Pay Day – The German Federal Labour Court Gives its Final Ruling on Foreign Mandatory Rules in the Nikiforidis Case

On February 25, 2015, the German Federal Labour Court had referred questions relating to the interpretation of Art. 9 Rome I to the CJEU (see here). In the context of a wage claim made by a Greek national who is employed by the Hellenic Republic at a Greek primary school in Germany, the German Federal Labour Court faced the problem whether to apply the Greek Saving Laws No 3833/2010 and 3845/2010 as overriding mandatory provisions. The claimant, Mr. Nikiforidis, had argued that, as a teacher who is employed in Germany under a contract governed by German law, he did not have to accept the wage cuts imposed on his Greek colleagues working in the Hellenic Republic. For a closer analysis, see the earlier post by Lisa Günther here.

In its decision of October 18, 2016 – C-135/15 (available here), the CJEU held (at para 50) that Article 9 of the Rome I Regulation must be interpreted "as precluding the court of the forum from applying, as legal rules, overriding mandatory provisions other than those of the State of the forum or of the State where the obligations arising out of the contract have to be or have been performed. Consequently, since, according to the referring court, Mr. Nikiforidis's employment contract has been performed in Germany, and the referring court is German, the latter cannot in this instance apply, directly or indirectly, the Greek overriding mandatory provisions which it sets out in the request for a preliminary ruling ". According to the CJEU, the duty of sincere cooperation laid down in Article 4(3) TEU does not modify this restrictive approach. The Court went on, however, to confirm

the practice established by German courts of taking foreign mandatory rules into account as a matter of fact (at para 52): "On the other hand, Article 9 of the Rome I Regulation does not preclude overriding mandatory provisions of a State other than the State of the forum or the State where the obligations arising out of the contract have to be or have been performed from being taken into account as a matter of fact, in so far as this is provided for by a substantive rule of the law that is applicable to the contract pursuant to the regulation." Finally, the CJEU reached the conclusion (at para. 53) that "[a]ccordingly, the referring court has the task of ascertaining whether Laws No 3833/2010 and No 3845/2010 are capable of being taken into account when assessing the facts of the case which are relevant in the light of the substantive law applicable to the employment contract at issue in the main proceedings." For a critical evaluation of this decision, see the comment by Geert van Calster here.

On April 26, 2017, the Federal Labour Court delivered its final decision in this case (5 AZR 962/13; the German press release is available here). Although the CJEU has, as a general principle, allowed German courts to take foreign mandatory laws into account as a matter of fact, the Federal Labour Court respectfully declines to follow this path in the particular case because substantive German labour law does not provide for a suitable point of entry for the Greek saving laws. Under German labour law, an employee is – unless specifically agreed between the parties – not obliged to accept permanent wage cuts merely because his employer is in financial difficulties. Seen in this light, the preliminary reference of February 2015 has, at least partially, a certain hypothetical flavour to it – nevertheless, the methodological clarifications made by the CJEU will be helpful in future cases.