SUMMARY

ECJ 15 March 2011 (Grand Chamber), case C-29/10 (Heiko Koelzsch – v – Luxembourg), Applicable law

<p>Article 6(2)(a) of the Rome Convention means that, in a situation in which an employee works in more than one EU country, the country in which he or she habitually carries out work is that in which or from which he or she performs the greater part of his or her duties towards the employer. Note: Case C-230/10 (Saenz Morales) was withdrawn on 3 February 2001.</p>

Facts

Mr Koelzsch was a truck driver who lived in Germany. He was employed by the Luxembourg company Gasa, a subsidiary of a Danish firm. His work consisted of transporting flowers and plants from Denmark to destinations all over Europe, mainly Germany. Gasa's trucks were registered in Luxembourg but were stationed in Germany. Gasa had no seat or office in Germany. The employment contract between Gasa and Mr Koelzsch was executed in Luxembourg. It provided that Luxembourg law governed the contract and that exclusively the courts in Luxembourg had jurisdiction. In 2001, one week after he was elected as a (alternate) member of Gasa's works council, Mr Koelzsch was terminated as part of a restructuring operation. He challenged his dismissal in a German court that, however, declared itself to lack jurisdiction. Subsequently, he brought proceedings in Luxembourg, seeking damages for unfair dismissal, compensation in lieu of notice and arrears of salary. These proceedings, which began in the Labour Court and ended in the Supreme Court, are referred to below as "Proceedings I". In those proceedings, Mr Koelzsch argued that, notwithstanding the choice of law in his employment contract, the mandatory rules of German law protecting works council

members were applicable to the dispute pursuant to Article 6(1) of the Convention on the law applicable to contractual obligations (opened for signature in Rome on 19 June 1980) ("the Rome Convention"). This Article 6(1) provides that "in a contract of employment a choice of law 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". Paragraph 2 provides that, in the absence of a choice of law, an employment contract must be governed by (a) the law of the country in which the employee habitually carries out work or, if the employee does not habitually carry out work in any one country, (b) the law of the country in which the employer's place of business is situated. As Mr Koelzsch habitually worked in Germany, so he argued, the mandatory provisions of German law protecting works council members against dismissal applied. As appears below, Proceedings I ended unfavourably for Mr Koelzsch. This led him to bring a Francovich-type action before the District Court in Luxembourg, in which he sought damages against the Luxembourg government for failure by the courts in Proceedings I to apply Article 6(1) and (2). The proceedings that began with this action are referred to below as "Proceedings II".

National Proceedings

In Proceedings I, the Labour Court held that the dispute was governed exclusively by Luxembourg Law. Appeals to the Court of Appeal and the Supreme Court were unsuccessful. The Supreme Court was not willing to refer questions to the ECJ. In Proceedings II, the District Court held that the judgments in Proceedings I had been correct. On appeal, however the Court of Appeal decided that it was necessary to seek guidance from the ECJ. The Court of Appeal took the view that the concept of the "law of the country in which the employee habitually carries out his work" in the Rome Convention needs to be interpreted in the same manner as Article 5(1) of the Brussels Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters ("the Brussels Convention"), which utilise the same concept. The referring court noted that the Rome Convention was replaced in 2008 by Regulation (EC) no 593/2008 (which applies to contracts concluded after 17 December 2009) and that the Brussels Convention was replaced by Regulation (EC) no 44/2001. Although neither of these Regulations applied to the dispute in question, which arose in 2001, they can perhaps shed light on the interpretation of the Rome and Brussels Conventions.

ECJ's findings

1. The criterion of the country in which the employee "habitually carries out his work" must be interpreted autonomously, i.e. independently of the laws of the country of the court where the action is pending (§ 31-32).

2. The Rome Convention must be interpreted in line with the Brussels Convention (§ 33).

3. In essence, the issue is whether to apply Article 6(2)(a) of the Rome Convention (the place where the employee habitually carries out work, in this case, Luxembourg) or Article 6(2)(b) (the employer's location, in this case, Germany) (§ 36-37).

4. As is apparent from the Giuliano and Lagarde report [which led to the Rome Convention, PVN], Article 6 of the Rome Convention 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". In previous cases, the ECJ took this intention into account, holding that the objective of Article 6 of the Rome Convention is to guarantee, as far as possible, the applicability of the law of the Member State where the employee works rather than that of the Member State in which the employer is established. Consequently, criterion (a) (the country in which the employee habitually carries out work) must be given a broad interpretation, while criterion (b) (the employer's place of business) ought to be limited to cases where the relevant court is unable to determine the country in which the work is habitually carried out. It follows that criterion (a) can also apply in a situation where the employee carries out activities in more than one Member State, provided that it is possible to determine the State with which the work has a significant connection (§ 40-44).

5. According to the ECJ's case law on the Brussels Convention, criterion (a) must be understood as referring to the place in which or from which the employee actually carries out his or her working activities and, in the absence of a centre of activities, to the place where he or she carries out the majority of activities. That interpretation is consistent with Regulation 593/2008 (§ 45-47).

6. Accordingly, as regards the international transport sector, the referring court must take account of all the factors that characterise the employee's activities. In particular, it must determine in which Member State is situated the place from which the employee carries out transport tasks, receives instructions and organises his or her work, the place where the work tools are situated, the places where the transport is principally carried out, where the goods are unloaded and the place to which he or she returns after completion of the tasks (§ 48-49).

Ruling

Article 6(2)(a) of the Rome Convention means that, in a situation in which an employee works in more than one EU country, the country in which he or she habitually carries out work is that in which or from which he or she performs the greater part of his or her duties towards

the employer. Note: Case C-230/10 (Saenz Morales) was withdrawn on 3 February 2001.

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