OPINION OF ADVOCATE GENERAL TRSTENJAK delivered on 16 December 2010[1]

I — Introduction ..... I - 1599

II — Legal context ..... I - 1601

A — The Rome Convention ..... I - 1601

B — The Brussels Convention ..... I - 1602

C — European Union law ..... I - 1603

1. Rome I ..... I - 1603

2. Regulation No 44/2001 ..... I - 1604

D — National law ..... I - 1605

III — Facts, main proceedings and question referred ..... I - 1605

IV — Procedure before the Court ..... I - 1608

V — The parties' arguments ..... I - 1608

A — Jurisdiction of the Court ..... I - 1608

B — The question referred ..... I - 1608

VI — Assessment by the Advocate General ..... I - 1611

A — Introduction ..... I - 1611

B — Jurisdiction of the Court ..... I - 1612

C — The legal basis for State liability in the present case ..... I - 1612

D — Discussion of the question referred ..... I - 1614

1. The Rome Convention and the protection of the employee as the weaker party to the contract ..... I - 1615

1 — Original language of the Opinion: Slovene; language of the case: French.

2. The Court's case-law on Article 5(1) of the Brussels Convention ..... I - 1617

3. Possibility of applying the case-law relating to the Brussels Convention to the interpretation of the Rome Convention ..... I - 1619

a) Literal interpretation ..... I - 1620

b) Historical interpretation ..... I - 1621

c) Systematic interpretation ..... I - 1623

d) Purposive interpretation ..... I - 1626

e) Limits of parallel interpretation ..... I - 1626

4. Criteria to be taken into account by the national court ..... I - 1628

E — Conclusion ..... I - 1632

VII — Conclusion ..... I - 1633

I — Introduction

1. The present case concerns the interpretation of the Rome Convention of 19 June 1980 on the law applicable to contractual obligations ('the Rome Convention'),[2] which was concluded in order to establish uniform conflict-of-law rules for the Contracting States. It has increased legal certainty and dispelled uncertainty with regard to the law applicable to contractual relations. The Rome Convention was replaced by Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations[3] ('Rome I'),[4] which applies to contracts concluded

2 — OJ 1980 L 266, p. 1.

3 — OJ 2008 L 177, p. 6.

4 — See, for example, Ferrari, F., 'From Rome to Rome via Brussels: remarks on the law applicable to contractual obligations absent a choice by the parties', *Rabels Zeitschrift für ausländisches und internationales Privatrecht*, No 4/2009, who points out that this new legal instrument was not intended to introduce new rules but, on the contrary, to reformulate the existing Convention in the Regulation. See, for example, also P. Lagarde, A. Tenenbaum, 'De la convention de Rome au règlement Rome', *Revue critique de droit international privé*, No 4/2008, p. 727 *et seq*.

after 17 December 2009.[5] As the employment contract at issue in the present case was concluded in 1998, the provisions of the Rome Convention are applicable.

2. The Court of Justice of the European Union ('the Court') is asked in the present case to reply to a question referred concerning the interpretation of Article 6 of the Rome Convention in relation to the law applicable to contracts of employment. While this case is not the first in which the Court has been asked to interpret the Rome Convention,[6] it will be the first in which it interprets Article 6 of the Convention with regard to the law applicable to employment contracts.[7] In that context, the Court must first of all consider whether the case-law relating to the interpretation of Article 5(1) of the Brussels Convention may offer guidance for the interpretation of Article 6 of the Rome Convention or, to be more precise, the interpretation of the notion of the 'country in which the employee habitually carries out his work' used in that article.[8] For that purpose, the Court will have, first, to start with the fact that the two legal instruments use similar terminology and, second, to take account of the limits of a parallel interpretation of the Brussels Convention and the Rome Convention.

3. The question referred in the present case arises in the context of a dispute between Mr Koelzsch, an international lorry driver domiciled in Germany, and the Grand Duchy of Luxembourg concerning an action for damages by reason of the alleged misapplication of the provisions of the Rome Convention by the Luxembourg courts. In the context of the dispute, Mr Koelzsch submits that it is German law, not Luxembourg law, which is applicable to the question of the termination of the employment contract, relying in that respect on the mandatory rules for the protection of workers set out in German law. As the labour courts of Luxembourg applied Luxembourg law, not German law, to the

5 — Rome I, Article 28.

6 — The first judgment in which the Court interpreted the Rome Convention was that in Case C-133/08 *ICF* [2009] ECR I-9687, which concerned the interpretation of Article 4 of the Convention, which sets out the rules for determining the applicable law if the parties to the contract fail to make a choice.

7 — It should be noted that a reference of 29 July 2010 for a preliminary ruling also concerns a question on the interpretation of Article 6(2)(b) of the Rome Convention: Case C-384/10 *Voogsgeerd* (OJ 2010 C 317, p. 14). That case concerns the interpretation of the phrase 'the law of the country in which the place of business through which he was engaged is situated' within the meaning of that article, where the employee does not habitually carry out his work in any one country. By the date of delivery of the present Opinion, the Court had not given a ruling in *Voogsgeerd*.

8 — Case C-125/92 *Mulox IBC* [1993] ECR I-4075; Case C-383/95 *Rutten* [1997] ECR I-57; Case C-37/00 *Weber* [2002] ECR I-2013; and Case C-437/00 *Pugliese* [2003] ECR I-3573.

dispute, he brought an action for damages against the Luxembourg State on the ground of maladministration by its courts.

II — Legal context

A — *The Rome Convention*

4. Article 3 of the Rome Convention, entitled 'Freedom of choice', provides as follows:

'1. 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 to part only of the contract.

…'

5. Article 4 of the Convention, headed 'Applicable law in the absence of choice', provides:

'1. To the extent that the law applicable to the contract has not been chosen in accordance with Article 3, the contract shall be governed by the law of the country with which it is most closely connected. Nevertheless, a severable part of the contract which has a closer connection with another country may by way of exception be governed by the law of that other country.

…'

6. Article 6 of the Rome Convention, entitled 'Individual employment contracts', reads as follows:

'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 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.'

7. Article 1 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, [9] reads as follows:

'The Court of Justice of the European Communities shall have jurisdiction to give rulings on the interpretation of:

(a) the Convention on the law applicable to contractual obligations, opened for signature in Rome on 19 June 1980, hereinafter referred to as "the Rome Convention";

(b) the Convention on accession to the Rome Convention by the States which have become Members of the European Communities since the date on which it was opened for signature;

...'

8. Article 2 of the First Protocol on the interpretation of the Rome Convention provides as follows:

'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.'

B — *The Brussels Convention*

9. Article 5 of the 1968 Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters

9 — OJ 1998 C 27, p. 47.

('the Brussels Convention') [10] provides as follows:

'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.' [11]

10 — The 1968 Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters (OJ 1972 L 299, p. 32), as amended by the Convention of 9 October 1978 on the accession of the Kingdom of Denmark, of Ireland and of the United Kingdom of Great Britain and Northern Ireland (OJ 1978 L 304, p. 1, and – amended version – p. 77), the Convention of 25 October 1982 on the accession of the Hellenic Republic (OJ 1982 L 388, p. 1), the Convention of 26 May 1989 on the accession of the Kingdom of Spain and the Portuguese Republic (OJ 1989 L 285, p. 1) and the Convention of 29 November 1996 on the accession of the Republic of Austria, the Republic of Finland and the Kingdom of Sweden (OJ 1996 C 15, p. 1).

11 — In the original version of the Brussels Convention there were no special provisions on jurisdiction in relation to employment contracts. Such provisions were added only in 1989 with the Convention on the accession to the Brussels Convention of the Kingdom of Spain and the Portuguese Republic (San Sebastián, OJ 1989 L 285, p. 1).

C — *European Union law* [12]

1. Rome I

10. Recital 7 in the preamble to Rome I reads as follows:

'The substantive scope and the provisions of this Regulation should be consistent with Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels I) ….'

11. Article 3 of Rome I, entitled 'Freedom of choice', provides as follows:

'1. A contract shall be governed by the law chosen by the parties. The choice shall be made expressly or clearly demonstrated by the terms of the contract or the circumstances of the case. By their choice the parties can select the law applicable to the whole or to part only of the contract.

…'

12 — In the present Opinion the term 'European Union law' is used to denote both Community law and European Union law. Where provisions of primary law are cited, they are those which apply *ratione temporis*.

12. Article 8 of Rome I, entitled 'Individual employment contracts', reads as follows:

'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.'

2. Regulation No 44/2001

13. Section 5 of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction, recognition and enforcement of judgments in civil and commercial matters [13] ('Regulation No 44/2001') regulates jurisdiction in relation to individual contracts of employment. Article 18 in that section provides as follows:

'1. In matters relating to individual contracts of employment, jurisdiction shall be determined by this Section, without prejudice to Article 4 and point 5 of Article 5.

...'

14. 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

13 — OJ 2001 L 12, p. 1.

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.'

D — *National law*

15. Paragraph 15 of the Kündigungsschutzgesetz (German Law on protection against dismissal) (the KSchG), entitled 'Unzulässigkeit der Kündigung' ('unlawfulness of dismissal'), reads as follows:

'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 for a period of one year … 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.

…'

III — Facts, main proceedings and question referred

16. Mr Koelzsch, domiciled in Osnabrück (Germany), was engaged as an international lorry driver in 1998 by Gasa Spedition Luxembourg S.A. ('Gasa Spedition'), established in Luxembourg. For that purpose he and Gasa Spedition signed a contract of employment on 16 October 1998 by which they agreed that exclusive jurisdiction would be vested in the Luxembourg courts. The contract also included a provision containing a reference to the Luxembourg law on contracts of employment. [14]

14 — Article 2 of the employment contract provided that, unless either party terminated the contract before the expiry of the trial period, the contract would become a contract for an unlimited period in accordance with the Law of 24 May 1989, which is the Luxembourg law on contracts of employment (*Loi du 24 mai 1989 sur le contrat de travail*, Journal officiel du Grand-duché de Luxembourg, No. 35, 5 June 1989, p. 611).

17. Gasa Spedition is the subsidiary of the Danish company Gasa Odense Blomster A.m.b.a. Its business consists in the transport of flowers and other plants from Odense, Denmark, to various destinations situated mostly in Germany, but also in other European countries, by means of lorries stationed in three locations in Germany (Kassel, Neukirchen/Vluyn and Osnabrück). The lorries are registered in Luxembourg and the drivers are covered by Luxembourg social security.

18. On 9 November 2001 Gasa Spedition Luxembourg S.A. was taken over by the Danish company Ove Ostergaard under the name of 'Ove Ostergaard Lux S.A.'

19. Mr Koelzsch's contract of employment was terminated with effect from 15 May 2001 by means of a letter of 13 March 2001 from the managing director of Gasa Spedition. However, Mr Koelzsch stated that he was dismissed verbally with immediate effect on 23 March 2001. He stated that he was an alternate member of the works council (*Betriebsrat*) of the company of Gasa Spedition in Germany and that his dismissal was contrary to the mandatory rules of the German law on protection against dismissal. He pointed out that actual members as well as alternate members who hold a position on the works council are entitled to protection on the basis of those provisions. In this regard he invoked Paragraph 15(1) KSchG, which prohibits the dismissal of members of the works council, and on the case-law of the Bundesarbeitsgericht (Federal Labour Court) under which the prohibition of dismissal applies also to alternate members of works councils. [15]

20. Mr Koelzsch then instituted proceedings before the Arbeitsgericht (Labour Court) Osnabrück, claiming wrongful dismissal. That court declined jurisdiction *ratione loci*. Mr Koelzsch appealed against the decision, but was again unsuccessful.

21. Mr Koelzsch then brought an action before the Tribunal du travail de Luxembourg (Labour Court, Luxembourg) seeking damages for wrongful dismissal and payment of arrears of wages. He contended that, although Luxembourg law was applicable to the employment contract in general and his pay claims, German law applied to the issue of dismissal. He based that submission on the argument that he was an alternate member of the works council and that, consequently, Article 15(1) of the KSchG should apply to him as it is a mandatory rule relating to the protection of workers' rights within the meaning of Article 6(1) of the Rome Convention and could therefore not be excluded. He therefore took the view that the law applicable to the

15 — Mr Koelzsch relies on the Bundesarbeitsgericht judgment of 17 March 1988 (2 AZR 576/87).

contract should be determined on the basis of Article 6(2) of the Rome Convention.

22. The judgment of 4 March 2004 of the Tribunal du travail de Luxembourg found that Luxembourg law applied to the case as a whole. It accordingly declared the action brought by Mr Koelzsch to be partly unfounded and dismissed it as to the remainder. That ruling was upheld by the Cour d'appel (Court of Appeal) by judgment of 26 May 2005, while the Cour de cassation (Luxembourg Court of Cassation) dismissed the appeal against that decision by judgment of 15 June 2006.

23. Mr Koelzsch then brought an action against the Grand Duchy of Luxembourg before the Tribunal d'arrondissement de Luxembourg (District Court, Luxembourg), seeking damages of EUR 168 301,77, plus statutory interest, on the ground of maladministration by the courts on the basis of the Loi du 1 septembre 1988 relative à la responsabilité civile de l'État et des collectivités publiques (Luxembourg Law of 1 September 1988 concerning the civil liability of the State and of public authorities). [16] Mr Koelzsch stated that he had suffered damage by reason of the judgments of the Luxembourg courts because they had breached Article 6(1) and (2) of the Rome Convention in so far as they had failed to take account of the mandatory rules of German law on the protection of members of the works council. In addition, according to Mr Koelzsch, there had been a breach of European Union law in that his proposal to have a question referred for a preliminary ruling to the Court had been turned down. By judgment of 9 November 2007, the Tribunal d'arrondissement dismissed the action as unfounded.

24. Mr Koelzsch appealed against that judgment to the Cour d'appel ('the referring court').

25. The referring court states that the first-instance court ought to have declared Mr Koelzsch's action for damages inadmissible in so far as the judgment in the first set of proceedings, in which Mr Koelzsch had claimed that his dismissal was unlawful, had become final. According to the referring court, by his claim for damages in the present action Mr Koelzsch is in fact challenging what has become a final and conclusive ruling in the proceedings before the labour courts. However, the referring court points out that the action for damages cannot be deemed inadmissible because, in the appeal proceedings, the Grand Duchy of Luxembourg did not claim that the action was inadmissible and the referring court cannot of its own motion rule the action to be inadmissible. Since the referring court, as an appeal court, is bound by those findings of the first-instance court, it must rule on Mr Koelzsch's action and has

16 — *Journal officiel du Grand-Duché de Luxembourg*, No 51, 26 September 1988, p. 1000.

therefore decided to refer a question to the Court for a preliminary ruling.

26. In those circumstances, by order of 13 January 2010, the Cour d'appel de Luxembourg stayed the proceedings and referred the following question to the Court for a preliminary ruling pursuant to the First Protocol on the interpretation of the Rome Convention:

'Is the rule of conflict in Article 6(2)(a) of the Rome Convention of 19 June 1980 on the law applicable to contractual obligations, 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?'

IV — Procedure before the Court

27. The order for reference was lodged at the Registry of the Court on 18 January 2010. In the course of the written procedure, observations were submitted by Mr Koelzsch, the Luxembourg Government, the Greek Government and the Commission. At the hearing on 26 October 2010, Mr Koelzsch's representative, the Luxembourg Government and the Commission made submissions and answered questions put by the Court.

V — The parties' arguments

A — *Jurisdiction of the Court*

28. The issue of the Court's jurisdiction to answer the question submitted by the referring court is considered only by the Commission in its written observations. The Commission takes the view that the Court has indeed jurisdiction as the referring court is ruling in the case at issue as an appeal court within the meaning of Article 2(b) of the First Protocol on the interpretation of the Rome Convention.

B — *The question referred*

29. *Mr Koelzsch* expresses the view that, under Article 6(2) of the Rome Convention, the law applicable to a contract of employment, in the absence of choice by the parties, is the law of the country in which the employee habitually carries out his work. As the concept of the country/place where the employee 'habitually carries out his work' is the same in

the Rome Convention and the Brussels Convention, according to Mr Koelzsch that term in the Rome Convention must be interpreted in the same way as the Court has interpreted it in its case-law on the interpretation of Article 5(1) of the Brussels Convention. He points out that the case-law demonstrates that, where the employee works in more than one Contracting State, the Brussels Convention cannot be construed as meaning that the courts of each Contracting State in which the employee works have jurisdiction. [17] On the contrary, the competent court is that of the place where or from which the employee principally discharges his obligations towards his employer or the place where he has established the effective centre of his working activities. Mr Koelzsch considers that, in the case of international transport, in which the driver spends most of his time in one Contracting State, from which he organises his working activity and to which he returns systematically, the effective centre of his working activities is in that Contracting State. He takes the view that, by reference to those criteria, the effective centre of his working activity is in Germany.

30. *The Luxembourg Government* expresses the view that Article 6 of the Rome Convention must be interpreted as meaning that the choice made by the parties must not deprive the employee of the protection guaranteed by the mandatory rules of the law which objectively applies. By virtue of Article 6 of the Rome Convention, that law may be the law of the country in which the employee habitually carries out his work (Article 6(2)(a)) or the law of the country in which the place of business through which he was engaged is situated (Article 6(2)(b)). The Luxembourg Government submits that Mr Koelzsch did not habitually carry out his work in one country only, which is why the law applicable must be determined on the basis of Article 6(2)(b) of the Rome Convention. That is the reason why Luxembourg law governs the employment contract in the present case.

31. *The Greek Government* points out, first, that the Rome Convention must be construed as taking account of the provisions of Rome I and, second, that, in the interpretation of Article 6 of the Rome Convention, account must also be taken of the case-law relating to the Brussels Convention. On that basis the Greek Government adds that Article 6(2)(a) of the Rome Convention must be interpreted as meaning that, if the employee carries out his work in more than one country, but returns systematically to one of them, that country may be the one in or from which he habitually carries out his work, provided that it is at the same time the country where he has established the centre of his working activities. According to the Greek Government, this is an assessment which must be carried out by the national court. The Greek Government also observes that, if it is not possible to determine the place where the employee habitually

17 — On this point Mr Koelzsch invokes the judgments cited in footnote 8: *Mulox*, paragraphs 21 to 23, *Rutten*, paragraph 18, and *Weber*, paragraph 42.

carries out his work, and if the country in which the place of business through which he was engaged is situated (Article 6(2)(b) of the Rome Convention) has no connection with the employment contract, the national court may apply the final subparagraph of Article 6(2) of the Rome Convention, by virtue of which the contract is governed by the law of the country with which the contract is most closely connected.

32. According to the *Commission*, in order to ensure that the terms of the Rome Convention are interpreted uniformly, they must be interpreted independently of terms in the law of the different Contracting States. The Commission also expresses the opinion that, in view of the close connection between the Rome Convention, on the one hand, and the Brussels Convention and Regulation No 44/2001, on the other, and taking account of the frequent use of the same terms in those instruments, it is necessary to ensure that they are interpreted as consistently and uniformly as possible. The Commission points out that the adoption of Article 5(1) of the Brussels Convention, on the basis of which the special jurisdiction rules for employment contracts were included, resulted from the Court's case-law on the interpretation of that article, which also provided the Court with guidance in the provisions on the protection of employees in Article 6 of the Rome Convention.

33. In connection with the notion of the place 'in which the employee habitually carries out his work', the Commission observes that, in *Mulox* [18] and in two subsequent cases (*Rutten* [19] and *Weber* [20]) on the interpretation of Article 5(1) of the Brussels Convention, the Court held that, where the employee performs his work in more than one Contracting State, he fulfils his contractual obligation at the place where or from which he discharges principally his obligations towards his employer. Therefore the Commission takes the view that Article 6(2)(a) of the Rome Convention must be interpreted as meaning that, if the employee performs his work in more than one Contracting State, the place where he habitually carries out his work, within the meaning of that provision, is the place where he has established the effective centre of his working activities. The Commission observes that, to determine that place, it is necessary to take account principally of the fact that the employee spends most of his

18 — Cited in footnote 8.
19 — Cited in footnote 8.
20 — Cited in footnote 8.

working time in a State in which the vehicles used for carrying out his work are stationed, from which changes of drivers are organised and to which he returns after each working journey abroad.

VI — Assessment by the Advocate General

A — *Introduction*

34. First of all, it is clear 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. [21] It is also clear from the preamble that the objective of the Convention is to establish uniform rules concerning the law applicable to contractual obligations, no matter where the judgment is delivered. [22] As appears from the Giuliano and Lagarde Report on the Rome Convention, [23] the Convention was born of a wish to eliminate the inconveniences arising from the diversity of the conflict-of-law rules and to raise the level of legal certainty and the protection of rights acquired over the whole field of private law. [24]

35. For the first time in the Court's judicial practice, the present case raises the question of the interpretation of Article 6(2) of the Rome Convention, which determines the law governing employment contracts in cases where the parties do not make a choice of law. Article 6(2) may also apply if, as in the present case, the choice made by the parties to the contract leads to the exclusion of mandatory rules on the protection of employees' rights which would be applicable in the absence of choice by the parties (Article 6(1)). In the context of Article 6(2) of the Rome Convention, the fundamental rule is that the law of the country in which the employee habitually carries out his work applies (point (a)); alternatively, if the employee does not habitually work in one single Member State, the law of the country in which the employer's place of business is situated applies (point (b)). Exceptionally, the law of the country with which the contract is most closely connected may also be applied (Article 6(2), last subparagraph).

21 — *ICF*, cited in footnote 6, paragraph 22.

22 — Opinion of Advocate General Bot in *ICF*, point 35.

23 — Report on the Convention on the law applicable to contractual obligations, by Mario Giuliano, Professor, University of Milan, and Paul Lagarde, Professor, University of Paris I (OJ 1980 C 282, p. 1; 'the Giuliano/Lagarde Report on the Rome Convention').

24 — *ICF*, cited in footnote 6, paragraph 23.

36. It must also be observed that, as the Commission rightly points out, the terms used in the Rome Convention must be interpreted autonomously, irrespective of their interpretation in the law of the Contracting States, and this must be done in the light of the general scheme and the purpose of the Convention so as to ensure uniform application in all Contracting States. The principle of independent interpretation has already been upheld by the Court many times in relation to the interpretation of the Brussels Convention [25] and of Regulation No 44/2001, [26] and in my view it applies also with regard to the Rome Convention.

B — *Jurisdiction of the Court*

37. With regard to the Court's jurisdiction to give a ruling on the question referred, I must agree with the Commission, which takes the view that the Court has jurisdiction. Under Article 2(b) of the First Protocol on the interpretation of the Rome Convention, which took effect on 1 August 2004, the courts of the Contracting States, when acting as appeal courts, may request the Court of Justice to give a preliminary ruling on a question in a case concerning the interpretation of the Rome Convention. As the referring court in the present case is acting as an appeal court, the Court of Justice has jurisdiction to reply to the question referred.

C — *The legal basis for State liability in the present case*

38. It must be observed that the parties to the main proceedings are Mr Koelzsch and the Grand Duchy of Luxembourg. Consequently this is an action brought against a State by an individual claiming damages on the ground of maladministration by the national courts. Although the referring court does not raise the question referred in relation to the legal basis of such liability, I should like to make a few brief observations so as to avoid any misunderstanding as to the nature of the problem.

39. In connection with the legal basis of the liability of the national court for any misapplication of the provisions of the Rome Convention, the national court of first instance referred to the Court's judgment in the *Köbler*

25 — For example, Case 150/77 *Bertrand* [1978] ECR 1431, paragraphs 14 to 16; Case C-89/91 *Shearson Lehmann Hutton* [1993] ECR I-139, paragraph 13; Case C-269/95 *Benincasa* [1997] ECR I-3767, paragraph 12; Case C-96/00 *Gabriel* [2002] ECR I-6367, paragraph 37; and Case C-27/02 *Engler* [2005] ECR I-481, paragraph 33.

26 — For example, Case C-103/05 *Reisch Montage* [2006] ECR I-6827, paragraph 29; Case C-372/07 *Hassett and Doherty* [2008] ECR I-7403, paragraph 17; and Case C-167/08 *Draka NK Cables and Others* [2009] ECR I-3477, paragraph 19.

case, [27] in which the Court held that the principle that Member States are obliged to make good damage caused to individuals by infringements of Community (now European Union) law for which they are responsible is also applicable where the alleged infringement stems from a decision of a court adjudicating at last instance in a case in which the rule of law infringed is intended to confer rights on individuals, the breach is sufficiently serious and there is a direct causal link between that breach and the loss or damage sustained by the injured parties. [28] Unlike the first-instance court, however, the referring court here takes the view that *Köbler* cannot be applied to the present case.

40. It must be stressed that there are two reasons why *Köbler* cannot be applied to the present case.

41. First, the Rome Convention does not form part of European Union law, but is an international treaty concluded by the Contracting States. [29] Consequently, in my view the principle laid down by the Court in *Köbler* cannot be applied to the present case because that principle was developed by the Court in the context of European Union law.

42. Second, the Court's jurisdiction to interpret the provisions of the Rome Convention is not based on the preliminary-ruling system governed by Article 267 TFEU, but arises from the contracting parties' agreement to that effect, irrespective of the preliminary-ruling system, by way of two special protocols added to the Rome Convention. [30] In connection with the last point, it must be observed that, in the context of the First Protocol on the interpretation of the Rome Convention, the national courts have only a right, but not an obligation, to refer a question to the Court for a preliminary ruling. Article 2 of that Protocol provides that the courts mentioned in that article 'may' request the Court of Justice to give a preliminary ruling. [31] Consequently, the preliminary-ruling system in the context of the Rome Convention differs in a significant respect from the system applicable under Article 267 TFEU in the context of European Union law.

43. In my view, therefore, European Union law does not require the Contracting States

27 — Case C-224/01 *Köbler* [2003] ECR I-10239.

28 — Paragraph 1 of the operative part of the judgment in *Köbler*, cited in footnote 27.

29 — See, for example, F. Rigaux, 'Quelques problèmes d'interprétation de la Convention de Rome', *L'européanisation du droit international privé* (Series of publications of the Academy of European Law, Trier, Vol. 8), 1996, p. 33.

30 — See the First Protocol on the interpretation of the Rome Convention, cited in footnote 9, and the Second Protocol conferring on the Court of Justice powers to interpret the Convention on the law applicable to contractual obligations, opened for signature in Rome on 19 June 1980 (OJ 1998 C 27, p. 52).

31 — Among commentators, the point is stressed by, for example, R. Plender, *The European Contracts Convention. The Rome Convention on the Choice of Law for Contracts*, Sweet & Maxwell, London 1991, p. 42, point 2.25.

to the Rome Convention to make good damage caused to individuals by breaches of that Convention. Of course, the Convention does not prohibit the Contracting States from regulating that kind of judicial liability in their national legislation, as Luxembourg, for example, has done by means of the Law of 1 September 1988 on the civil liability of the State and of public authorities. [32]

D — *Discussion of the question referred*

44. The question asked by the referring court is whether Article 6(2)(a) of the Rome Convention is to be interpreted as meaning that, where an employee works in more than one country, but returns systematically to one of them, that latter country must be regarded as being the country in which the employee habitually carries out his work.

45. As the Commission correctly observes in its written observations, [33] the question must be understood as meaning that the referring court wishes in essence to know whether it is possible to apply the Court's interpretation in its case-law concerning Article 5(1) of the Brussels Convention [34] in order to interpret Article 6(2)(a) of the Rome Convention. In that case-law the Court took account not only of the place where the employee works, but also of the place *from which* he performs his that work. Consequently the referring court wishes to know whether the fact that the employee systematically returns to a particular country may be relevant in order to determine the law governing a contract of employment in the context of the Rome Convention also. In this Opinion I shall take the view that that case-law may be applied for purposes of interpreting Article 6(2)(a) of the Rome Convention, but with a partial modification of the interpretation suggested by the referring court.

46. In interpreting the phrase 'the country in which the employee habitually carries out his work in performance of the contract' in Article 6(2)(a) of the Rome Convention, I shall take a step-by-step approach. I shall begin with a brief account of the system established by the Rome Convention for the protection of the employee as the weaker party to the contract. I shall then consider the Court's case-law relating to Article 5(1) of the Brussels Convention and shall argue, on the basis of different methods of interpretation, that that

32 — Cited in footnote 16.

33 — Written observations of the Commission, paragraph 27.

34 — *Mulox, Rutten, Weber* and *Pugliese*, cited in footnote 8.

case-law may be applied to the interpretation of Article 6(2)(a) of the Rome Convention. Finally, I shall deal with the criteria which the referring court must take into account in order to determine the country in or from which the employee habitually carries out his work.

1. The Rome Convention and the protection of the employee as the weaker party to the contract

47. The basic rule laid down by the Rome Convention for determining the law applicable to contractual obligations is that the parties are free to choose the law governing the contract; this is the rule laid down in Article 3 of the Rome Convention. [35] If no choice is made by the parties, the applicable law is determined on the basis of Article 4 of the Convention, which states, by way of a fundamental criterion, that the contract is governed by the law of the country with which it is most closely connected.

48. Article 6 of the Rome Convention, which governs the law applicable to employment contracts, is a *lex specialis* in relation to Articles 3 and 4 of the Convention. First, the parties cannot, by an agreement in the employment contract, exclude the mandatory rules on the protection of employees' rights by virtue of the law of the State which apply where no choice is made by the parties (Article 6(1) of the Rome Convention). [36] Second, Article 6(2) lays down special rules which apply if no choice is made by the parties: in that case, the law of the country where the employee habitually carries out his work is applied or, if that country cannot be ascertained, the law of the country in which the place of business through which he was engaged is situated. However, the last subparagraph of Article 6(2) contains a special provision whereby neither of those provisions applies if the contract is more closely connected with another

35 — Opinion of Advocate General Bot in *ICF*, cited in footnote 6, point 36.

36 — For further comments on the mandatory rules in the Rome Convention, see M. Wojewoda, 'Mandatory rules in private international law: with special reference to the mandatory system under the Rome Convention on the law applicable to contractual obligations', *Maastricht Journal of European and Comparative Law*, No 2/2000, p. 183 et seq., who points out, with regard to the reference to mandatory rules in Article 6(1) of the Rome Convention (p. 201), that the procedure for establishing the existence of mandatory rules of that kind is rather complicated: the national court must first establish which law would govern the employment contract if the parties had not made a choice of law, and must then determine whether that law contains mandatory rules for the protection of employees' rights and, finally, apply the provisions which are more favourable for the employee than those of the law chosen by the parties. See also I.F. Fletcher, '*Conflict of Laws and European Community Law: With Special Reference to the Community Conventions on private international law*', North-Holland, Amsterdam 1982, p. 168; R.C.G.J. Morse, 'Consumer Contracts, Employment Contracts and the Rome Convention', *International and Comparative Law Quarterly*, No 1/1992, pp. 14–16; M.M. Salvadori, 'La protezione del contraente debole (consumatori e lavoratori) nella Convenzione di Roma', G. Sacerdoti, M. Frigo (ed.), *La Convenzione di Roma sul diritto applicabile ai contratti internazionali*, Giuffrè Editore, Milan 1993, pp. 62 and 63.

country, in which case the contract is governed by the law of that country. [37]

49. It must also be observed that in the Court's case-law – specifically that relating to the Brussels Convention – it has been stated that contracts of employment differ from other contracts – even those for the provision of services – in that they create a lasting bond which brings the worker to some extent within the organisational framework of the employer's business and they are linked to the place where the activities are pursued. [38] It must also be observed that, in interpreting the corresponding provisions of the Brussels Convention, account must be taken of the concern to afford proper protection to the employee as the weaker party to the contract. [39] I think these general considerations concerning employment contracts are also relevant to the interpretation of the Rome Convention.

50. The objective of Article 6 of the Rome Convention is therefore to secure protection for the party who from the socio-economic point of view is regarded as the weaker in the contractual relationship. [40] That protection is provided by applying to the employment contract the law of the country with which it has the closest connection. Commentators point out that the business and political environment of any given State affect workers by reason of their work in that State and that they must therefore be guaranteed the protection provided by the legislature in that State, taking that environment into account. [41] From that point of view, the Rome Convention therefore clearly follows the principle of *favor laboratoris.* Consequently, it is logical to

37 — Whereas Rome I contains a provision comparable to Article 8(4), neither Article 5(1) of the Brussels Convention nor Article 19 of Regulation No 44/2001 contains such a provision. H. Ofner, 'Neuregelung des internationalen Vertragsrechts: Römisches Schuldvertragsübereinkommen', *Recht der Wirtschaft*, No 1/1999, p. 7, points out that, because of that provision, Article 6(2) of the Rome Convention is regarded as a presumption which may be rebutted if the contract is more closely connected with another State.

38 — Case 266/85 *Shenavai* [1987] ECR 239, paragraph 16.

39 — *Mulox*, paragraph 18; *Weber*, paragraph 40; *Rutten*, paragraph 22, and *Pugliese*, paragraph 18, all cited in footnote 8. See also *Ivenel*, paragraph 14, cited in footnote 44, in which the Court referred to Article 6 of the Rome Convention in order to justify the aim of protection in the context of interpreting Article 5(1) of the Brussels Convention.

40 — See the Giuliano/Lagarde Report, cited in footnote 23, commentary on Article 6 of the Rome Convention, paragraph 1. Also B. Rudisch in D. Czernich, H. Heiss, *EVÜ. Das Europäische. Schuldvertragsübereinkommen*, Orac, Vienna 1999, p. 155; R. Plender, M. Wilderspin, *The European Contracts Convention. The Rome Convention on the Choice of Law for Contracts*, Sweet & Maxwell, London 2001, p. 159, paragraph 8-01; R. Clerici, 'Quale favor per il lavoratore nel Regolamento Roma I?', G.S. Venturini, S. Bariatti, *Liber Fausto Pocar*, Vol. 2, Giuffrè Editore, Milan 2009, pp. 216 and 217; R. Knez, 'Rimska konvencija o uporabi prava pri pogodbenih obligacijskih razmerjih in njen pomen za Republiko Slovenijo', *Pravnik*, No 1-3/1994, pp. 52 and 53. See also, with regard to the protection of the employee as the weaker party in Rome I, E. Lein, 'The New Rome I / Rome II / Brussels I Synergy', *Yearbook of Private International Law*, 2008, p. 187.

41 — R. Plender, M. Wilderspin, *The European Private International Law of Obligations*, Thomson Reuters, London 2009, p. 316, paragraph 11-043.

interpret Article 6(2)(a) of the Convention strictly so as best to achieve the aim of protecting so far as possible the employee as the weaker party to the contract.

2. The Court's case-law on Article 5(1) of the Brussels Convention

51. The Court's case-law on the interpretation of Article 5(1) of the Brussels Convention includes several cases in which an employee worked in more than one Contracting State. The case-law has been developed gradually, along with the criteria for determining the place where the employee carries out his work, and I shall now set out the cases on the interpretation of Article 5(1) below. [42]

52. First of all, it must be observed that, when interpreting Article 5(1) in relation to contracts of employment, the Court refused to follow its previous case-law in *De Bloos* and *Tessili* relating to the determination of jurisdiction for contracts generally. [43] The Court distinguished employment contracts from other contracts and, in seeking greater protection for employees, it held in *Ivenel* that, to determine jurisdiction in the context of Article 5(1) of the Brussels Convention, the obligation to be taken into account is the obligation which characterises the contract, [44] that is to say, the obligation to carry out the work.

53. Regarding cases where the employee carries out his work in more than one Contracting State, the Court gave its first ruling in 1993

42 — For a commentary on the case-law, see É. Pataut, 'L'office du juge communautaire dans le contentieux international du travail, *Procès du travail, travail du procès*, L.G.D.J., Paris 2008, p. 326 et seq.; H. Gaudemet-Tallon, "Compétence et exécution des jugements en Europe: Règlement 44/2001, Conventions de Bruxelles (1968) et de Lugano (1988 et 2007)", *Librairie générale de droit et de jurisprudence*, Paris 2010, p. 305 et seq..

43 — The Court developed the general rules of jurisdiction in contractual relationships in two cases, Case 14/76 *De Bloos* [1976] ECR 1497 and Case 12/76 *Tessili* [1976] ECR 1473. In the former (paragraph 13), the Court held that the 'obligation to be taken into account is that which corresponds to the contractual right on which the plaintiff's action is based, that is to say, the obligation at issue between the parties to the contract, while in *Tessili* (paragraph 13), the Court held that the place of performance of the obligation in question must be determined in accordance with the law applicable to the contractual relationship on the basis of the conflict rules of the court before which the matter is brought.

44 — Case 133/81 *Ivenel* [1982] ECR 1891, operative part and paragraph 20.

in *Mulox*. [45] In that case, the Court held that Article 5(1) of the Brussels Convention must be interpreted as meaning that, in the case of a contract of employment in pursuance of which the employee performs his work in more than one Contracting State, the place of performance of the obligation characterising the contract is the place where or from which the employee principally discharges his obligations towards his employer. [46]

54. In the *Rutten* judgment of 1997 the Court took the view that Article 5(1) of the Brussels Convention refers to the place where the employee has established the effective centre of his working activities. [47] In its reasoning, the Court also pointed out that it is the place where, or from which, he in fact performs the essential part of his duties vis-à-vis his employer. [48]

55. In the *Weber* judgment of 2002, the Court held however that Article 5(1) of the Brussels Convention must be interpreted as meaning that the place where the employee habitually works, within the meaning of that provision, is the place where, or from which, taking account of all the circumstances of the case, he in fact performs the essential part of his duties vis-à-vis his employer. [49] The Court also pointed out that, if the employee works in more than one Contracting State, it is necessary, in principle, to take account of the whole of the duration of the employment relationship in order to identify the place where the employee habitually works, within the meaning of that provision, and that, failing other criteria, that will be the place where the employee has worked the longest. [50]

56. Mention should in addition be made of the *Pugliese* case, which also concerned the

45 — *Mulox*, cited in footnote 8. As early as 1989 the Court had already given a ruling in Case 32/88 *Six Constructions* [1989] ECR 341 in a case in which the employee worked in several countries, but they were not Contracting States to the Brussels Convention (judgment, paragraph 4). Therefore the Court held that Article 5(1) of the Brussels Convention was not applicable and that in such a case jurisdiction was to be determined on the basis of the general rule of Article 2 of the Convention, that is to say, the defendant's domicile (judgment, paragraph 2 of the operative part).

46 — *Mulox*, cited in footnote 8, operative part. See also paragraphs 24 and 26 of the judgment. In French, which was also the language of the case, that criterion was ' le lieu ... où ou à partir duquel le travailleur s'acquitte principalement de ses obligations à l'égard de son employeur'.

47 — *Rutten*, cited in footnote 8, operative part. See also paragraphs 23, 26 and 27 of the judgment.

48 — *Rutten*, cited in footnote 8, paragraph 23. In the language of the case (Dutch), the criteria of the judgment are formulated as follows: 'de plaats waar de werknemer het werkelijke centrum van zijn beroepswerkzaamheden heeft gevestigd en waar of van waaruit hij in feite het belangrijkste deel van zijn verplichtingen jegens zijn werkgever vervult'.

49 — *Weber*, cited in footnote 8, paragraph 2 of the operative part and paragraph 58. In the language of the case (Dutch), the criterion is 'de plaats waar of van waaruit hij, rekening houdend met alle omstandigheden van het concrete geval, feitelijk het belangrijkste deel van zijn verplichtingen jegens zijn werkgever vervult'.

50 — *Ibid.*

interpretation of Article 5(1) of the Brussels Convention, but which differed from *Mulox*, *Rutten* and *Weber* in that the employee worked in a single Contracting State where she was allowed to transfer to another employer at a place which was not the place determined by the contract of employment concluded with the first employer. [51] In the dispute between the employee and the first employer, the Court held that the place where the employee performs her obligations to a second employer can be regarded as the place where she habitually carries out her work when the first employer has, at the time of the conclusion of the second contract of employment, an interest in the performance of the service by the employee to the second employer in a place decided on by the latter. [52]

57. Although the terminology used by the Court and the criteria in those judgments for determining the place where the employee habitually carries out his work within the meaning of Article 5(1) of the Brussels Convention are in part different, I think it can be accepted that the decisive criterion is the place where or from which the employee performs the essential part of his duties vis-à-vis his employer, and that the determination of that place must take into account the circumstances of each individual case.

3. Possibility of applying the case-law relating to the Brussels Convention to the interpretation of the Rome Convention

58. The present case raises the question of whether the Court's interpretation of Article 5(1) of the Brussels Convention in *Mulox*, *Rutten, Weber* and *Pugliese* may be used by analogy for the purpose of interpreting Article 6(2)(a) of the Rome Convention. I think that question should be answered in the affirmative in accordance with the academic writers who are also in favour of applying that case-law. [53] I shall go on to discuss the

51 — *Pugliese*, cited in footnote 8, paragraph 20.

52 — *Pugliese*, cited in footnote 8, paragraph 1 of the operative part and paragraph 26. In the language of the case (German) the criterion is 'der Ort, an dem der Arbeitnehmer seine Verpflichtungen gegenüber einem zweiten Arbeitgeber erfüllt, als der Ort angesehen werden kann, an dem er gewöhnlich seine Arbeit verrichtet, wenn der erste Arbeitgeber … zum Zeitpunkt des Abschlusses des zweiten Vertrages selbst ein Interesse an der Erfüllung der vom Arbeitnehmer für den zweiten Arbeitgeber an einem von diesem bestimmten Ort zu erbringenden Leistung hatte'.

53 — W. Wurmnest in J. Basedow, K.J. Hopt, R. Zimmermann, *Handwörterbuch des Europäischen Privatrechts*, Vol. I, Mohr Siebeck, Tübingen 2009, p. 93. A. Junker, 'Gewöhnlicher Arbeitsort und vorübergehende Entsendung im internationalen Privatrecht', in S. Lorenz, *Festschrift für Andreas Heldrich zum 70. Geburtstag*, Beck, Munich 2005, p. 722, observes that the Rome Convention was adopted as a supplementary instrument to the Brussels Convention and that the Court's case-law on the interpretation of Article 5(1) of the Brussels Convention applies equally to the rules of conflict relating to employment contracts. See also O. Deinert, 'Neues internationales Arbeitsvertragsrecht', in *Recht der Arbeit*, No 3/2009, p. 145.

possibility of applying that case-law to the Rome Convention from the viewpoint of several methods of interpretation: literal, historical, systematic and purposive. Finally I shall mention the limits to the parallel interpretation of the two Conventions.

a) Literal interpretation

59. Article 6(2)(a) of the Rome Convention provides that, if no choice of law is made by the parties to the contract, it is to be governed by 'the law of the country *in which* the employee habitually carries out his work.' [54]

60. It is true that, in taking account only of the wording of that provision, which uses the words 'in which', it cannot be concluded that the law of the country 'from which' the employee works may also be relevant. Nevertheless, I consider that three arguments must be accepted in favour of the interpretation on the basis of which the country 'from which' the employee works may also be taken into account.

61. The first ground is that the terms requiring interpretation are the same in the Brussels Convention and in the Rome Convention. Article 5(1) of the former and Article 6(2)(a) of the latter both refer to the place or the country in which the employee habitually carries out his work, but without defining that concept. [55] Therefore, so far as the Brussels Convention is concerned, the Court has – irrespective of the words 'the place *in which* the employee habitually carries out his work' – authorised the place *from which* the employee habitually carries out his work to be taken into account also.

62. Second, it must be borne in mind that the actual words of Article 6(2)(a) of the Rome Convention and the fact that that article refers to the law of the country 'in which' the employee works are not at variance with the interpretation to the effect that work in the country 'from which' the employee carries

54 — Emphasis added. German version of Article 6(2)(a): 'Recht des Staates, in dem der Arbeitnehmer … gewöhnlich seine Arbeit verrichtet', Spanish version: 'país en que el trabajador … realice habitualmente su trabajo', Italian version: 'paese in cui il lavoratore … compie abitualmente il suo lavoro'.

55 — The difference in the wording of the two articles is that the Rome Convention refers to 'the country' and the Brussels Convention to 'the place' in which the employee habitually carries out his work, but I do not think that the difference means that the case-law relating to Article 5(1) of the Brussels Convention cannot be applied to the interpretation of Article 6(2)(a) of the Rome Convention. Regarding the difference in wording, see Junker, *op. cit.,* footnote 53, p. 724.

out his work is also relevant. The employee may habitually carry out his work precisely *in the country from which* he carries out that work. From that point of view, the words of Article 6(2)(a) of the Rome Convention are, in my view, open to interpretation.

63. Third, it is important to note that the mere fact that the employee carries out his work *from* a particular Contracting State is not sufficient for the law of that country to apply to the case. If the case-law relating to Article 5(1) of the Brussels Convention is applied by analogy, it will be found that the Court's case-law has required the employee in fact to perform in a particular Contracting State or from a particular Contracting State the *essential part* of his duties vis-à-vis his employer. [56] The fundamental relevant criterion in the context of the case-law is therefore the effective centre of the employee's working activities. If, for example, an employee merely returned systematically to a particular Contracting State, but performed the essential part of his duties in another State, the first State could not, in my view, be the country in or from which he habitually carries out his work.

64. Consequently I do not think that a literal interpretation of Article 6(2)(a) of the Rome Convention precludes account from being taken of the law of the country in or from which an employee habitually carries out his work in order to determine the law governing a contract of employment.

b) Historical interpretation

65. For the purpose of historical interpretation it is necessary first of all to consider the Giuliano/Lagarde Report on the Rome Convention, [57] in particular the part discussing the relationship between points (a) and (b) of Article 6(2) of the Convention. The Report states that point (a) applies if the employee habitually works in one and the same country even if he is temporarily employed in another country, while if he does not habitually work in one and the same country, point (b) applies. [58]

66. I do not think that it can be concluded, on the basis of that Report, that Article 6(2)(a)

56 — See points 53 to 57 above.

57 — Cited in footnote 23.

58 — *Ibid.*, commentary on Article 6 of the Rome Convention, paragraph 3.

of the Rome Convention must be interpreted as meaning that it opens up the possibility that an employee may habitually work *from* a particular Contracting State, but at the same time the Report does not, in my view, exclude that interpretation. The Report is not binding; on the contrary, it is academic and analytical because it was prepared by a group of experts and therefore it does not represent the final legislative intention of the States which are signatories to the Convention. [59]

67. It must be noted that it does not appear from the Cruz/Real/Jenard Report on the Convention of San Sebastián [60] prepared in relation to the Brussels Convention in the version amended by the Convention of San Sebastián, [61] that Article 5(1) of the Brussels Convention could be interpreted as meaning that the place from which the employee works may also be relevant for the purpose of determining jurisdiction in respect of employment contracts. [62] However, that did not prevent the Court from recognising, in the *Mulox* judgment which was delivered a number of years after the abovementioned Report, the possibility that the place from which the employee works may also be relevant. [63]

68. The Court's case-law in *Mulox*, *Rutten* and other cases on the interpretation of Article 5(1) of the Brussels Convention therefore shows that, with regard to the interpretation of that article, the Court adopted a position different from that of the experts in the reports cited. Consequently, I think that the same conclusion is also possible in relation to the interpretation of Article 6(2)(a) of the Rome Convention.

69. It cannot therefore be concluded, on the basis of an historical interpretation, that the case-law relating to Article 5(1) of the Brussels Convention may be applied to the interpretation of Article 6(2)(a) of the Rome Convention, but historical interpretation does

59 — It must also be observed that an interpretation of a provision supported only by a historical method cannot prevail over an interpretation based on other methods. For an analogy with European Union law, see M. Pechstein, C. Drechsler, 'Die Auslegung und Fortbildung des Primärrechts', in K. Riesenhuber, *Europäische Methodenlehre: Handbuch für Ausbildung und Praxis*, de Gruyter Recht, Berlin 2006, pp. 172 and 173. In spite of its supposedly lesser importance, the Court has not excluded historical interpretation in its case-law: see Case C-162/09 *Lassal* [2010] ECR I-9217, paragraph 55, where that method of interpretation was used.

60 — Report on the Convention of San Sebastián by M. Almeida Cruz, M. Desantes Real and P. Jenard (OJ 1990 C 189, p. 35).

61 — Cited in footnote 11.

62 — Likewise, of course, in the Jenard Report on the Brussels Convention (OJ 1979 C 59, p. 18, 'the Jenard Report'), which was the first report on that Convention, in connection with Article 5(1) of the Convention, the possibility of that interpretation was not foreseen because at that time the Convention contained absolutely no special provision for determining jurisdiction in respect of contracts of employment.

63 — *Mulox*, cited in footnote 8, paragraph 26.

not, in my opinion, rule out the application of that case-law either.

c) Systematic interpretation

70. A systematic interpretation suggests parallel interpretation of Article 6(2)(a) of the Rome Convention and Article 5(1) of the Brussels Convention. This has two aspects. It is necessary to take account, first, of the fact that in the past the wording of Article 6 of the Rome Convention has influenced the interpretation of Article 5(1) of the Brussels Convention and, secondly, of the wording of Article 8(2) of Rome I, which was adopted at a later date.

71. Unlike the Rome Convention, at the time when the Brussels Convention was adopted, and after the amendments of 1978 [64] and 1982, [65] it contained no special provision on jurisdiction for employment contracts, but provided only that, in matters relating to contracts, an action could be brought at the place of performance of the contractual obligations.

72. During that period the Court held in the *Ivenel* case, [66] in which it had to give a ruling on the question of what obligation should be taken into account for applying Article 5(1) of the Brussels Convention where a contract of employment is at issue. In interpreting Article 5(1), the Court referred in that case to Article 6 of the Rome Convention and pointed out that, by virtue of that article, contracts of employment are governed by the law of the country in which the employee habitually carries out his work unless it appears from the circumstances as a whole that the contract is more closely connected with another country. [67] In that connection the Court held that the obligation to be taken into account for the purposes of Article 5(1) of the Brussels Convention is the obligation which characterises the contract, [68] thus disregarding, so far as employment contracts are concerned, the previous case-law on jurisdiction in respect of disputes arising from the contracts. [69]

73. That case-law and, indirectly, of course, also the wording of Article 6 of the Rome Convention had the effect that later, in 1989,

64 — Convention of 9 October 1978 on the accession of the Kingdom of Denmark, of Ireland and of the United Kingdom of Great Britain and Northern Ireland to the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters, cited in footnote 10.

65 — Convention of 25 October 1982 on the accession of the Hellenic Republic to the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters, cited in footnote 10.

66 — Cited in footnote 44.

67 — *Ibid.*, paragraph 13.

68 — *Ibid.*, paragraph 20.

69 — See the present Opinion, point 52.

Article 5(1) of the Brussels Convention was amended by the Convention of San Sebastián [70] in that special jurisdiction was provided for employment contracts. The Brussels Convention thereby also included special jurisdiction rules for employment contracts. [71]

74. For the purpose of systematic interpretation, mention must also be made of an additional ground in support of applying the case-law on Article 5(1) of the Brussels Convention to the interpretation of Article 6(2)(a) of the Rome Convention, namely the fact that the Community legislature took account of that case-law in the procedure for the adoption of Rome I which followed the Rome Convention. Article 8(2) of Rome I provides that, 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. [72]

75. In my view, that legislative amendment is important for two reasons.

76. First, it is important because it shows clearly that the legislature wished to attach to the abovementioned provision of that instrument of private international law the same meaning as that which the phrase 'the place in which the employee habitually carries out his work' in Article 5(1) of the Brussels Convention has on the basis of the Court's case-law. [73]

70 — Cited in footnote 11.

71 — For that development, see Junker, *op.cit.* (footnote 53), pp. 722 and 723; A. Sinay-Cytermann, 'La protection de la partie faible en droit international privé: les exemples du salarié et du consommateur', in *Le droit international privé: mélanges en l'honneur de Paul Lagarde*, Dalloz, Paris 2005, pp. 739 and 740. See also the Cruz/Real/Jenard Report on the Convention of San Sebastián, cited in footnote 60, paragraph 23; Gaudemet-Tallon, *op. cit.* cited in footnote 42, p. 302 *et seq*.

72 — See P. Mankowski, in F. Ferrari, S. Leible, *Rome I Regulation. The Law Applicable to Contractual Obligations in Europe*, Sellier, Munich 2009, p. 177, who observes that this is the most significant modification of Article 6(2)(a) of the Rome Convention.

73 — See the Proposal for a Regulation of the European Parliament and the Council on the law applicable to contractual obligations (Rome I) (COM(2005) 650 final), commentary on Article 6. The same point is made by commentators, for example Wurmnest, *op.cit.* (footnote 53), p. 94; Plender and Wilderspin, *op. cit.* (footnote 41), p. 315, paragraph 11-041; H. Gaudemet-Tallon, 'Le principe de proximité dans le Règlement Rome I', in *Revue hellénique de droit international*, 2008, p. 195; V. Marquette, 'Le Règlement "Rome I" sur la loi applicable aux contrats internationaux', in *Revue de droit commercial belge*, no. 6/2009, p, 532, (footnote 91); H. Kenfack, 'Le règlement (CE) no. 593/2008 du 17 Juin 2008 sur la loi applicable aux obligations contractuelles ("Rome I"), navire stable aux instruments efficaces de navigation?', in *Journal du droit international*, No. 1/2009, p. 65.

The wording of Article 8(2) of Rome I, it is true, is very different from that of Article 6(2)(a) of the Rome Convention and also from that of Article 5(1) of the Brussels Convention, but in fact it is no more than a clearer formulation or even codification of the existing case-law on Article 5(1) of the Brussels Convention. [74]

77. Secondly, that legislative modification is important because it shows that the legislature intended Article 8(2)(a) of Rome I to be interpreted broadly and that the law governing an employment contract should be determined, if possible, on the basis of that article. [75] In the opinion of the Community legislature, point (b) of that article applies more rarely. [76] Consequently, it is essential to take account of the employee's centre of working activity even if he is merely organising his work from that place. [77]

78. The objective in codifying the conflict rules in Rome I was to replace the Rome Convention [78] and at the same time to ensure continuity fundamentally with it. [79] It is therefore appropriate to interpret the provisions of the Rome Convention in such a way as to ensure continuity and to enable Rome I to begin to be applied without significant modifications of interpretation.

79. Consequently, in my view, systematic interpretation suggests that the case-law relating to Article 5(1) of the Brussels Convention can be applied to the interpretation of Article 6(2)(a) of the Rome Convention.

74 — U. Magnus, 'Die Rom I-Verordnung', in *Praxis des internationalen Privat- und Verfahrensrechts (IPRax)*, No 1/2010, pp. 40 and 41; R. Mauer, 'Die Kündigung komplexer grenzüberschreitender Arbeitsverhältnisse nach der EG-Verordnung ROM I', in *Recht der internationalen Wirtschaft*, No. 2/2007, p. 93; O. Boskovic, 'La protection de la partie faible dans le règlement Rome I, in *Recueil Dalloz*, No. 31/2008, p. 2175 *et seq*.; S. Corneloup, 'La loi applicable aux obligations contractuelles: transformation de la Convention de Rome en règlement communautaire Rome I', in *La semaine juridique. Édition générale*, No. 4/2008, p. 26, footnote 34; M. Zilinsky, 'Rome I en arbeidsovereenkomst', in *Weekblad voor privaatrecht, notariaat en registratie*, No. 6824/2009, p. 1034.

75 — See, to that effect, Boskovic, *op.cit.* (footnote 74), p. 2175 *et seq*.; L.L. Hansen, 'Applicable employment law after Rome I: the draft Rome I Regulation and its importance for employment contracts', in *European Business Law Review*, No. 4/2008, p. 768.

76 — See the Proposal for a Regulation of the European Parliament and the Council on the law applicable to contractual relations (Rome I) (COM(2005) 650), commentary on Article 6. See also, to that effect, Magnus, *op. cit.* (footnote 74), p. 41.

77 — Mankowski (2009), *op.cit.* (footnote 72), p. 177, who calls this the 'base rule' because it takes into account the base or centre from which the employee works.

78 — Article 24(1) of Rome I provides that the Regulation replaces the Rome Convention in the Member States except as regards the territories of the Member States which fall within the territorial scope of the Convention and to which the Regulation does not apply.

79 — Article 24(2) of Rome I provides that in so far as the Regulation replaces the Rome Convention, any reference to the Convention shall be understood as a reference to the Regulation. See also the works cited in footnote 4.

d) Purposive interpretation

80. The reason which, from the purposive viewpoint, suggests that the case-law relating to Article 5(1) of the Brussels Convention can be applied to the interpretation of Article 6(2)(a) of the Rome Convention is that consistency between *forum* and *ius* is desirable, which means that the court with jurisdiction to determine a case should apply the law of its own State. [80] Ideally, the jurisdiction rule would confer jurisdiction on the court of the State the law of which will apply on the basis of the rules of private international law. In that way the court would apply the law with which it is most familiar, thereby reducing the possibility of erroneously applying (foreign) law and at the same time avoiding a confirmation of foreign law which proves to be exacting from the viewpoint of time and also cost.

81. The uniform interpretation of 'the country' and 'the place where the employee habitually carries out his work' in Article 6(2)(a) of the Rome Convention and Article 5(1) of the Brussels Convention may therefore be conducive to consistency between *forum* and *ius*, because on the basis of uniform interpretation, the court for the place where the employee habitually carries out his work will generally have jurisdiction for disputes arising from contracts of employment, and that court will at the same time apply its own law (*lex loci laboris* [81]). I therefore take the view that those terms in the Brussels and Rome Conventions must be interpreted uniformly.

e) Limits of parallel interpretation

82. Nevertheless I should like to point out generally that a degree of caution is required in the parallel interpretation of identical or similar terms arising from conflict rules and rules for determining international jurisdiction because the two categories of rules have different aims. [82] Whereas the purpose of conflict rules is to determine the law applicable to

80 — For consistency between *forum* and *ius*, see C. Esplugues Mota, G. Palao Moreno, in: U. Magnus, P. Mankowski (edit.), *Brussels I Regulation*, Sellier, Munich 2007, p. 334, paragraph 7; P. Mankowski in: T. Rauscher (edit.), *Europäisches Zivilprozeßrecht. Kommentar*, 2nd ed., Sellier, European Law Publishers, Munich 2006, p. 319, paragraph 4. See also the Jenard Report on the Brussels Convention, cited in footnote 62, p. 74, which observes that it is desirable that disputes over contracts of employment should as far as possible be brought before the courts of the State the law of which governs the contracts.

81 — For the application of this concept, see Salvadori, *op.cit.* (footnote 36), p. 66; F. Gamillscheg, 'Conflitti di leggi nei contratti di lavoro e nelle relazioni industriali', in: M. Biagi, R. Blanpain, *Diritto del lavoro e relazioni industriali nei paesi industrializzati ad economia di mercato*, Vol. I, Maggioli Editore, Rimini 1991, p. 544.

82 — W. Van Eeckhoutte, 'The Rome Convention on the Law Applicable to Contractual Obligations and Labour Law (1980)', in: R. Blanpain, *Freedom of services in the European Union*, Kluwer, The Hague 2006, p. 170.

a contractual obligation (in the present case, a contract of employment), the purpose of rules for determining international jurisdiction is to identify the court having jurisdiction. Therefore the conflict rules (Rome Convention) generally lead to the determination of the law of a single country, but on the basis of the rules for determining the court with international jurisdiction it *may* be open to the applicant – at least in certain cases – to choose the forum before which he will be sued. [83]

83. Accordingly I should like to say that in the present case I am not pleading in favour of general uniformity in the interpretation of all identical or similar terms in the Rome and Brussels Conventions. I must stress, in particular, that it is not possible to start from the general presumption that all identical or similar terms must be interpreted uniformly: on the contrary, the question of uniform interpretation must be considered in the context of each individual case. [84] Terms which are sometimes entirely appropriate to one field cannot be interpreted uniformly. In Case C-435/06 *C*, [85] for example, in relation to the interpretation of Regulation No 2201/2003, [86] the Court held that the term 'civil matter' in that regulation has an autonomous meaning and the Court did not rely in that context on the definition of the term in the Brussels Convention or Regulation No 44/2001. However, it is true that in fields in which the provisions of the two instruments have the same aim of protection (for example, the protection of employees or consumers) a uniform interpretation will be more likely. [87]

83 — P. Mankowski, 'Internationale Zuständigkeit und anwendbares Recht: Parallelen und Divergenzen', in: S. Lorenz, *Festschrift für Andreas Heldrich zum 70. Geburtstag*, Beck, Munich 2005, pp. 868 and 869; J.D. Lüttringhaus, J. Weber, 'Aussonderungsklagen an der Schnittstelle von EuGVVO und EuInsVO', in: *Recht der internationalen Wirtschaft*, No. 1-2/2010, p. 49; 'Max Planck Institute for Comparative and International Private Law: Comments on the European Commission's Proposal for a Regulation of the European Parliament and the Council on the law applicable to contractual obligations (Rome I)', in: *Rabels Zeitschrift für ausländisches und internationales Privatrecht*, No. 2/2007, p. 238; Lein, *op. cit.* (footnote 40), p. 196; J. Kropholler, *Internationales Privatrecht: einschließlich der Grundbegriffe des internationalen Zivilverfahrensrechts*, Mohr Siebeck, Tübingen 2006, p. 612.

84 — See also my Opinion in Case C-533/07 *Falco Privatstiftung* [2009] ECR I-3327, in which I pointed out the limits to uniform interpretation of terms in different legal acts, in particular the only partial possibility of analogy between the term 'services' in Regulation No 44/2001 and in primary law (point 60 *et seq.)*, and that no analogy could be drawn between that term in Regulation No 44/2001 and in the European Union law provisions in the area of VAT.

85 — [2007] ECR I-10141.

86 — Council Regulation No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000.

87 — J. Lüttringhaus, 'Der Direktanspruch im vergemeinschafteten IZVR und IPR nach der Entscheidung EuGH VersR 2009, 1512 (Vorarlberger Gebietskrankenkasse)', in: *Versicherungsrecht*, No.. 4/2010, p. 189. See also Lein, *op.cit.* (footnote 40), pp. 186 and 187, who refers to the protection of the weaker party to the contract (i.e. also the employee) in Rome I and Regulation No 44/2001.

4. Criteria to be taken into account by the national court

84. The criterion of the country in or from which the employee habitually works therefore depends on the circumstances of each individual case.

85. In the present case, the national court must therefore ascertain the Contracting State in or from which the employee habitually works. In proceedings for a preliminary ruling, which are based on a clear separation of functions between the national courts and the Court, any assessment of the facts in the case is a matter for the national court. [88] Also in its case-law on Article 5(1) of the Brussels Convention, the Court has pointed out that it is for the national court to determine the place or the country in which the employee habitually carries out his work. [89] However, the Court of Justice must provide the national court with clear criteria upon the basis of which it can give judgment.

86. It may be noted that the Court, in the case-law concerning Article 5(1) of the Brussels Convention, has taken different criteria into account in order to determine whether an employee habitually works in a particular Contracting State, which, of course, depends on the facts giving rise to the case.

87. Thus, in *Mulox* the employee worked as an international marketing director, with an office in France (Aix-les-Bains), and he initially sold products in Germany, Belgium, the Netherlands and the Scandinavian countries before continuing to work only in France. [90] In order to determine the place where the employee habitually carried out his work within the meaning of Article 5(1) of the Brussels Convention, the Court took account of the fact that he had an office in a Contracting State, that he lived in that State, from which he worked and to which he returned after each business trip and, when the dispute arose, he was working only in that State. [91]

88. In *Rutten*, the employee lived in the Netherlands and was employed by the Netherlands subsidiary of a United Kingdom

88 — Case C-341/05 *Laval un Partneri* [2007] ECR I-11767, paragraph 45; Joined Cases C-261/08 and C-348/08 *Zurita García* [2009] ECR I-10143, paragraph 34; and Case C-537/07 *Gómez-Limón* [2009] ECR I-6525, paragraph 24.

89 — *Mulox*, paragraph 25; *Rutten*, paragraph 25; *Weber,* paragraph 55, and *Pugliese*, paragraph 25, all cited in footnote 8. On the assessment of each individual case in relation to the comparable phrase 'place in which the employee habitually carries out his work' in Regulation No 44/2001, see Mankowski (2006), *op. cit.* (footnote 80), p. 320, paragraph 4.

90 — *Mulox,* cited in footnote 8, paragraph 3.

91 — *Ibid.,* paragraph 25.

company. [92] He spent two-thirds of his working hours in the Netherlands, where he had an office, and one-third in the United Kingdom, Belgium, Germany and the United States. [93] The Court found that he carried out two-thirds of his work in one country and that he had his office in that country, where he organised his work for his employer and to which he returned after each business trip abroad. [94]

89. The *Weber* case concerned an employee who worked for several years as a cook on vessels and installations stationed over the Netherlands continental shelf, and also for several months on board a floating crane used in Danish territorial waters. [95] The Court observed that, unlike the situation in *Mulox* and *Rutten*, the employee had no office in a Contracting State that could have constituted the effective centre of his working activities or from which he performed the essential portion of his duties vis-à-vis his employer. [96] For that reason, according to the Court, the time factor was decisive and the Court established in which country the employee had worked the longest. [97]

90. The *Pugliese* case concerned an Italian national who was employed by an Italian company which allowed her to transfer to a post with a company established in Germany, with which she entered into an employment contract. [98] Therefore the Court had to give a ruling in a situation where the employee had concluded two employment contracts in succession with two different employers, the first having been informed of the conclusion of the contract with the second employer and having agreed to the temporary suspension of the first contract. [99] The case raised the question of which country was the one in which the employee habitually carried out her work, the purpose of the question being to determine the court with jurisdiction to deal with the dispute between the employee and the first employer. The Court of Justice took the view that the place where the employee performed her obligations to a second employer could be the place where she habitually carried out her work if the first employer had, at the time of the conclusion of the second contract of employment, an interest in the performance of the service by the employee to the second employer in a place decided on by the latter. [100]

92 — *Rutten*, cited in footnote 8, paragraph 2.
93 — *Ibid.*, paragraph 5.
94 — *Ibid.*, paragraph 25.
95 — *Weber*, cited in footnote 8, paragraphs 17 to 21.
96 — *Ibid.*, paragraph 48.
97 — *Ibid.*, paragraph 58.
98 — *Pugliese*, cited in footnote 8, paragraphs 4, 5 and 7.
99 — *Ibid.*, paragraph 13.
100 — *Ibid.*, paragraph 26.

91. Different criteria for determining the country or place where an employee habitually carries out his work are also mentioned by academic commentators. For example, to distinguish between habitual and occasional work, one commentator cites the time needed by an employee to carry out work in a particular country and the importance of the work in question. [101] Although time is a relevant criterion, it is not the decisive criterion: the essential factor is that the employee establishes the effective centre of his working activities in a particular country. [102] It is also suggested that the purpose of the Contracting parties is a relevant criterion. [103] Another writer observes that it is necessary to ascertain whether the core of the working activity may be established in a Contracting State. [104]

92. In the present case also, the Court must set out for the national court the criteria that it must take into account to determine in which country the employee habitually works.

93. With regard to the criteria that may be relevant, it must be observed that Mr Koelzsch's work differs in nature from that at issue in the previous cases relating to Article 5(1) of the Brussels Convention, in particular in *Mulox* and *Rutten*. The most important factor is that Mr Koelzsch's work is such that he did not need an office and, from that point of view, the present case is comparable to *Weber*. The present case concerns work in transport. Mr Koelzsch transports flowers and plants from Odense in Denmark to various places in Germany and other countries. Therefore the national court in the present case must take account of the special characteristics of the transport business as regards the method of carrying it out and as regards the means or equipment used.

94. As I have already pointed out, [105] for the purpose of applying the law of a specific Contracting State, it is not sufficient that the employee returns systematically to that State. On the contrary, the centre of his working activities must also be established in that State. Therefore the mere fact that the employee returns systematically to a particular State is not sufficient for the requirement that he should habitually work there or that he should establish the effective centre of his working activities there.

101 — Van Eeckhoutte, *op. cit.*, footnote 82, pp. 169 and 170.

102 — Plender and Wilderspin, *op. cit.*, footnote 41, p. 315, paragraph 11-039.

103 — Van Eeckhoutte, *op. cit.*, footnote 82, pp. 170; in connection with Article 8(2) of Rome I, Mankowski (2009), *op. cit.*, footnote 72, p. 178.

104 — Wurmnest, *op. cit.*, footnote 53, p. 93.

105 — See point 63 above.

95. However, systematically returning to a country is not the only factor that may be relevant in the present case. When determining the country in or from which Mr Koelzsch habitually carries out his work, the national court must take account of all the circumstances of the case.

96. Therefore, in my view, the national court must in the present case take account of the following factors:

— it must ascertain in which countries Mr Koelzsch carried out transport work and must carefully examine the documents recording the journeys he made (*Körselsrapport*);

— in ascertaining the countries in which Mr Koelzsch carried out transport work, the national court must take account, first, of the countries which were not his final destination but in which Mr Koelzsch carried out transport work, that is to say, the countries through which he passed and, secondly, the countries which were his final destination; in connection with the latter, the court must ascertain whether most of the final destinations were in one country or were spread over a number of different countries;

— it must establish from which place Mr Koelzsch organised his work and how it was organised;

— with regard to the organisation of the work, the national court must ascertain where the equipment used was located; in the present case, the relevant factor is that the lorries were stationed in three 'connecting' places ('Wechselstandorte') in Germany (Kassel, Neukirchen/Vluyn and Osnabrück) [106] and that Mr Koelzsch's lorry was stationed in Osnabrück;

— with regard to the organisation of the work, the national court must find, *inter alia*, that the employees, residing in Osnabrück, took over from each other there for driving;

— with regard to the organisation of the work, it is also important to ascertain where Mr Koelzsch received instructions for making journeys;

— with regard to the organisation of the work, the national court must also take account of the fact that Mr Koelzsch began his journeys in Osnabrück and that he returned there after completing them.

106 — It appears form the order for reference that three lorries are stationed at each of those three places. Mr Koelzsch's lorry was stationed in Osnabrück.

97. Consequently, when determining the country in or from which the employee habitually carries out his work, the national court must take into account the equipment factor as well as the time factor. [107]

98. In that connection it must be observed that, for the purpose of determining the country in or from which the employee habitually carries out his work, it is irrelevant whether Gasa Spedition had facilities in Luxembourg or only a postbox. In my view, it is likewise immaterial whether Mr Koelzsch received instructions from the registered office of Gasa Spedition in Luxembourg or indirectly from that of Gasa Odense Blomster in Denmark. In the present case, that does not assist in establishing the place where the employee carries out work for his employer.

E — *Conclusion*

99. The present case is of crucial importance for the interpretation of Article 6(2)(a) of the Rome Convention because, as a result of the requirements relating to a high level of protection for employees, it enlarges the scope of that article in the sense that, in order to determine the country in or from which the employee habitually carries out his work within the meaning of that article, the relevant factors are not only the country in which the employee in fact works, but also the country from which he works. Therefore the interpretation of Article 5(1) of the Brussels Convention in the Court's case-law will apply by analogy to the interpretation of Article 6(2)(a) of the Rome Convention.

100. I accordingly take the view that the reply to the question referred must be that Article 6(2)(a) of the Rome Convention must be interpreted as meaning that, in a situation where an employee works in more than one Contracting State, the country in which he habitually carries out his work in performance of the contract within the meaning of that article is the country in or from which, taking account of all the circumstances of the case at issue, the employee in fact performs the essential part of his duties vis-à-vis his employer, and that assessment must be carried out by the national court, taking into account all the facts of the case.

107 — Junker, *op. cit.*, footnote 53, p. 733.

VII — Conclusion

101. In the light of the foregoing considerations, I propose that the Court's reply to the question referred for a preliminary ruling by the Cour d'appel, Luxembourg, should be as follows:

Article 6(2)(a) of the Rome Convention of 19 June 1980 on the law applicable to contractual relations must be interpreted as meaning that, in a situation where an employee works in more than one Contracting State, the country in which he habitually carries out his work in performance of the contract within the meaning of that article is the country in or from which, taking account of all the circumstances of the case at issue, the employee in fact performs the essential part of his duties vis-à-vis his employer The national court must carry out that assessment, taking into account all the facts of the case.