the purchase of teak and balsa trees between an undertaking and a consumer, which is intended to confer ownership of the trees, which are then managed, harvested and sold for profit, and which includes for that purpose a lease agreement and a service agreement, is to be regarded as 'a contract relating to a right *in rem* in immovable property or a tenancy of immovable property' within the meaning of that provision?

II. […].

G r o u n d s:

I. Facts:

The first respondent is a public limited company under Swiss law. The second respondent is a member of its board of directors and its chief executive officer. The first respondent offers investments in South American hard and exotic wood plantations.

Between January 2012 and June 2014, the appellant, a consumer resident in Vienna, executed a framework agreement with the first respondent and a total of four purchase contracts for the acquisition of teak and balsa trees in Brazil. The four contracts were for the purchase of 705 teak trees costing EUR 67 328.85 (275551-V1), **[Or. 3]** 2 690 teak trees costing EUR 101 716.53 (275551-V2), 2 600 teak trees costing EUR 111 583.34 (275551-V3) and 1 860 balsa trees costing EUR 32 340 (275551-V4). The framework agreement also included a leasing agreement and a service agreement. The ground rent for the leasing agreement, which granted the right to allow the trees to grow, was included in the purchase price. Under the service agreement, the appellant instructed the first respondent to manage, administer, harvest and sell the trees and to remit the net return on the timber to him. The difference compared to the gross return, expressed as a percentage of the return, was retained by the first respondent as its fee for those services.

The first respondent advertised the investment as offering a secure production of timber and ownership of the trees, a return of triple the purchase price and a high yield of up to 12% per annum at relatively low risk.

The framework agreement signed by the first respondent and the appellant in 2012 included the following terms […]:

'3.1. SWS (first respondent) shall sell the trees in the SWS and SWB plantations in its own name and on its own account to the PURCHASER. SWS undertakes to transfer ownership of the trees to the PURCHASER on payment of the purchase price.

3.2. The PURCHASER shall purchase individually identified trees already planted. Trees are individually identified through to harvest and sale by tree number, plot number, parcel number and plantation number, recorded in an inventory of trees.

[…]

4.2. Once payment has been received, a tree title deed recording the individual identification markers of the trees sold shall be served on the PURCHASER **[Or. 4]** *in confirmation of completion of the sale.*

[…]

7. Ground lease

7.1. On purchasing the trees, the PURCHASER shall simultaneously lease back the ground (see individual contract) for as long as the trees sold by SWS are standing on them or for the term stipulated in the individual contract, whichever is the sooner. The lease shall only confer the right to allow the trees sold to grow.

7.2. The ground rent is included in the purchase price.

[…]

7.3. The lease can only be transferred if the trees are resold. Sub-leasing is prohibited.

8. Resale of the trees by the PURCHASER

8.1. The PURCHASER may sell and transfer ownership of his trees to a third party at any time with or without a service agreement. The PURCHASER promises to transfer the ground lease to the third party and to ensure that the third party promises to do likewise.

[…]

9. Value retention in purchased trees

9.1. SWS recommends that the trees be tended to regularly to ensure they retain and increase their value. SWS offers that service under the service agreement.

[…]

11. With service agreement

11.1. In entering into a service agreement with SWS, the PURCHASER instructs SWS to manage, administer, tend to, harvest and sell the trees sold in accordance with plantation management policy and international standards on **[Or. 5]** *sustainable plantation management and to remit the net return achieved from the timber sales to the account stipulated by the PURCHASER. SWS shall also discharge all obligations pursuant to the ground lease.*

[…]

11.9. SWS shall decide, on the PURCHASER's behalf and in accordance with its plantation management policy, which trees are to be harvested in which years and shall advise the PURCHASER accordingly prior to the harvest. Unless the PURCHASER rejects the harvesting proposal within 10 days of receipt of the advice by post or email, the proposal shall be construed as accepted.

[…]

15.1. SWS shall insure the land and the teak trees (but not the other trees) against fire, lightning strike, gales, precipitation and frost damage for the PURCHASER and for itself for the first 4 years after planting. The PURCHASER acknowledges that insurance shall not cover losses of less than 10% of the teak trees.

[…]

24.1. The framework agreement and each individual agreement shall be governed by Swiss substantive law, to the exclusion of (i) international conventions, including the United Nations Convention on Contracts for the Sale of International Goods of 11 April 1980 (CISC) and (ii) conflict of law rules.'

Contract V3 was cancelled by agreement between the appellant and the first respondent.

II. Forms of order sought and arguments of the parties: [Or. 6]

The **appellant** is seeking payment by the respondent jointly and severally of EUR 201 385.38 plus interest and costs (to date) in return for production of all the tree deeds and the possible transfer of all rights and obligations pursuant thereto. He argues that he (also) has a right of cancellation of contracts V1, V2 and V4 and to compensation under Austrian law, for example under Paragraph 3 of the Konsumentenschutzgesetz (Law on Consumer Protection, 'the KSchG'), in the version that applied prior to the Verbraucherrechte-Richtlinie-Umsetzungsgesetz (Law on the implementation of the Consumer Rights Directive, Federal Law Gazette I 2014/33), and that the first respondent failed to discharge its obligation under the contract of sale to obtain ownership of the trees for the appellant.

The **respondents** are contesting the action and claim that it should be dismissed.

III. Previous proceedings:

The **court of first instance** dismissed the forms of order sought. In doing so, it held that the contracts are to be regarded as consumer contracts within the meaning of Article 6 of Regulation (EC) No 593/2008 (the Rome I Regulation); that a choice of law is permissible under Article 6(2), but that, in making that choice, it is not possible to derogate from the consumer protection law that would have necessarily applied in the absence of choice (in this case Austrian law); that, according to Article 6(4)(c) of the Rome I Regulation, however, Article 6(2) does not apply to contracts relating to a right *in rem* in immovable property or a tenancy of immovable property; that the question of what constitutes immovable property has to be interpreted in compliance with EU law; that it would appear that the Court has not yet established any case-law on a matter such as this; that, according to point 45 of the Explanatory notes on **[Or. 7]** EU VAT place of supply rules on services connected with immovable property that entered into force in 2017, goods that cannot move or be moved easily are immovable goods; that, as in this case, the trees are trees that have to grow for years in order to be harvested for a profit, not nursery trees or suchlike that must be held in bundles on standby for shipment, it must be assumed for this question that the contracts are for the purchase of immovable goods; that the ground lease agreement also triggers the exemption rule in Article 6(4)(c) of the Rome I Regulation and that Swiss law therefore applies.

The **court of appeal** did not uphold the appellant's appeal. In particular, it concurred with the finding by the court of first instance that the contractual relationship between the appellant and the first respondent is governed by Swiss law further to the choice of law made.

The **Supreme Court of Justice** is now required to rule on the appellant's appeal on a point of law against that judgment. The appellant has again based his claims, in the appeal on a point of law, on Austrian consumer protection law. If the assumptions by the lower courts that the framework agreement and the individual contracts fall under the exemption enacted in Article 6(4)(c) of the Rome I Regulation was incorrect, at least some of the grounds for the claim require further examination.

IV. Legal basis:

Basis in EU law:

The relevant provisions of the Rome I Regulation read as follows:

'Article 3

Freedom of choice **[Or. 8]**

1. A contract shall be governed by the law chosen by the parties. The choice shall be made expressly or clearly demonstrated 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 to part only of the contract. […]

Article 6

Consumer contracts

1. Without prejudice to Articles 5 and 7, a contract concluded by a natural person for a purpose which can be regarded as being outside his trade or profession (the consumer) with another person acting in the exercise of his trade or profession (the professional) shall be governed by the law of the country where the consumer has his habitual residence, provided that the professional:

a) pursues his commercial or professional activities in the country where the consumer has his habitual residence, or

b) by any means, directs such activities to that country or to several countries including that country,

and the contract falls within the scope of such activities.

2. Notwithstanding paragraph 1, the parties may choose the law applicable to a contract which fulfils the requirements of paragraph 1, in accordance with Article 3. Such a choice may not, however, have the result of depriving the consumer of the protection afforded to him by provisions that cannot be derogated from by agreement by virtue of the law which, in the absence of choice, **[Or. 9]** *would have been applicable on the basis of paragraph 1.*

[…]

4. Paragraphs 1 and 2 shall not apply to:

[…]

c) a contract relating to a right in rem in immovable property or a tenancy of immovable property other than a contract relating to the right to use immovable properties on a timeshare basis within the meaning of Directive 94/47/EC;

[…].'

V. Questions referred

1. By his appeal on a point of law, the appellant challenges the finding of the lower courts on the applicable law with the argument that this is a 'hybrid contract for immovable property-related investments in raw materials' which does not fall under the exemption enacted in Article 6(4)(c) of the Rome I Regulation.

2.1 It is common ground that the contractual relationship between the appellant and the first respondent falls within the scope of Article 6(1)(b) of the Rome I Regulation. Thus, Austrian substantive law (as the law of the country in which the appellant has his habitual residence) should apply to the framework agreement and the individual agreements. Although the parties agreed that Swiss law applies, Article 6(2) of the Rome I Regulation states that a choice of law may not, however, have the result of depriving the consumer of the protection afforded to him by provisions that cannot be derogated from by agreement by virtue of the law which, in the absence of choice, would have been applicable on the basis of Article 6(1). **[Or. 10]**

2.2 Inalienable rules of a contractual nature which either expressly regulate consumer protection or which provide protection for weaker parties (e.g. rules on whether contracts are contrary to good business practice) constitute rules 'that cannot be derogated from by agreement' and include the bases for the claims being made by the appellant in this case.

3.1 However, the appellant can only rely upon them if the contract does not fall under the conflict-of-laws exemption from consumer protection in Article 6(4)(c) of the Rome I Regulation.

Article 6(4)(c) of the Rome I Regulation refers (as do Article 4(1)(c) and Article 11(5) of the Rome I Regulation) to 'a contract relating to a right *in rem* in immovable property or a tenancy of immovable property'

Therefore, the question that arises for the Supreme Court concerns the meaning of these concepts, which must be given an autonomous interpretation (see, with regard to Article 16(1) of the Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters, ([judgment of 10 January 1990, *Reichert*] C-115/88, EU:C:1990:3, paragraph 8).

3.2.1 According to the case-law of the Court, concepts are to be interpreted consistently with Article 22, point 1, of the Brussels I Regulation or Article 24, point 1, of the Brussels 1a Regulation (as stated in recital 7 of the Rome I Regulation). Recourse can be had to the findings of the Court on Article 4(3) of the Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters ([opinion of Advocate General Kokott of 31 January 2019, *Kerr*, C-25/18, EU:C:2019:86, points 34 and 36) […].

Article 4(3) of the abovementioned Brussels Convention, which is worded more narrowly than the Rome I Regulation, refers to a contract whose subject matter is **[Or. 11]** 'a right in immovable property or a right to use immovable property'. The revised wording is explained by the need for harmonisation with the wording of Article 22, point 1, of the Brussels I Regulation (Article 24, point 1, of the Brussels Ia Regulation) […].

3.2.2 Legal commentators observe that […], immovable goods should be understood exclusively to mean land and parts of it (such as a condominium), not

(in a physical sense) movable goods which the specific *lex situs* equates to immovable property (such as aircraft or ships) or immovable goods (essential constituent parts including, where appropriate, fixed attachments to an area of land).

It is therefore argued that objects fixed to an area of land may also be movable goods within the meaning of Article 4(1)(a) [Article 6(4)(c)] of the Rome I Regulation and that, more precisely, movable goods should initially be understood to mean all physical objects, that is objects limited in space, including living organisms, such as plants […].

3.3.1 These arguments suggest that the trees sold in this case are to be regarded as movable goods within the meaning of the Rome I Regulation, especially as the contract is predicated primarily on achieving a return from the sale of the timber, that is from harvesting the trees.

3.3.2 The reference to the Explanatory notes on EU VAT place of supply rules on services connected with immovable property that entered into force in 2017 (Council Implementing Regulation (EU) No 1042/2013) **[Or. 12]** is unconvincing. The legal definition of the concept of 'immovable property' in Article 13b applies 'for the application of Directive 2006/112/EC'. According to recital 18, its sole purpose is to ensure a uniform tax treatment by Member States of supplies of services connected with immovable property.

3.3.3 The essential reason for conferring exclusive jurisdiction on the courts of the State in which the property is situated is that the courts of the *locus situs* are the best placed, for reasons of proximity, to ascertain the facts satisfactorily and to apply the rules and practices which are generally those of the State in which the property is situated ([judgment of 10 January 1990, *Reichert*] C-115/88, EU:C:1990:3, paragraph 10). In that sense, the conflict-of-laws exemption from consumer protection in Article 6(4)(c) of the Rome I Regulation is also justified in commentaries by the fact that a contract relating to a right *in rem* to immovable property or a tenancy of immovable property usually has a markedly close connection with the place in which the property is situated, compared to which consumer protection considerations should take second place […]. The question arises as to whether the model applied in this case for investments in trees justifies a conflict-of-laws derogation from consumer protection.

3.3.4 The Court of Justice of the European Union has, moreover, also already clarified that an action seeking rescission of a contract for the sale of immovable property and compensation on the grounds of such rescission does not fall under Article 16(1) of the Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters, which confers exclusive jurisdiction for rights *in rem*, as the action **[Or. 13]** may have some impact on the title to the property, but is nonetheless based on the personal right ([order of 5 April 2001, *Gaillard*] C-518/99, EU:C:2001:209, paragraph 18).

Even if that case-law is applied *mutatis mutandis*, subsumption under Article 6(4)(c) of the Rome I Regulation is out of the question in this case.

3.4 The Supreme Court of Justice is of the opinion that the second precondition to an exemption under Article 6(4)(c) of the Rome I Regulation is not fulfilled simply by reason of the fact that the principal aim of the contract does not concern use of the immovable property (see [the judgment of 14 December 1977, *Sanders*] Case 73/77, EU:C:1977:208, paragraph 16). The ground lease does not serve an independent purpose separate from the purchase of the trees; its purpose is to perform and support the purchase contract and the service agreements.

4. However, it remains to bear in mind that, as a provision conferring exclusive jurisdiction, Article 24, point 1, of the Brussels Ia Regulation (like its precursor provisions) takes account of particular procedural interests which it may not be possible to apply in every case to conflict-of-law rules […]. Therefore, the interpretation of Article 6(4)(c) of the Rome I Regulation, compared to Article 24, point 1, of the Brussels Ia Regulation, may depend upon other considerations not previously taken into account which, at best, take account of the fact that a choice of law, as in this case, may not result in the application of the *lex situs* (Brazil), even though the conflict-of-laws exemption from consumer protection is clearly predicated on a close connection between the contract and the place in which the property is situated.

IV. Procedure: **[Or. 14]**

As the court of last instance, the Supreme Court of Justice is obliged to make an order for reference if the correct application of EU law is not so obvious as to leave no scope for any reasonable doubt. Such doubt is present in this case.

The proceedings on the appellant's appeal are stayed pending a ruling by the Court of Justice of the European Union.

Supreme Court of Justice,

Vienna, 28 September 2020

[…]