Reports of Cases

JUDGMENT OF THE COURT (First Chamber)

15 July 2021 *

(Reference for a preliminary ruling – Judicial cooperation in civil matters – Law applicable to contractual obligations – Regulation (EC) No 593/2008 – Articles 3 and 8 – Choice of law by the parties – Individual employment contracts – Employees who perform work in more than one Member State – Existence of closer connections with a country other than that in which or from which the employee habitually carries out his or her work or in which the place of business through which the employee was engaged is situated – Concept of 'provisions which cannot be derogated from by agreement' – Minimum wage)

In Joined Cases C-152/20 and C-218/20,

TWO REQUESTS for a preliminary ruling under Article 267 TFEU from the Tribunalul Mureș (Regional Court, Mureș, Romania), made by decisions of 1 October and 10 December 2019, received at the Court on 30 March and 27 May 2020, in the proceedings

DG,

EH

v

SC Gruber Logistics SRL (C-152/20),

and

Sindicatul Lucrătorilor din Transporturi, DT

v

SC Samidani Trans SRL (C-218/20),

THE COURT (First Chamber),

composed of J.-C. Bonichot, President of the Chamber, L. Bay Larsen, C. Toader, M. Safjan (Rapporteur) and N. Jääskinen, Judges,

Advocate General: M. Campos Sánchez-Bordona,

Registrar: A. Calot Escobar,

* Language of the case: Romanian.

having regard to the written procedure,

after considering the observations submitted on behalf of:

– the Romanian Government, by E. Gane and L. Lițu, acting as Agents,

– the Finnish Government, by M. Pere, acting as Agent,

– the European Commission, initially by M. Wilderspin and M. Carpus Carcea, and subsequently by M. Carpus Carcea, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 22 April 2021,

gives the following

Judgment

1 These requests for a preliminary ruling concern the interpretation of Articles 3 and 8 of Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I) (OJ 2008 L 177, p. 6; 'the Rome I Regulation').

2 The requests have been made in proceedings between Romanian lorry drivers and their employers, commercial companies established in Romania, concerning the amount of their remuneration.

Legal framework

EU law

3 Recitals 11, 23 and 35 of the Rome I Regulation state:

'(11) The parties' freedom to choose the applicable law should be one of the cornerstones of the system of conflict-of-law rules in matters of contractual obligations.

…

(23) As regards contracts concluded with parties regarded as being weaker, those parties should be protected by conflict-of-law rules that are more favourable to their interests than the general rules.

…

(35) Employees should not be deprived of the protection afforded to them by provisions which cannot be derogated from by agreement or which can only be derogated from to their benefit.'

4 Article 3 of that regulation provides:

‘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.

2. The parties may at any time agree to subject the contract to a law other than that which previously governed it, whether as a result of an earlier choice made under this Article or of other provisions of this Regulation. Any change in the law to be applied that is made after the conclusion of the contract shall not prejudice its formal validity under Article 11 or adversely affect the rights of third parties.

3. Where all other elements relevant to the situation at the time of the choice are located in a country other than the country whose law has been chosen, the choice of the parties shall not prejudice the application of provisions of the law of that other country which cannot be derogated from by agreement.

4. Where all other elements relevant to the situation at the time of the choice are located in one or more Member States, the parties’ choice of applicable law other than that of a Member State shall not prejudice the application of provisions of [EU] law, where appropriate as implemented in the Member State of the forum, which cannot be derogated from by agreement.

5. The existence and validity of the consent of the parties as to the choice of the applicable law shall be determined in accordance with the provisions of Articles 10, 11 and 13.’

5 Under Article 8 of the Rome I Regulation:

‘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.’

Romanian law

6 Article 2(1) of the Ordinul ministrului muncii și solidarității sociale nr. 64 pentru aprobarea modelului cadru al contractului individual de muncă (Order No 64 of the Minister for Labour and Social Protection approving the standard-form individual employment contract) of 28 February 2003 (*Monitorul Oficial al României*, No 139 of 4 March 2003; 'Order No 64/2003') was worded as follows:

'The individual employment contract concluded between the employer and the employee must include the elements contained in the standard form.'

7 The standard form referred to in Article 2(1) of that order, which was annexed thereto, provided, in Section N thereof:

'The provisions of this individual employment contract are supplemented by the provisions of [Legea nr. 53/2003 – Codul muncii (Law No 53/2003 establishing the Labour Code) of 24 January 2003 (*Monitorul Oficial al României*, No 72 of 5 February 2003)] and of the collective agreement applicable …'

The disputes in the main proceedings and the questions referred for a preliminary ruling

Case C-152/20

8 The dispute in the main proceedings in Case C-152/20 concerns the remuneration of two Romanian lorry drivers, DG and EH, who were employed by the company SC Gruber Logistics SRL. Their individual employment contracts, drafted both in Romanian and Italian, stipulated that the clauses contained in those contracts were supplemented by the provisions of Law No 53/2003. In addition, those contracts stipulated that disputes relating thereto were to be resolved by the court having jurisdiction *ratione materiae* and *ratione loci*. As regards the place of work, the contracts stipulated that 'work [was to] be carried out (at the section/workshop/office/department) of the garage of the company/the place of performance of the activity/another place of business in the municipality of Oradea [(Romania)] and, in accordance with postings to the offices or places of performance of the activities of customers or of current and future suppliers, at any location on national territory and abroad where the vehicle used by the employee in the performance of his or her duties will also be required, or in any other place in which the employee carries out transport activities'.

9 DG and EH brought an action against SC Gruber Logistics before the Tribunalul Mureș (Regional Court, Mureș) seeking an order requiring that that company pay the difference between the wages actually received and the minimum wage to which, in their view, they would have been entitled under Italian law on the minimum wage in the road transport sector, that wage being set by the collective agreement for the transport sector in Italy.

10 DG and EH submit that Italian law on the minimum wage is applicable to their individual employment contracts in accordance with Article 8 of the Rome I Regulation. They argue that, although those contracts were concluded in Romania, they habitually performed their duties in Italy. They submit that the place from which they carried out their assignments and from which they received their instructions, and the place to which they returned at the end of their

assignments, was in Italy. In addition, most of their transport tasks were carried out in Italy. In the light of the judgment of 15 March 2011, *Koelzsch* (C-29/10, EU:C:2011:151), DG and EH submit that they are entitled to the minimum wage applicable in Italy.

11 In the view of SC Gruber Logistics, DG and EH worked on its behalf in lorries registered in Romania and on the basis of transport licences issued in accordance with the applicable Romanian legislation, with all instructions being issued by SC Gruber Logistics and the activities of DG and EH being organised in Romania. That company therefore contends that the employment contracts in question in the main proceedings must be subject to Romanian law.

12 In those circumstances, the Tribunalul Mureș (Regional Court, Mureș) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Is Article 8 of [the Rome I] Regulation … to be interpreted as meaning that the choice of law applicable to an individual employment contract excludes the application of the law of the country in which the employee has habitually carried out his or her work or as meaning that the fact that a choice of law has been made excludes the application of the second sentence of Article 8(1) of that regulation?

(2) Is Article 8 of [the Rome I] Regulation … to be interpreted as meaning that the minimum wage applicable in the country in which the employee has habitually carried out his or her work is a right that falls within the scope of "provisions that cannot be derogated from by agreement under the law that, in the absence of choice, would have been applicable", within the meaning of the second sentence of Article 8(1) of the regulation?

(3) Is Article 3 of [the Rome I] Regulation … to be interpreted as meaning that the specification, in an individual employment contract, of the provisions of the Romanian Labour Code does not equate to a choice of Romanian law, in so far as, in Romania, it is well known that [the inclusion of] such a … clause [concerning the choice of Romanian law] in individual employment contracts [is a legal obligation]? In other words, is Article 3 of [the Rome I] Regulation … to be interpreted as precluding national rules and practices pursuant to which a clause specifying the choice of [national] law must necessarily be included in individual employment contracts?'

Case C-218/20

13 The dispute in the main proceedings in Case C-218/20 concerns the law applicable to the remuneration of a Romanian lorry driver, DT, employed by the Romanian company, SC Samidani Trans SRL. DT submits that he carried out his activities exclusively in Germany.

14 DT's individual employment contract contained a clause stipulating that the provisions of that contract were supplemented by the provisions of Law No 53/2003. DT's employment contract also contained a clause specifying that disputes relating to that employment contract were to be resolved by the court having jurisdiction *ratione materiae* and *ratione loci*.

15 That same employment contract did not expressly mention the place where the employee was to carry out his activities. DT submits that the place from which he carried out his tasks and from which he received his instructions was Germany. In addition, the lorries that he used were parked in Germany and the transport assignments that he carried out took place within German borders.

16 By an action brought before the referring court, the Sindicatul Lucrătorilor din Transporturi (transport workers' union, Romania), a trade union of which DT is a member, sought, for and on behalf of DT, an order requiring SC Samidani Trans to pay DT the difference between the wages that he actually received and the minimum wage to which he would have been entitled under German law on the minimum wage. In addition, that trade union submits that DT is entitled to payment of wages in respect of a 'thirteenth' and 'fourteenth' month provided for in German law.

17 The transport workers' union maintains that German minimum wage law is applicable to DT's employment contract in accordance with Article 8 of the Rome I Regulation. Although his individual employment contract was concluded in Romania, DT habitually performed his duties in Germany. In the light of the judgment of 15 March 2011, *Koelzsch* (C-29/10, EU:C:2011:151), DT is therefore entitled to the minimum wage provided for in German law.

18 SC Samidani Trans disputes that and contends that it was specifically laid down by the parties to the employment contract at issue in the main proceedings that the law applicable to the individual employment contract was to be Romanian labour law.

19 In those circumstances, the Tribunalul Mureș (Regional Court, Mureș) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Interpretation of Article 8 of [the Rome I] Regulation …: does the choice of law applicable to an individual employment contract exclude the application of the law of the country in which the employee has habitually carried out his or her work or does the fact that a choice of law has been made exclude the application of the second sentence of Article 8(1) of that regulation?

(2) Interpretation of Article 8 of [the Rome I] Regulation …: is the minimum wage applicable in the country in which the employee has habitually carried out his or her work a right that falls within the scope of "provisions that cannot be derogated from by agreement under the law that, in the absence of choice, would have been applicable", within the meaning of the second sentence of Article 8(1) of the regulation?

(3) Interpretation of Article 3 of [the Rome I] Regulation …: does the specification, in an individual employment contract, of the provisions of the Romanian Labour Code equate to a choice of Romanian law, in so far as, in Romania, it is well known that the employer predetermines the content of the individual employment contract?'

The questions referred

The first and second questions in Cases C-152/20 and C-218/20

20 By its first and second questions in Cases C-152/20 and C-218/20, which should be examined together, the referring court asks, in essence, whether Article 8 of the Rome I Regulation must be interpreted as meaning that, where the law governing the individual employment contract has been chosen by the parties to that contract, and that law differs from the law applicable pursuant to paragraphs 2, 3 or 4 of that article, whether the application of the latter law must be excluded and, if so, to what extent.

21 It should be noted at the outset that it is not apparent from the orders for reference whether the lorry drivers in question in the main proceedings are posted workers within the meaning of Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services (OJ 1997 L 18, p. 1) or workers who, while not having that status, habitually carry out their activities in a country other than that in which the employer has its headquarters. Since it is for the referring court to establish the factual circumstances of the disputes before it, the questions of that court will be analysed exclusively in the light of the Rome I Regulation.

22 Article 8 of the Rome I Regulation lays down special conflict-of-law rules for individual employment contracts which apply if, in performance of such a contract, work is carried out in at least one State other than that in which the chosen law applies.

23 Paragraph 1 of that article provides that an individual employment contract is to be governed by the law chosen by the parties in accordance with Article 3 of that regulation and that such a choice of law may not have the result of depriving the employee of the protection afforded to him or her by provisions under the law that cannot be derogated from by agreement and that would be applicable to the contract in the absence of such a choice, pursuant to paragraphs 2, 3 and 4 of that article.

24 If those provisions offer the employee concerned greater protection than those of the law chosen, the former provisions will override the latter, while, as the Advocate General noted in point 43 of his Opinion, the law chosen will continue to apply to the rest of the contractual relationship.

25 In that regard, it should be noted that Article 8(2) of the Rome I Regulation refers to the law of the country in which or, failing that, from which the employee habitually carries out his or her work in performance of the employment contract.

26 Article 8 of that regulation is thus intended to ensure, as far as possible, compliance with the provisions protecting the employee that are laid down by the law of the State in which that employee carries out his or her professional activities (see, to that effect, judgment of 18 October 2016, *Nikiforidis*, C-135/15, EU:C:2016:774, paragraph 48 and the case-law cited).

27 As the Advocate General observed in point 44 of his Opinion, the correct application of Article 8 of the Rome I Regulation therefore requires, in a first step, that the national court identify the law that would have applied in the absence of choice and determine, in accordance with that law, the rules that cannot be derogated from by agreement and, in a second step, that that court compare

the level of protection afforded to the employee under those rules with that provided for by the law chosen by the parties. If the level of protection provided for by those rules is greater, those same rules must be applied.

28 In the present case, the referring court seems to consider that, because of the places where the drivers in question in the main proceedings habitually carried out their work, certain provisions of Italian law and of German law on the minimum wage could, pursuant to Article 8(1) of the Rome I Regulation, apply instead of Romanian law, which was chosen by the parties to the employment contracts in question in the main proceedings.

29 As regards the question whether such rules constitute provisions that cannot be derogated from by agreement within the meaning of that provision, it should be noted that it is apparent from the very wording of that provision that that question must be assessed in accordance with the law that would have been applicable in the absence of choice. Accordingly, the referring court must itself interpret the national rule in question.

30 It should also be noted that, in the absence of criteria in the Rome I Regulation that allow for the determination as to whether a national rule constitutes a provision or a law within the meaning of Article 8(1) of that regulation, where it follows from national law that rules contained in agreements which, while they do not necessarily come within the scope of the law but are mandatory, it is for the court to respect that choice even if it differs from that made by its national law.

31 As regards specifically the minimum wage rules of the country where the employee has habitually carried out his or her activities, these can, in principle, be classified as 'provisions that cannot be derogated from by agreement under the law that, in the absence of choice, would have been applicable' within the meaning of Article 8(1) of the Rome I Regulation, as the Advocate General observed in points 72 and 107 of his Opinion.

32 In the light of the foregoing, the answer to the first and second questions in Cases C-152/20 and C-218/20 is that Article 8(1) of the Rome I Regulation must be interpreted as meaning that, where the law governing the individual employment contract has been chosen by the parties to that contract, and that law differs from the law applicable pursuant to paragraphs 2, 3 or 4 of that article, the application of the latter law must be excluded with the exception of 'provisions that cannot be derogated from by agreement' under that law within the meaning of Article 8(1) of that regulation, provisions that can, in principle, include rules on the minimum wage.

The third questions in Cases C-152/20 and C-218/20

33 As a preliminary point, it should be noted that, since the Court has jurisdiction to extract from the body of material provided by the referring court, and in particular from the statement of reasons for the order for reference, the elements of Union law which require interpretation in the light of the subject matter of the dispute (see, to that effect, judgment of 22 April 2021, *Profi Credit Slovakia*, C-485/19, EU:C:2021:313, paragraph 50 and the case-law cited), the third questions in the present cases must be understood as referring to Article 8 of the Rome I Regulation.

34 Even though the referring court refers in those questions to the general rule contained in Article 3 of that regulation, it must be noted that, as stated in paragraph 22 of this judgment, Article 8 contains special conflict-of-law rules for employment contracts.

35 Consequently, the third questions in Cases C-152/20 and C-218/20, as raised in slightly different wording in those two cases, should be understood as seeking, in essence, to ascertain whether Article 8 of the Rome I Regulation must be interpreted as meaning that:

– first, the parties to an individual employment contract are to be regarded as being free to choose the law applicable to that contract even if a national provision requires the inclusion in that contract of a clause under which the contractual provisions are supplemented by national labour law and

– secondly, the parties to an individual employment contract are to be regarded as being free to choose the law applicable to that contract even if the contractual clause concerning that choice is drafted by the employer, with the employee merely accepting it.

36 It should be noted, first of all, that Article 3 of the Rome I Regulation, to which Article 8 thereof refers, lays down the principle of freedom of choice in circumstances involving a conflict of laws (see, to that effect, judgments of 18 October 2016, *Nikiforidis*, C-135/15, EU:C:2016:774, paragraph 42, and of 17 October 2013, *Unamar*, C-184/12, EU:C:2013:663, paragraph 49). That provision allows the parties to a contract to choose freely the law governing their contract. In accordance with Article 3(1) of the Rome I Regulation, the choice of the applicable law can be made expressly or clearly demonstrated by the terms of the contract or the circumstances of the case. That choice must be clearly apparent from the contractual provisions or the circumstances of the case.

37 As regards, next, the requirement that the choice of the applicable law be free, within the meaning of Article 3 of the Rome I Regulation, the referring court states that Article 2(1) of Order No 64/2003, read in conjunction with the standard-form individual employment contract annexed thereto, suggests that the parties to the contracts in question in the main proceedings are, contrary to that requirement, obliged to choose Romanian law.

38 In its written observations, the Romanian Government submits, however, that national law does not provide for an obligation to choose Romanian law as the law applicable to the contract. It is only if the parties make that choice of their own free will that they must comply with Order No 64/2003 and draft their contract in line with the standard form annexed to that order, resulting in the supplementary application of the Romanian Labour Code. Accordingly, the inclusion of a clause such as that mentioned by the referring court is a consequence of the choice made by the parties of the law applicable to the contract.

39 It is for the referring court alone to assess whether the latter interpretation of national law is correct and thus to verify that the inclusion in the contract of a clause providing for the application of the Romanian Labour Code does not reflect an obligation for the parties to choose Romanian law, but confirms the implicit and free choice of that law made by those parties in accordance with Article 3 of the Rome I Regulation.

40 As regards, lastly, the question whether the inclusion by the employer in a pre-formulated employment contract of a clause providing for the choice of the applicable law makes it possible to establish that there is no freedom of choice, contrary to Article 3 of the Rome I Regulation, it should be noted that that regulation does not prohibit the use of standard clauses pre-formulated by the employer. Freedom of choice, within the meaning of that provision, can be exercised by consenting to such a clause and is not called into question solely because that choice is made on the basis of a clause drafted and included by the employer in the contract.

41 In the light of the foregoing, the answer to the third questions in Cases C-152/20 and C-218/20 is that Article 8 of the Rome I Regulation must be interpreted as meaning that:

– first, the parties to an individual employment contract are to be regarded as being free to choose the law applicable to that contract even if the contractual provisions are supplemented by national labour law pursuant to a national provision, provided that the national provision in question does not require the parties to choose national law as the law applicable to the contract, and

– secondly, the parties to an individual employment contract are to be regarded as being, in principle, free to choose the law applicable to that contract even if the contractual clause concerning that choice is drafted by the employer, with the employee merely accepting it.

Costs

42 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the referring court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (First Chamber) hereby rules:

1. **Article 8(1) of Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I) must be interpreted as meaning that, where the law governing the individual employment contract has been chosen by the parties to that contract, and that law differs from the law applicable pursuant to paragraphs 2, 3 or 4 of that article, the application of the latter law must be excluded with the exception of 'provisions that cannot be derogated from by agreement' under that law within the meaning of Article 8(1) of that regulation, provisions that can, in principle, include rules on the minimum wage.**

2. **Article 8 of Regulation No 593/2008 must be interpreted as meaning that:**

   – **first, the parties to an individual employment contract are to be regarded as being free to choose the law applicable to that contract even if the contractual provisions are supplemented by national labour law pursuant to a national provision, provided that the national provision in question does not require the parties to choose national law as the law applicable to the contract, and**

   – **secondly, the parties to an individual employment contract are to be regarded as being, in principle, free to choose the law applicable to that contract even if the contractual clause concerning that choice is drafted by the employer, with the employee merely accepting it.**

[Signatures]