

SUMMARY

ECJ (Grand Chamber) 18 October 2016, case C-135/15 (Nikiforidis), Applicable law

<p>The Rome I Regulation only applies to contracts concluded before 17 December 2009 insofar as the contract has undergone major change afterwards. It precludes overriding mandatory provisions other than those of the forum court.</p>

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Facts

Mr Nikiforidis is a teacher in a school in Germany run by Greece. His contract, which was entered into in 2008, is governed by German law. Over the period 2010-2012, his employer, the State of Greece, reduced his salary very substantially. This was done pursuant to several Greek laws, which were designed to implement the agreements between Greece and its international creditors.

National proceedings

Mr Nikiforidis brought legal proceedings before a German court, claiming reinstatement of his contractual salary. The Greek government argued that those laws reduce the pay of all public sector employees of Greece, irrespective of whether they carry out their duties in Greece or abroad. It considered that the relevant provisions of those laws meet the definition of overriding mandatory provisions within the meaning of private international law. The Bundesarbeitsgericht referred three questions to the ECJ. The first related to Article 28 of

Regulation 593/2008 on the law applicable to contractual obligations (the ‘Rome I Regulation’). This regulation replaced the 1990 Rome Convention, with the proviso in Article 28 that: “This Regulation shall apply to contracts concluded as from 17 December 2009”. In other words, the question was: which EU instrument determined the law applicable to Mr Nikiforidis’ contract: the 1980 Convention or the Rome I Convention? A second question was whether Article 9(3) of the Rome I Regulation must be interpreted as precluding overriding mandatory provisions other than those of the State of the forum or of the State where the obligations arising out of the contract had to be performed from being taken into account by the court of the forum pursuant to the national law applicable to the contract. In other words, did the Rome I Regulation prevent the German courts from applying overriding provisions of Greek law to the dispute? The third question related to the principle of sincere cooperation embodied in Article 4(3) of the Treaty on European Union.

ECJ’s findings

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In order to answer the first question, the Court had to determine whether a variation of an employment contract concluded before 17 December 2009, agreed between the parties to that contract on or after that date, could lead to a new employment contract being regarded as having been concluded between those parties on or after that date, for the purposes of Article 28 of the Rome I Regulation, so that that contract would fall within the regulation’s scope. This was not found to be the case. It was clear from the drafting history of Article 28 that the EU legislature did not wish the Rome I Regulation to apply to the future effects of contracts concluded before 17 December. Any other interpretation of Article 25 would mean that even minor variations made by the parties, on or after 17 December 2009, to a contract initially concluded before that date would be sufficient to bring that contract within the scope of the Rome I Regulation. That would be contrary to the principle of legal certainty and, more specifically, have an adverse effect on predictability of the outcome of litigation and on certainty as to the law applicable (§32-36).

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However, a contract concluded before 17 December 2009 could be subject, on or after that date, to a variation agreed between the contracting parties of such magnitude that it gives rise to the creation of a new legal relationship between the contracting parties, so that the initial

contract should be regarded as having been replaced by a new contract, concluded on or after that date, for the purposes of Article 28 of the Rome I Regulation. It was for the referring court to determine whether the contract concluded between Mr Nikiforidis and his employer underwent a variation of such magnitude on or after 17 December 2009. If it did not, the Rome I Regulation would not apply in the main proceedings (§37-38).

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Freedom of the contracting parties to choose the applicable law is a general principle laid down by the Rome I Regulation, but Article 9 derogates from that principle. It has the purpose of enabling the court of the forum to take account of considerations of public interest in exceptional circumstances. As a derogating measure, Article 9 must be interpreted strictly (§43-44).

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It was apparent from the drafting history of the Rome I Regulation that the EU legislature sought to restrict disturbance to the system of conflict of laws caused by the application of overriding mandatory provisions, other than those of the State of the forum. To permit the court of the forum to apply overriding mandatory provisions other than those expressly referred to in Article 9(2) and (3) of the Rome I Regulation would be liable to jeopardise full achievement of the Regulation's general objective, which was legal certainty in European justice. Acceptance that the court of the forum has such a power would increase the number of overriding mandatory provisions applicable by way of derogation from the general rule set out in Article 3(1) of the Rome I Regulation and would therefore affect the foreseeability of the substantive rules applicable to the contract (§45-47).

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Finally, to accord the court of the forum the power to apply overriding mandatory provisions other than those referred to in Article 9 of the Rome I Regulation could affect the objective pursued by Article 8, which was intended to ensure compliance with provisions to protect employees that are laid down by the law of the State in which he carries out his work (§48).

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On the other hand, Article 9 of the Rome I Regulation does not preclude overriding mandatory provisions of a State other than the State of the forum or the State where the obligations arising out of the contract have to be or have been performed from being taken into account

where this is provided for by a substantive rule of law applicable to the contract. The Rome I Regulation harmonises conflict-of-law rules concerning contractual obligations and not the substantive rules of the law of contract. Insofar as the latter provide that the court of the forum should take into account overriding mandatory provisions of the legal order of a State other than the State of the forum or the State of performance of the contractual obligations, Article 9 of the Regulation cannot prevent the court from taking that into account (§51-52).

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The principle of sincere cooperation does not authorise a Member State to circumvent the obligations imposed on it by EU law and does not permit the referring court to disregard the fact that the list of overriding mandatory provisions which may be given effect under Article 9 of the Rome I Regulation is exhaustive in considering the Greek provisions at issue (§54).

Judgment

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Article 28 of Regulation (EC) No 593/2008 must be interpreted as meaning that an employment contract that came into being before 17 December 2009 falls within the scope of the Regulation only insofar as that relationship has undergone a variation of such magnitude that a new employment contract must be regarded as having been concluded on or after that date. This is a matter for the referring court to determine.

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Article 9(3) of Regulation No 593/2008 must be interpreted as precluding overriding mandatory provisions other than those of the State of the forum or of the State where the obligations arising out of the contract have to be or have been performed from being applied by the court of the forum. However, it does not preclude the court from taking other overriding mandatory provisions into account as matters of fact, where this is provided for by the national law applicable to the contract. This interpretation is not affected by the principle of sincere cooperation laid down in Article 4(3) TEU.

Creator: European Court of Justice (ECJ)

Verdict at: 2016-10-18

Case number: C-135/15 (Nikiforidis)