Heiko Koelzsch

v.

État du Grand-Duché de Luxembourg

C-29/10

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

OPERATIVE PART:

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.

EXCERPT FROM THE REASONS:

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:

Heiko Koelzsch

protiv

Velikoga Vojvodstva Luksemburg

C-29/10

15. ožujka 2011.

Rimska konvencija o pravu mjerodavnom za ugovorne obveze – ugovor o radu – stranački izbor – prisilni propisi prava koje je mjerodavno ako nema stranačkog izbora – određivanje toga prava – pojam države u kojoj radnik "uobičajeno obavlja posao" radnik koji obavlja posao u više država ugovornica

IZREKA:

Članak 6. stavak 2. lit. a) Konvencije o mjerodavnom pravu za ugovorne obveze, otvorene za potpisivanje 19. lipnja 1980. u Rimu, treba tumačiti tako da ako radnik svoj posao obavlja u više država članica, država u kojoj u smislu ove odredbe uobičajeno obavlja svoj rad na temelju ugovora jest ona država u kojoj ili iz koje, uzimajući u obzir sve značajke koje obilježavaju taj posao, najvećim dijelom ispunjava svoje obveze prema poslodavcu.

IZ OBRAZLOŽENJA:

1 Zahtjev za prethodno tumačenje odnosi se na tumačenje članka 6. stavka 2. lit. a) Konvencije o mjerodavnom pravu za ugovorne obveze, otvorene za potpisivanje 19. lipnja 1980. u Rimu (SL L 266, str. 1, u daljnjem tekstu Rimska konvencija) koji se odnosi na ugovore o radu pojedinaca.

2 Postavljen je u okviru tužbe radi utvrđivanja odgovornosti koju je gospodin Koelzsch podigao protiv Velikog Vojvodstva Luksemburga i obrazložio navodnim kršenjem navedene odredbe Rimske konvencije od strane luksemburških sudova. Sudovi su trebali odlučiti o tužbi za naknadu štete koju je tužitelj u glavnom postupku podnio protiv međunarodnog prijevoznog poduzeća Ove Ostergaard Luxembourg SA, ranije Gasa Spedition Luxembourg (u daljnjem tekstu Gasa) sa sjedištem u Luksemburgu, s kojim je sklopio ugovor o radu.

Pravni okvir

Propisi o mjerodavnom pravu za ugovorne obveze i o sudskoj nadležnosti u građanskim i trgovačkim predmetima

Rimska konvencija

3 Članak 3. stavak 1. Rimske konvencije propisuje:

'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.

"Na ugovor se primjenjuje pravo koje stranke izaberu. Izbor mora biti izričit ili dovoljno sigurno proizlaziti iz ugovornih odredaba ili iz okolnosti slučaja. Stranke mogu odrediti mjerodavno pravo za cijeli ugovor ili samo za neki njegov dio."

4 Članak 6. ("Pojedinačni ugovori o radu") Rimske konvencije propisuje:

"(1) Bez obzira na članak 3., izbor mjerodavnog prava stranaka za ugovor o radu ne smije dovesti do toga da se radnik liši zaštite koju mu jamče prisilni propisi prava koje bi, da nije bilo izbora prava, bilo mjerodavna po ovome članku.

(2) Iznimno od članka 4., u slučaju neizbora prava prema članku 3. za ugovore o radu mjerodavno je:

a) pravo države u kojoj radnik na temelju ugovora uobičajeno obavlja svoj rad, čak ako je privremeno upućen u drugu državu ili

b) pravo države u kojoj se nalazi poslovni nastan koji je radnika zaposlio, ako on redovito ne obavlja rad u samo jednoj državi,

osim ako iz svih okolnosti proizlazi da je ugovor o radu u bližoj vezi s nekom državom; u tom je slučaju mjerodavno pravo te druge države."

5 Prvi protokol o tumačenju Konvencije o mjerodavnom pravu za ugovorne obveze, otvorene za potpisivanje 19. lipnja 1980. u Rimu, od strane Suda Europskih zajednica (SL 1998., C 27, str. 47.) (u daljnjem tekstu: Prvi protokol o tumačenju Rimske konvencije) propisuje u članku 2.:

"Sljedeći sudovi mogu pitanje koje se javlja u postupku u kojem odlučuju i koje se odnosi na tumačenje pravila sadržanih u Konvencijama iz članka 1. uputiti Sudu EZ-a kao prethodno pitanje, ako odluku o tom pitanju smatraju neophodnom za donošenje svoje presude:

...

b) sudovi država članica ako odlučuju o pravnom sredstvu."

Uredba (EZ) br. 593/2008

6 Uredba (EZ) br. 593/2008 Europskoga parlamenta i Vijeća od 17. lipnja 2008. o pravu mjerodavnom za ugovorne obveze (Rim I) (SL L 177, str. 6) zamijenila je Rimsku konvenciju. Ova se Uredba primjenjuje na ugovore sklopljene 17. prosinca 2009. ili kasnije.

7 Članak 8. (Pojedinačni ugovori o radu) Uredbe br. 593/2008 glasi:

"(1) Za pojedinačni ugovor o radu mjerodavno je pravo koje izaberu stranke prema članku 3. Međutim, takav izbor prava ne može radnika lišiti zaštite koju mu jamče propisi koji se ne mogu isključiti sporazumom prema pravu koje bi, da nije bilo izbora, bilo mjerodavno na temelju stavaka 2., 3. i 4. ovoga članka.

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:

(2) Ako mjerodavno pravo nije izabrano, za ugovor o radu mjerodavno je pravo države u kojoj odnosno iz koje radnik uobičajeno obavlja rad na temelju ugovora. Ne smatra se da se promijenila država u kojoj se rad uobičajeno obavlja, ako je zaposlenik privremeno zaposlen u nekoj drugoj državi.

(3) Ako se mjerodavno pravo ne može utvrditi prema stavku 2., za ugovor je mjerodavno pravo države u kojoj se nalazi sjedište poslovnog nastana putem kojeg je radnik zaposlen.

(4) Ako je iz svih okolnosti slučaja jasno da je ugovor u užoj vezi s državom koja nije država navedena u stavcima 2. i 3., mjerodavno je pravo te druge države.

Bruxelleska konvencija

8 Bruxelleska konvencija od 27. rujna 1968. o sudskoj nadležnosti i ovrsi sudskih odluka u građanskim i trgovačkim predmetima (SL 1972, L 299, str. 32) u inačici izmijenjenoj Sporazumom od 29. studenog 1996. o pristupanju Republike Austrije, Republike Finske i Kraljevine Švedske (SL 1997, C 15, str. 1) (u daljnjem tekstu: Bruxelleska konvencija) u članku 5. propisuje:

"Osoba s prebivalištem u nekoj državi članici može biti tužena u drugoj državi članici:

1. ako su predmet postupka ugovor ili prava iz ugovora, pred sudom mjesta u kojemu je obveza ispunjena ili u kojemu je trebala biti ispunjena; ako su predmet postupka pojedinačni ugovor o radu ili prava iz pojedinačnog ugovora o radu, pred sudom mjesta u kojem radnik uobičajeno radi; ako radnik uobičajeno ne radi samo u jednoj državi, poslodavac može biti tužen i pred sudom mjesta u kojem se nalazi ili se nalazilo sjedište poslovnog nastana koji je zaposlio radnika;

..."

Uredba (EZ) br. 44/2001

9 Uredba (EZ) br. 44/2001 Vijeća od 22. prosinca 2000. o sudskoj nadležnosti i priznanju i ovrsi sudskih odluka u građanskim i trgovačkim stvarima (SL 2001, L 12, str. 1) zamijenila je Bruxellesku konvenciju.

10 Članak 19. Uredbe br. 44/2001 određuje:

"Poslodavac s prebivalištem u nekoj državi članici može biti tužen:

1. pred sudovima države članice u kojoj ima prebivalište; ili

2. u drugoj državi članici

a) pred sudom mjesta u kojem radnik uobičajeno obavlja posao ili pred sudom mjesta u kojemu je zadnje uobičajeno obavljao posao,

b) ako radnik uobičajeno ne obavlja ili nije obavljao svoj posao samo u jednoj državi, pred sudom mjesta u kojemu se nalazi ili se nalazila poslovna jedinica koja ga je zaposlila."

Nacionalno pravo

11 Luksemburški Zakon o reformi personalnih odbora od 18. svibnja 1979. (*Mémorial* A 1979 br. 45, str. 948) u članku 34. stavku 1. predviđa:

'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 appli-

"Članovi različitih radničkih vijeća i njihovi zamjenici ne mogu dobiti otkaz za vrijeme svog mandata; otkaz koji poslodavac dostavlja članu radničkog vijeća je ništav."

12 Njemački Zakon o zaštiti od otkaza (*Kündigungsschutzgesetz*) u članku 15. stavku 1. određuje:

"Otkaz članu radničkog vijeća … nije dopušten, osim ako su poznate činjenice koje poslodavcu daju pravo na otkaz zbog bitnog razloga bez poštivanja otkaznog roka te je dana potrebna suglasnost prema čl. 103. Zakona o ustrojstvu poduzeća ili je ta suglasnost nadomještena sudskom odlukom. Nakon isteka mandata otkaz članu radničkog vijeća… nije dopušten… unutar jedne godine…, osim ako su poznate činjenice koje poslodavcu daju pravo na otkaz zbog bitnog razloga bez poštivanja otkaznog roka; ovo ne vrijedi, ako se istek članstva temelji na sudskoj odluci."

Glavni postupak i prethodno pitanje

13 Ugovorom o radu koji je potpisan 16. listopada 1998. u Luksemburgu, Gasa je zaposlila gospodina Koelzscha, vozača kamiona s prebivalištem u Osnabrücku, Njemačka, kao vozača u prekograničnom prometu. Taj ugovor sadrži klauzulu koja upućuje na luksemburški Zakon o ugovoru o radu od 24. svibnja 1989. (*Mémorial* A 1989 br. 35, str. 612) i klauzulu kojom se određuje isključiva nadležnost sudova te države.

14 Gasa je društvo kći tvrtke Gasa Odense Blomster amba, društva osnovanog po danskom pravu. Predmet poslovanja je prijevoz cvijeća i drugih biljaka iz Odensea (Danska) na odredišta prije svega u Njemačkoj, ali i u drugim europskim zemljama, pomoću teretnih vozila čija su parkirna mjesta u Njemačkoj, među ostalim u Kasselu, Neukirchen-Vluynu i Osnabrücku. Gasa u Njemačkoj nema ni sjedište ni poslovne prostorije. Teretna su vozila registrirana u Luksemburgu, vozači su uključeni u luksemburški sustav socijalnog osiguranja.

15 Nakon najave restrukturiranja Gase i smanjenja vožnji transportnih vozila s polazišta u Njemačkoj, zaposlenici tog poduzeća u Njemačkoj 13. siječnja 2001. osnovali su radničko vijeće u koje je gospodin Koelzsch 5. ožujka 2001. izabran kao zamjenski član.

16 Dopisom od 13. ožujka 2001. direktor Gase otkazao je ugovor o radu gospodina Koelzscha s danom 15. svibnja 2001.

Tužba protiv Gase radi poništenja otkaza i naknade štete

17 Tužitelj je osporio otkaz najprije u Njemačkoj pred Sudom za radne sporove (*Arbeitsgericht*) u Osnabrücku, koji se odlukom od 4. srpnja 2001. proglasio mjesno nenadležnim. Na to je gospodin Koelzsch uložio žalbu pri Zemaljskom sudu za radne sporove (*Landesarbeitsgericht*) u Osnabrücku koja je međutim odbačena.

18 Gospodin Koelzsch 24. srpnja 2002. na luksemburškom Sudu za radne sporove (*Tribunal du travail de Luxembourg*) podnio je tužbu protiv Ove Ostergaard Luxembourg SA, koja je pravni sljednik Gase, tužbenim zahtjevom da se to društvo osudi na isplatu naknade štete zbog bespravnog otkaza, kao i otpremnine za otkaz i zaostale plaće. Naveo je da se prema članku 6. stavku. 1. Rimske konvencije trebaju primijeniti prisilna pravila

cable 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.

njemačkog prava o zaštiti članova radničkih vijeća, bez obzira na izbor luksemburškog prava kao mjerodavnog prava za ugovor, jer bi se na ugovor primjenjivalo njemačko pravo, da stranke nisu izabrale mjerodavno pravo. Otkaz koji je primio stoga smatra protupravnim, jer članak 15. njemačkog Zakona o zaštiti od otkaza zabranjuje otpuštanje članova radničkog vijeća, a prema praksi Saveznog suda za radne sporove (*Bundesarbeitsgericht*) to vrijedi i za zamjenske članove.

19 U svojoj odluci od 4. ožujka 2004. *Tribunal du travail de Luxembourg* odredio je da se na taj pravni spor primjenjuje isključivo luksemburško pravo, stoga je među ostalim primijenio Zakon od 18. svibnja 1979. o reformi radničkih vijeća.

20 Tu je odluku, svojom odlukom od 26. svibnja 2005., u pogledu sadržaja potvrdio luksemburški Žalbeni sud (*Cour d'appel de Luxembourg*) koji je zahtjev gospodina Koelzscha da se na njegova ukupna prava primjenjuje njemačko pravo ocijenio novim i time nedopuštenim. Luksemburški Kasacijski sud (*Cour de cassation de Luxembourg*) također je odbacio pravno sredstvo protiv takve odluke, svojom odlukom od 15. lipnja 2006.

Tužba na utvrđenje odgovornosti države zbog kršenja Rimske konvencije od strane sudova

21 Nakon što je definitivno okončan prvi postupak pred luksemburškim sudovima, gospodin Koelzsch 1. ožujka 2007. na temelju članka 1. stavka 1. Zakona od 1. rujna 1988. o građanskopravnoj odgovornosti države i javnopravnih tijela (*Mémorial* A 1988 br. 351, str. 1000) podigao je tužbu na naknadu štete protiv države Velikog Vojvodstva Luksemburg, zbog lošeg funkcioniranja luksemburških pravosudnih službi.

22 Gospodin Koelzsch, među ostalim, istaknuo je da su sudovi navedenim odlukama prekršili članak 6. stavke 1. i 2. Rimske konvencije time što su prinudna pravila njemačkog Zakona o zaštiti od otkaza proglasili nemjerodavnim te odbili zahtjev za prethodnim tumačenjem prema Sudu Europskih zajednica, kako bi se precizirao kriterij mjesta uobičajenog obavljanja posla s obzirom na okolnosti dotičnog slučaja.

23 Odlukom od 9. studenog 2007. luksemburški Okružni sud (*Tribunal d'arrondissement de Luxembourg*) proglasio je tužbu dopuštenom, ali neopravdanom. Posebice što se tiče utvrđivanja mjerodavnog prava, sudovi koji su odlučivali o pravnom sporu između gospodina Koelzscha i njegova poslodavca – smatra taj sud – ispravno su odlučili da su stranke ugovora o radu izabrale luksemburško pravo kao mjerodavno pravo, tako da ne treba uzeti u obzir članak 6. stavak 2. Rimske konvencije. Osim toga, na predstavnička tijela zaposlenika treba primijeniti prisilne propise one države u kojoj je sjedište poslodavca.

24 Gospodin Koelzsch 17. lipnja 2008. uložio je žalbu protiv te odluke kod suda koji je i uputio prethodno pitanje.

25 Prema mišljenju *Cour d'appel de Luxembourg*, žaliteljeva kritika takva tumačenja članka 6. stavka. 1. Rimske konvencije od strane luksemburških sudova nije sasvim neopravdana, jer oni ne bi ni utvrđivali na temelju te odredbe koje je mjerodavno pravo, da stranke nisu izabrale mjerodavno pravo.

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 determin-

26 Da stranke nisu izabrale mjerodavno pravo te da je stoga mjerodavno luksemburško pravo, ne bi bilo neophodno uspoređivati luksemburški zakon s odredbama njemačkog zakona na koje se tužitelj poziva, kako bi se utvrdilo pravo koje je povoljnije za radnika u smislu članka 6. stavka 1. Rimske konvencije. No, kada bi se, da stranke nisu izabrale mjerodavno pravo, primjenjivalo njemačko pravo, prisilna narav luksemburških propisa o otkazu ne bi smjela spriječiti primjenu njemačkih propisa o posebnoj zaštiti od otkaza za članove radničkog vijeća.

27 Za razliku od odluke *Tribunal d'arrondissement de Luxembourg*, poveznice predviđene u članku 6. stavku 2. Rimske konvencije, a posebno kriterij države uobičajenog obavljanja posla, ne dopuštaju da se unaprijed isključi njemačko pravo kao mjerodavno pravo za ovaj ugovor.

28 Pojam "pravo države u kojoj radnik na temelju ugovora uobičajeno obavlja svoj rad" određen u članku 6. stavku 2. lit. a) Rimske konvencije, potrebno je radi koherentnosti tumačiti u svjetlu pojma kako ga određuje članak 5. stavak 1. Bruxelleske konvencije i uzimajući u obzir formulaciju upotrijebljenu u članku 19. Uredbe br. 44/2001 i u članku 8. Uredbe br. 593/2008, gdje ne postoji samo uputa na državu u kojoj se obavlja posao, nego i na državu iz koje radnik obavlja svoj posao.

29 S obzirom na ta razmatranja, *Cour d'appel de Luxembourg* odlučio je prekinuti postupak i Europskom sudu postaviti sljedeće prethodno pitanje:

Treba li kolizijsko pravilo određeno u članku 6. stavku 2. lit. a) Rimske konvencije, prema kojemu je za ugovore o radu mjerodavno pravo one države u kojoj radnik na temelju ugovora uobičajeno obavlja svoj rad, tumačiti tako da se ako radnik svoj posao obavlja u više država, ali se redovito vraća u jednu, ta država mora smatrati onom u kojoj radnik uobičajeno obavlja svoj posao?

O pitanju iz zahtjeva za prethodnim tumačenjem

30 Kako je pitanje postavio sud koji odlučuje o pravnom sredstvu, prema Prvom protokolu o tumačenju Rimske konvencije koji je stupio na snagu 1. kolovoza 2004., Sud EZ-a nadležan je za odluku o prethodnom pitanju.

31 Kao odgovor na prethodno pitanje treba tumačiti pravilo predviđeno u članku 6. stavku 2. lit. a) Rimske konvencije, a posebno kriterij države u kojoj radnik "uobičajeno obavlja svoj rad".

32 Kako je Europska komisija s pravom istaknula, taj kriterij treba protumačiti autonomno u tom smislu što se sadržaj i doseg te reference ne mogu odrediti na temelju *lex fori*, već se moraju utvrditi pomoću jedinstvenih i autonomnih kriterija, kako bi se osigurala puna djelotvornost Konvencije glede njenih ciljeva (usp. presude od 13. srpnja 1993., *Mulox* IBC, C-125/92, [1993] ECR I-4075, točke 10. i 16.).

33 Osim toga, takvo tumačenje ne smije zanemariti tumačenje kriterija predviđenih člankom 5. stavkom 1. Bruxelleske konvencije, ako oni određuju pravila o sudskoj nad-

ing 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'.

ležnosti za ista područja i ustanovljuju slične pojmove. Iz preambule Rimske konvencije naime proizlazi da je ona sklopljena kako bi se nastavilo ujednačavanje na području međunarodnog privatnog prava, započeto Bruxelleskom konvencijom (usp. presudu od 7. listopada 2009., *ICF*, C-133/08, [2009] ECR I-978, točka 22.).

34 Sadržajno članak 6. Rimske konvencije predviđa posebne kolizijske norme za pojedinačne ugovore o radu. Te se norme razlikuju od općih kolizijskih normi iz članaka 3. i 4. iste Konvencije koje se odnose na slobodan izbor mjerodavnog prava, odnosno kriterije za određivanje mjerodavnog prava, ako ono nije izabrano.

35 Člankom 6. stavkom 1. sloboda izbora mjerodavnog prava se ograničava. Ta odredba predviđa da ugovorne strane ne mogu isključiti primjenu prinudnih odredaba onoga prava koje bi bilo mjerodavno za ugovor da ga strane nisu izabrale.

36 Članak 6. stavak 2. Rimske konvencije postavlja posebne poveznice, naime onu države u kojoj radnik "uobičajeno obavlja svoj rad" (točka a), ili ako takvo mjesto ne postoji, "poslovni nastan koji je radnika zaposlio" (točka b). Osim toga, u ovom se stavku propisuje da te dvije poveznice nisu mjerodavne, ako iz sveukupnih okolnosti proizlazi da je ugovor o radu ili radni odnos uže povezan s nekom drugom državom; u tom slučaju mjerodavno je pravo te druge države.

37 Prethodnim pitanjem *Cour d'appel de Luxembourg* želi doznati koji je od prvih dvaju kriterija mjerodavan za ugovor o radu o kojemu se radi u glavnom postupku.

38 Prema mišljenju koje zastupa Veliko Vojvodstvo Luksemburg, iz riječi članka 6. Rimske konvencije proizlazi da je slučaj za koje je postavljeno prethodno pitanje, a koji se odnosi na rad u transportnom sektoru, onaj za koji vrijedi kriterij postavljen u članku 6. stavku 2. točka b). Kada bi se na takav ugovor primijenilo pravilo iz članka 6. stavka 2. točke a), tvrdi Luksemburg, odredba iz članka 6. stavka 2. točke b) koja zahvaća upravo onaj slučaj kada radnik svoj rad ne obavlja samo u jednoj državi, izgubila bi svoj smisao.

39 Prema shvaćanju tužitelja u glavnom postupku, grčke vlade i Komisije međutim iz prakse Suda EZ-a o članku 5. stavku 1. Bruxelleske konvencije proizlazi da sustavno tumačenje kriterija mjesta u kojem radnik "uobičajeno radi" dovodi do toga da se primjena tog pravila dopušta i u onim slučajevima u kojima se radi u više država članica. Posebice se Sud, kako se ističe, kod konkretnog određivanja tog mjesta nadovezao na ono mjesto iz kojeg radnik uglavnom ispunjava svoje obveze prema poslodavcu (presuda *Mulox*, *IBC*, točke 21. do 23.) ili na ono mjesto koje je postalo stvarno središte njegova profesionalnog rada (presuda od 9. siječnja 1997., *Rutten*, C-383/95, zb. 1997, I-57, točka 23.) ili, ako ne postoji neki ured, na ono mjesto gdje radnik obavlja najveći dio svog posla (presuda od 27. veljače 2002., *Weber*, C-37/00, zb. 2002, I-2013, točka 42.).

40 O tome iz izvješća o Konvenciji o mjerodavnom pravu za ugovorne obveze gospode Giuliana i Lagarde (SL 1980, C 282, str. 1) proizlazi da članak 6. Konvencije ima svrhu "pronaći povoljnije rješenje za činjenična stanja kod kojih interesi ugovornih strana nisu na istoj razini, kako bi se onoj strani koja se u tom kontekstu mora smatrati socijalno i gospodarski slabijom zajamčila primjerena zaštita".

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'.

41 Ovaj se Sud također rukovodio tim načelima kada je tumačio pravila nadležnosti određena Bruxelleskom konvencijom koja se odnose na takve ugovore. Naime, odlučio je da u slučajevima kada radnik svoj posao obavlja u više država, kao što je slučaj u glavnom postupku, treba pridati dovoljno pozornosti potrebi da se radniku kao slabijoj ugovornoj strani zajamči primjerena zaštita (usp. u tom smislu presudu *Rutten*, točka 22., i presudu od 10. travnja 2003, *Pugliese*, C-437/00, [2003] ECR I-3573, točka 18.).

42 Prema tomu, članak 6. Rimske konvencije koji treba osigurati primjerenu zaštitu radniku, treba shvatiti tako da jamči primjenu prava one države u kojoj radnik obavlja svoj posao, a ne prava države u kojoj poslodavac ima sjedište. Radnik naime obavlja svoju gospodarsku i socijalnu djelatnost u prvoj državi, a tamo, kako kaže nezavisna odvjetnica u točki 50. svoga mišljenja, poslovno i političko okruženje utječe na njegov rad. Stoga treba u najvećoj mogućoj mjeri zajamčiti poštivanje odredaba o zaštiti radnika predviđene pravom te države.

43 Uzimajući u obzir cilj članka 6. Rimske konvencije, valja ustanoviti da kriterij države u kojoj radnik "uobičajeno obavlja svoj rad" iz stavka 2. točke a) tog propisa treba tumačiti široko, dok se kriterij mjesta gdje se nalazi "poslovni nastan koji je radnika zaposlio" predviđen u članku 6. stavku 2. točki b) treba primijeniti ako sud koji odlučuje o postupku nije u stanju odrediti državu gdje se rad uobičajeno obavlja.

44 Iz navedenog proizlazi da je kriterij iz članka 6. stavka 2. točke a) Rimske konvencije primjenjiv i u slučaju poput onog o kojem se raspravlja u glavnom postupku u kojem radnik obavlja rad u više država članica, ako je sud koji odlučuje o postupku u stanju utvrditi državu s kojom je rad povezan.

45 Prema praksi Suda navedenoj u točki 39. spomenute presude koja ostaje mjerodavna za ocjenu usklađenosti s člankom 6. stavkom 2. Rimske konvencije, vrijedi da se kriterij države u kojoj se uobičajeno obavlja rad, ako se rad obavlja u više država članica, treba tumačiti široko i shvatiti tako da se odnosi na mjesto u kojem ili iz kojega radnik stvarno obavlja svoj profesionalni rad te, ako ne postoji središte djelatnosti, na mjesto u kojem obavlja najveći dio svog rada.

46 Ovo je tumačenje u skladu s tekstom nove odredbe o kolizijskim normama u odnosu na pojedinačne ugovore o radu, uvedene Uredbom br. 593/2008, koja u ovom slučaju vremenski nije primjenjiva. Prema članku 8. te Uredbe, ako stranke nisu izabrale mjerodavno pravo, za pojedinačni ugovor o radu mjerodavno je pravo države u kojoj odnosno iz koje radnik uobičajeno obavlja rad na temelju ugovora. Ono ostaje mjerodavno pravo i ako radnik privremeno obavlja posao u drugoj državi. Osim toga, tumačenje ove odredbe mora biti u skladu s načelima *favor laboratoris*, jer slabija strana ugovora mora biti zaštićena "kolizijskim pravilima koja su [za nju] povoljnija…".

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.

47 Iz navedenoga proizlazi da sud koji je uputio prethodno pitanje glede razjašnjenja pitanja je li tužitelj u glavnom postupku rad uobičajeno obavljao u jednoj državi članici te utvrđivanja u kojoj ga je uobičajeno obavljao, mora široko tumačiti poveznicu iz članka 6. stavka 2. točke a) Rimske konvencije.

48 Sud koji odlučuje o postupku mora, kako predlaže nezavisna odvjetnica u točkama 93. do 96. njezina mišljenja, voditi računa o svim aspektima koji obilježavaju djelatnost radnika, uzimajući u obzir bitne značajke rada u sektoru međunarodnog prijevoza o kojem se radi u glavnom postupku.

49 Posebice mora utvrditi u kojoj se državi nalazi mjesto odakle radnik obavlja transportne vožnje, prima upute za te vožnje i organizira svoj rad te gdje se nalaze radna sredstva. Nadalje mora provjeriti na koja se mjesta roba uglavnom prevozi, gdje se istovaruje i kamo se radnik vraća nakon svojih vožnji.

50 Stoga na pitanje valja odgovoriti da članak 6. stavak 2. točku a) Rimske konvencije treba tumačiti tako da ako radnik svoj rad obavlja u više država članica, država u kojoj u smislu te odredbe uobičajeno obavlja rad na temelju ugovora jest ona u kojoj ili iz koje on, uzimajući u obzir sve značajke koje obilježavaju tu djelatnost, najvećim dijelom ispunjava svoje obveze prema poslodavcu.