JUDGMENT OF THE COURT (Grand Chamber)

15 March 2011 (*)

(Rome Convention on the law applicable to contractual obligations – Contract of employment – Choice made by the parties – Mandatory rules of the law applicable in the absence of choice – Determination of that law – Notion of the country in which the employee 'habitually carries out his work' – Employee carrying out his work in more than one Contracting State)

In Case C-29/10,

REFERENCE 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 Cour d'appel de Luxembourg (Luxembourg), made by decision of 13 January 2010, received at the Court on 18 January 2010, in the proceedings

Heiko Koelzsch

v

État du Grand-Duché de Luxembourg,

THE COURT (Grand Chamber),

composed of V. Skouris, President, A. Tizzano, J.N. Cunha Rodrigues, K. Lenaerts and J.-C. Bonichot, Presidents of Chambers, A. Borg Barthet, M. Ilešič, J. Malenovský, U. Lõhmus, P. Lindh and C. Toader (Rapporteur), Judges,

Advocate General: V. Trstenjak,

Registrar: R. Şereş, Administrator,

having regard to the written procedure and further to the hearing on 26 October 2010,

after considering the observations submitted on behalf of:

– Mr Koelzsch, by P. Goergen, avocat,

– État du Grand-Duché de Luxembourg, by G. Neu and A. Corre, avocats,

– the Greek Government, by T. Papadopoulou and K. Georgiadis, acting as Agents,

– the European Commission, by A.-M. Rouchaud-Joët and M. Wilderspin, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 16 December 2010,

gives the following

Judgment

1 The present reference for a preliminary ruling concerns the interpretation of Article 6(2)(a) 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'), which relates to individual employment contracts.

2 The reference has been made in the context of an action for a declaration of liability brought by Mr Koelzsch against the État du Grand-Duché de Luxembourg (State of the Grand Duchy of Luxembourg) and based on an alleged breach of that provision of the Rome Convention by the judicial authorities of that State. Those authorities had been called upon to rule in an action for damages brought by Mr Koelzsch against the international transport undertaking Ove Ostergaard Luxembourg SA, formerly Gasa Spedition Luxembourg ('Gasa'), established in Luxembourg, with which he had entered into a contract of employment.

Legal context

The rules on the law applicable to contractual obligations and on jurisdiction in civil and commercial matters

The Rome Convention

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

'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 the Rome 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.'

5 Article 2 of the First Protocol on the interpretation by the Court of Justice of the European Communities of the Convention on the law applicable to contractual obligations, opened for signature in Rome on 19 June 1980, (OJ 1998 C 27, p. 47) ('the First Protocol on the interpretation of the Rome Convention') provides:

‘Any of the courts referred to below may request the Court of Justice to give a preliminary ruling on a question raised in a case pending before it and concerning interpretation of the provisions contained in the instruments referred to in Article 1 if that court considers that a decision on the question is necessary to enable it to give judgment:

…

(b) the courts of the Contracting States when acting as appeal courts.’

Regulation (EC) No 593/2008

6 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) has replaced the Rome Convention. This regulation applies to contracts concluded after 17 December 2009.

7 Article 8 of Regulation No 593/2008, entitled ‘Individual employment contracts’, provides:

‘1. An individual employment contract shall be governed by the law chosen by the parties in accordance with Article 3. Such a choice of law may not, however, have the result of depriving the employee of the protection afforded to him by provisions that cannot be derogated from by agreement under the law that, in the absence of choice, would have been applicable pursuant to paragraphs 2, 3 and 4 of this Article.

2. To the extent that the law applicable to the individual employment contract has not been chosen by the parties, the contract shall be governed 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. The country where the work is habitually carried out shall not be deemed to have changed if he is temporarily employed in another country.

3. Where the law applicable cannot be determined pursuant to paragraph 2, the contract shall be governed by the law of the country where the place of business through which the employee was engaged is situated.

4. 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 Brussels Convention

8 Article 5 of the Brussels Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters (OJ 1972 L 299, p. 32), as amended by the Convention of 29 November 1996 on the accession of the Republic of Austria, the Republic of Finland and the Kingdom of Sweden (OJ 1997 C 15, p. 1), (‘the Brussels Convention’) provides:

‘A person domiciled in a Contracting State may, in another Contracting State, be sued:

(1) in matters relating to a contract, in the courts for the place of performance of the obligation in question; in matters relating to individual contracts of employment, this place is that where the employee habitually carries out his work, or if the employee does not habitually carry out his work in any one country, the employer may also be sued in the courts for the place where the business which engaged the employee was or is now situated;

… .’

Regulation (EC) No 44/2001

9 Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ 2001 L 12, p. 1) has replaced the Brussels Convention.

10 Article 19 of Regulation No 44/2001 reads as follows:

‘An employer domiciled in a Member State may be sued:

1. in the courts of the Member State where he is domiciled; or

2. in another Member State:

(a) in the courts for the place where the employee habitually carries out his work or in the courts for the last place where he did so, or

(b) if the employee does not or did not habitually carry out his work in any one country, in the courts for the place where the business which engaged the employee is or was situated.’

National law

11 Article 34(1) of the Luxembourg Law of 18 May 1979 reforming works councils (*Mémorial* A 1979, No 45, p. 948) provides:

‘During their term of office, the members and alternate members of the various works councils cannot be dismissed; any dismissal notified by an employer to a member of a works council shall be treated as null and void.’

12 Paragraph 15(1) of the Kündigungsschutzgesetz (German Law on protection against dismissal) states:

‘The dismissal of a member of a works council … shall be unlawful unless facts exist which justify dismissal by the employer on a compelling ground without prior notice, and unless the authorisation required under Paragraph 103 of the Betriebsverfassungsgesetz [Law on the organisation of enterprises] is given or replaced by a judicial decision. After the term of office of a member of a works council, of a delegate … has expired, dismissal shall be unlawful … unless facts exist which justify dismissal by the employer on a compelling ground without prior notice; these provisions shall not apply where membership of a works council is terminated pursuant to a judicial decision.

After expiry of the term of office, dismissal shall be unlawful for a period of one year.’

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

13 By a contract of employment signed in Luxembourg on 16 October 1998, Mr Koelzsch, a heavy goods vehicle driver, domiciled in Osnabrück (Germany), was engaged as an international driver by Gasa. That contract contains a clause which refers to the Luxembourg Law of 24 May 1989 on contracts of employment (*Mémorial* A 1989, No 35, p. 612), and a clause conferring exclusive jurisdiction on the courts of that State.

14 Gasa is a subsidiary of Gasa Odense Blomster amba, a company established under Danish law. Its business consists in the transport of flowers and other plants from Odense (Denmark) to destinations situated mostly in Germany, but also in other European countries, by means of lorries stationed in Germany, namely in Kassel, Neukirchen/Vluyn and Osnabrück. Gasa does not have a seat or offices in Germany. The lorries are registered in Luxembourg and the drivers are covered by Luxembourg social security.

15 Following the announcement of the restructuring of Gasa and a reduction in transport activities from Germany, the employees of that undertaking set up, on 13 January 2001, a works council ('Betriebsrat') in that State, to which Mr Koelzsch was elected on 5 March 2001 as an alternate member.

16 By letter of 13 March 2001, the director of Gasa terminated Mr Koelzsch's contract of employment with effect from 15 May 2001.

The action for annulment of the dismissal and the action for damages against Gasa

17 Mr Koelzsch first of all challenged the dismissal decision in Germany before the Arbeitsgericht (Labour Court) Osnabrück, which, by a ruling of 4 July 2001, declined jurisdiction *ratione loci*. Mr Koelzsch unsuccessfully appealed against that decision to the Landesarbeitsgericht (Regional Labour Court) Osnabrück.

18 By application of 24 July 2002, Mr Koelzsch subsequently brought proceedings against Ove Ostergaard Luxembourg SA, the successor to Gasa, before the Tribunal du travail de Luxembourg (Labour Court, Luxembourg), seeking an order requiring it to pay both damages for unfair dismissal and compensation in lieu of notice and arrears of salary. He argued that, notwithstanding the choice of Luxembourg law as the *lex contractus*, the mandatory rules of German law which protect members of works councils were applicable to the dispute, within the terms of Article 6(1) of the Rome Convention, on the ground that the contract would have been governed by German law in the absence of choice by the parties. Therefore, he contended, his dismissal was unlawful inasmuch as Paragraph 15 of the German Law on protection against dismissal prohibits the dismissal of members of the works council and, according to the case-law of the Bundesarbeitsgericht (Federal Labour Court), that prohibition extends to alternate members.

19 In its judgment of 4 March 2004, the Tribunal du travail de Luxembourg held that the dispute was subject exclusively to Luxembourg law and, consequently, it applied, inter alia, the Law of 18 May 1979 reforming works councils.

20 That judgment was upheld on the substance by the judgment of 26 May 2005 of the Cour d'appel de Luxembourg (Court of Appeal, Luxembourg), which also took the view that Mr Koelzsch's application to have the German Law on protection against dismissal applied to all of his claims was new and, for that reason, inadmissible. The Cour de cassation de Luxembourg (Luxembourg Court of Cassation) also dismissed the appeal against that decision by judgment of 15 June 2006.

The action for damages against the State for breach of the Rome Convention by the judicial authorities

21 As that first set of proceedings before the Luxembourg courts was definitively terminated, Mr Koelzsch, on 1 March 2007, brought an action for damages against the État du Grand-Duché de Luxembourg pursuant to the first paragraph of Article 1 of the Loi du 1er septembre 1988 relative à la responsabilité civile de l'État et des collectivités publiques (Law of 1 September 1988 concerning the civil liability of the State and of public authorities) (*Mémorial* A 1988, No 51, p. 1000) by invoking maladministration on the part of its judicial services.

22 Mr Koelzsch claimed in particular that those judicial decisions had breached Article 6(1) and (2) of the Rome Convention in declaring that the mandatory rules of German law on protection against dismissal were not applicable to his contract of employment and by turning down his application to have a reference for a preliminary ruling made to the Court of Justice in order to clarify, in the light of the facts of the case, the criterion of the habitual place of performance of the work.

23 By judgment of 9 November 2007, the Tribunal d'arrondissement de Luxembourg (Luxembourg) (District Court, Luxembourg), declared the action to be admissible but unfounded. With regard, in particular, to the question of determining the applicable

law, that court observed that the courts dealing with the dispute between Mr Koelzsch and his employer had been correct to hold that the parties to the contract of employment had designated Luxembourg law as the applicable law, with the result that Article 6(2) of the Rome Convention was not to be taken into consideration. Furthermore, it pointed out that staff representation bodies are governed by the mandatory provisions of the country in which the employer is established.

24 On 17 June 2008, Mr Koelzsch appealed against that judgment to the referring court.

25 The Cour d'appel de Luxembourg takes the view that the appellant's criticism regarding the interpretation of Article 6(1) of the Rome Convention by the Luxembourg courts does not appear to be entirely unfounded, because those courts did not determine the law which , in the absence of choice by the parties, would be applicable on the basis of that provision.

26 It points out that, if Luxembourg law is to be considered as the law which would be applicable to the contract in the absence of choice by the parties, it is not necessary to proceed to a comparison between that law and the provisions of German law relied on by the appellant to establish which is more favourable to the employee, for the purposes of Article 6(1) of the Rome Convention. However, if German law is to be considered as the law which would be applicable in the absence of choice by the parties, the mandatory nature of the rules established by the Luxembourg law on dismissal should not prevent the application of the German law on the special protection of members of works councils against dismissal.

27 In that regard, according to the referring court, the connecting criteria set out in Article 6(2) of the Rome Convention, in particular that of the country of habitual performance of the work, do not, in contrast to the approach taken by the Tribunal d'arrondissement de Luxembourg in its judgment, allow German law to be rejected at the outset as the *lex contractus*.

28 The referring court takes the view that a need for consistency militates in favour of an interpretation of the concept of 'law of the country in which the employee habitually carries out his work', within the terms of Article 6(2)(a) of the Rome Convention, in the light of that set out in Article 5(1) of the Brussels Convention and by taking account of the wording used in Article 19 of Regulation No 44/2001 and in Article 8 of Regulation No 593/2008, which refer not only to the country in which the work is carried out but also to the country from which the employee carries out his activities.

29 In the light of those considerations, the Cour d'appel de Luxembourg decided to stay the proceedings and to refer the following question to the Court for a preliminary ruling:

'Is the rule of conflict in Article 6(2)(a) of the Rome Convention … , which states that an employment contract is governed by the law of the country in which the employee habitually carries out his work in performance of the contract, to be interpreted as meaning that, in the situation where the employee works in more than one country, but returns systematically to one of them, that country must be regarded as that in which the employee habitually carries out his work?'

The question referred for a preliminary ruling

30 As the question has been referred by an appeal court, the Court has jurisdiction to rule on the reference for a preliminary ruling pursuant to the First Protocol on the interpretation of the Rome Convention, which entered into force on 1 August 2004.

31 In order to answer the question referred, it is necessary to interpret the rule set out in Article 6(2)(a) of the Rome Convention and, in particular, the criterion of the country in which the employee 'habitually carries out his work'.

32 In that regard, it should be noted, as the European Commission has correctly pointed out, that that criterion must be interpreted autonomously, in the sense that the meaning and scope of that referential rule cannot be established on the basis of the law of the court seised, but must be established according to consistent and independent criteria in order to guarantee the full effectiveness of the Rome Convention in view of the objectives which it pursues (see, by way of analogy, Case C-125/92 *Mulox IBC* [1993] ECR I-4075, paragraphs 10 and 16).

33 Moreover, such an interpretation must not disregard that relating to the criteria set out in Article 5(1) of the Brussels Convention where they lay down the rules for determining jurisdiction for the same matters and set out similar concepts. It follows from the preamble to the Rome Convention that it was concluded in order to continue, in the field of private international law, the work of unification of law set in motion by the adoption of the Brussels Convention (see Case C-133/08 *ICF* [2009] ECR I-9687, paragraph 22).

34 With regard to the content of Article 6 of the Rome Convention, it should be noted that it lays down special conflict rules relating to individual contracts of employment. Those rules derogate from those of a general nature set out in Articles 3 and 4 of that convention, which concern, respectively, the freedom of choice of the applicable law and the criteria for determining that law in the absence of such a choice.

35 Article 6(1) of the Rome Convention limits the freedom to choose the applicable law. It provides that the parties to the contract cannot, by their agreement, exclude the application of mandatory rules of law which would govern the contract in the absence of such choice.

36 Article 6(2) of the Rome Convention lays down specific connecting criteria, which are either that of the country in which the employee 'habitually carries out his work' (a), or, in the absence of such a place, that of the seat of 'the place of business through which he was engaged' (b). Article 6(2) also provides that those two connecting criteria are not to 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.

37 In its order for reference, the Cour d'appel de Luxembourg seeks to determine, essentially, which of the first two criteria is applicable to the employment contract at issue in the main proceedings.

38 According to the État du Grand-Duché de Luxembourg, it follows from the wording of Article 6 of the Rome Convention that the situation referred to in the question submitted for a preliminary ruling, which concerns employment in the transport sector, is that referred to by the criterion set out in Article 6(2)(b) thereof. To allow the application to such a contract of the connecting rule set out in Article 6(2)(a) would, it argues, have the effect of rendering meaningless Article 6(2)(b), which refers precisely to cases in which the employee does not habitually carry out his work in a single country.

39 By contrast, according to the appellant in the main proceedings, the Greek Government and the Commission, it follows from the Court's case-law on Article 5(1) of the Brussels Convention that the consistent interpretation of the criterion of the place where the employee 'habitually carries out his work' has the result that that rule can also be applied in cases where work is carried out in several Member States. In particular, they point out that, for the purposes of specifically determining that place, the Court has made reference to the place from which the employee mainly carries out his obligations towards his employer (*Mulox IBC*, paragraphs 21 to 23) or to the place in which he has established the effective centre of his working activities (Case C-383/95 *Rutten* [1997] ECR I-57, paragraph 23), or, in the absence of an office, to the place in which the employee carries out the majority of his work (Case C-37/00 *Weber* [2002] ECR I-2013, paragraph 42).

40 In that regard, it is apparent from the Giuliano and Lagarde Report on the Convention on the law applicable to contractual obligations (OJ 1980 C 282, p. 1) that Article 6 thereof 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'.

41 The Court has also been guided by those principles in the interpretation of the rules of jurisdiction relating to those contracts which are laid down by the Brussels Convention. It has held that, in a situation in which, as in the main proceedings, the employee carries out his working activities in more that one Contracting State, it is necessary to take due account of the need to guarantee adequate protection to the employee as the weaker of the contracting parties (see, to that effect, *Rutten*, paragraph 22, and Case C-437/00 *Pugliese* [2003] ECR I-3573, paragraph 18).

42 It follows that, in so far as the objective of Article 6 of the Rome Convention is to guarantee adequate protection for the employee, that provision must be understood as guaranteeing the applicability of the law of the State in which he carries out his working activities rather than that of the State in which the employer is established. It is in the former State that the employee performs his economic and social duties and, as was noted by the Advocate General in point 50 of her Opinion, it is there that the business and political environment affects employment activities. Therefore, compliance with the employment protection rules provided for by the law of that country must, so far as is possible, be guaranteed.

43 Consequently, in the light of the objective of Article 6 of the Rome Convention, it must be held that the criterion of the country in which the employee 'habitually carries out his work', set out in Article 6(2)(a) thereof, must be given a broad interpretation, while the criterion of 'the place of business through which [the employee] was engaged', set out in Article 6(2)(b) thereof, ought to apply in cases where the court dealing with the case is not in a position to determine the country in which the work is habitually carried out.

44 It follows from the foregoing that the criterion in Article 6(2)(a) of the Rome Convention can apply also in a situation, such as that at issue in the main proceedings, where the employee carries out his activities in more than one Contracting State, if it is possible, for the court seised, to determine the State with which the work has a significant connection.

45 According to the Court's case-law, cited in paragraph 39 of the present judgment, which remains relevant to the analysis of Article 6(2) of the Rome Convention, where work is carried out in more than one Member State, the criterion of the country in which the work is habitually carried out must be given a broad interpretation and be understood as referring to the place in which or from which the employee actually carries out his working activities and, in the absence of a centre of activities, to the place where he carries out the majority of his activities.

46 Moreover, that interpretation is consistent also with the wording of the new provision on the conflict-of-law rules relating to individual contracts of employment, introduced by Regulation No 593/2008, which is not applicable to the present case *ratione temporis*. According to Article 8 of that regulation, to the extent that the law applicable to the individual employment contract has not been chosen by the parties, the contract is to be governed 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. That law remains applicable also where the employee carries out duties temporarily in another State. Furthermore, as stated in recital 23 in the preamble to that regulation, the interpretation of that provision must be prompted by the principles of *favor laboratoris* in that the weaker parties to contracts must be protected 'by conflict-of-law rules that are more favourable'.

47 It follows from the foregoing that the referring court must give a broad interpretation to the connecting criterion laid down in Article 6(2)(a) of the Rome Convention in order

to establish whether the appellant in the main proceedings habitually carried out his work in one of the Contracting States and, if so, to determine which one.

48 Accordingly, in the light of the nature of work in the international transport sector, such as that at issue in the main proceedings, the referring court must, as proposed by the Advocate General in points 93 to 96 of her Opinion, take account of all the factors which characterise the activity of the employee.

49 It must, in particular, determine in which State is situated the place from which the employee carries out his transport tasks, receives instructions concerning his tasks and organises his work, and the place where his work tools are situated. It must also determine the places where the transport is principally carried out, where the goods are unloaded and the place to which the employee returns after completion of his tasks.

50 In those circumstances, the answer to the question referred is that Article 6(2)(a) of the Rome Convention must be interpreted as meaning that, in a situation in which an employee carries out his activities in more than one Contracting State, the country in which the employee habitually carries out his work in performance of the contract, within the meaning of that provision, is that in which or from which, in the light of all the factors which characterise that activity, the employee performs the greater part of his obligations towards his employer.

Costs

51 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 (Grand Chamber) hereby rules:

Article 6(2)(a) 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, in a situation in which an employee carries out his activities in more than one Contracting State, the country in which the employee habitually carries out his work in performance of the contract, within the meaning of that provision, is that in which or from which, in the light of all the factors which characterise that activity, the employee performs the greater part of his obligations towards his employer.

[Signatures]

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* Language of the case: French.