German Federal Labour Court on Foreign Mandatory Rules and the Principle of Cooperation among EU Member States

by Dr. Lisa Günther

Dr. Lisa Günther, a lawyer at TaylorWessing, has kindly provided us with the following note on the recent reference for a preliminary ruling made by the German Federal Labour Court (see Giesela Rühl's earlier post on the Court's press release here). Günther is the author of a doctoral dissertation on the applicability of foreign mandatory rules under Rome I and II that was accepted by the University of Trier (Die Anwendbarkeit ausländischer Eingriffsnormen im Lichte der Rom I- und Rom II-Verordnungen, Verlag Alma Mater, Saarbrücken 2011; more details are available here).

On February 25, 2015, the German Federal Labour Court referred three questions relating to the interpretation of Art. 9 and Art. 28 Rome I Regulation to the CJEU. In the context of a wage claim made by a Greek national who is employed by the Greek State 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 Laws as overriding mandatory provisions although the employment contract is governed by German law.

The Greek Saving Laws are the result of the implementation of agreements between Greece and the institutions formerly known as the "Troika" (EU, ECB, IMF) regarding the granting of credits in the context of Greece's financial difficulties. The Saving Laws are supposed to ensure that Greece meets the obligations contained in Art. 119 ff. TFEU, particularly in Art. 126 TFEU. These obligations have been specified by Council Decision 2010/320/EU of 10 May 2010. The Greek Saving Laws result in payment cuts in the public sector. The Greek claimant demands payment of the difference between his original salary and the sum that has been reduced in accordance with the Greek Saving Laws.

As the employment contract was concluded in 1996, amended in writing in 2008

and lasted at least until December 2012, the German Federal Labour Court first raises the question as to whether the application of the Greek Saving Laws is subject to Art. 9 of the Rome I Regulation as far as the the temporal scope of the Regulation is concerned. If Art. 9 Rome I Regulation is applicable in this sense, the German Federal Labour Court raises the further question as to whether Art. 9 (3) Rome I Regulation implicitly prohibits the application of the Greek Saving Laws because Art. 9 (3) Rome I Regulation only covers overriding mandatory provisions of the place of performance and – according to the German Federal Labour Court – Germany is the relevant place of performance in this case.

Thus, the temporal scope of application of the Rome I Regulation must be the starting point of legal analysis. According to Art. 28 of the Rome I Regulation, the Regulation applies to contracts concluded as from 17 December 2009 (cf. the corrigendum published in OJ 2009, No. L 309, p. 87). As the employment contract was – initially – concluded in 1996, the answer in the negative seems quite clear. The previous instance, the Regional Labour Court of Nürnberg, thus decided that the Rome I Regulation is in fact not applicable. The German Federal Labour Court, however, argues that an autonomous interpretation of the term "concluded" is necessary because the Member States have different understandings of when an employment contract is actually "concluded". Particularly, the German Federal Labour Court points out that such an autonomous interpretation must take into account the fact that employment contracts are continuous obligations. Also, the Court emphasizes that it may be necessary not only to include the very first conclusion of an employment contract into the scope of Art. 28 Rome I Regulation, but to interpret the term "concluded" in a way that amendments or changes (i.e. alteration of the gross salary or legislative measures such as the measures of the Greek legislature in question) to an existing employment contract also lead to the application of the Rome I Regulation.

Nevertheless, the wording of Art. 28 Rome I Regulation is rather inflexible in referring to contracts *concluded* as from 17 December 2009 but not to contracts merely *continuing* after 17 December 2009. Also, the legislative procedure shows that the drafters decided consciously against a retroactive effect of the Rome I Regulation (cf. *von Hein*, in: Thomas Rauscher [ed.], EuZPR/EuIPR, Munich 2011, Art. 8 Rome I para.16). While Art. 24 (3) of 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, provided for a limted retroactive effect, this transitional provision was deleted and did not become a part of the final Rome I Regulation. The interpretation that it is sufficient for the applicability of the Rome I Regulation to simply continue a contract after 17 December 2009, however, would result in precisely such a retroactive effect. Against this background, a conscious choice of the contracting parties to substantially modify and/or actually renew their contract should be the minimum requirement for the intertemporal application of the Rome I Regulation.

Should the CJEU affirm the intertemporal application of the Rome I Regulation, the second question referred to the CJEU will become decisive. The characterization of the Greek Saving Laws as overriding mandatory provisions as such does not seem to pose any difficulties. Both the requirements of German case law as well as the definition now contained in Art. 9 (1) Rome I Regulation ("*provisions the respect for which is regarded as crucial by a country for safeguarding its public interest, such as its political, social or economic organisation, to such an extent that they are applicable to any situation within their scope, irrespective of the law otherwise applicable to the contract*") – which provides guidance regardless of whether the Rome I Regulation is applicable or not – are met if taking into consideration genesis, wording as well as the policy of the Greek Saving Laws.

If Art. 9 Rome I Regulation is not applicable *ratione temporae*, the German Federal Labour Court considers taking the Greek Saving Laws into account as a matter of fact within the scope of the German lex causae. This approach complies with how German courts used to consider third country overriding mandatory provisions before the Rome I Regulation entered into force. As Art. 7(1) of the Rome Convention on the law applicable to contractual obligations from 19 June 1980 was never adopted in Germany, the German courts had to rely on blanket clauses in the lex causae allowing such consideration within the framework of substantive law rather than applying them pursuant to conflict of laws rules. The German Federal Labour Court, however, raises the question as to whether Art. 9 Rome I Regulation now excludes taking Greek Saving Laws into account. This question is a result of the unfortunate restrictions of Art. 9 Rome I Regulation. Whereas Art. 9(2) Rome I Regulation concerns the application of overriding mandatory provisions of the law of the forum – in this case German law –, Art. 9(3) Rome I Regulation limits the application of overriding mandatory provisions

to the provisions of the place of performance, stating that "*[e]ffect may be given to the overriding mandatory provisions of the law of the country where the obligations arising out of the contract have to be or have been performed, in so far as those overriding provisions render the performance of the contract unlawful. […].*" While the Rome I Regulation does not provide a definition of the "place of performance", therefore not answering the question whether the relevant place of performance is the place of performance of the characteristic performance of the contract only or whether each performance has to be considered separately, the German Federal Labour Court seems to have determined that Germany must be regarded as the place of performance for the payments of the Greek state within the meaning of Art. 9(3) Rome I Regulation. Therefore, the question as to whether Art. 9(3) Rome I Regulation actually prohibits the application of overriding mandatory provisions which are neither overriding mandatory provisions of the lex fori nor of the place of performance becomes crucial.

Both the wording as well as the genesis of Art. 9(3) Rome I Regulation suggest that the direct application of overriding mandatory provisions which are not part of the law of the place of performance on a conflict of laws level is – unfortunately – not possible. The Member States could not agree on a provision comparable to Art. 7(1) of the Convention on the law applicable to contractual obligations from 19 June 1980 which provided for the application of third country overriding mandatory provisions with which the situation has a close connection (cf. Art. 8(3) of the proposal COM(2005) 650 final) but deliberately restricted the scope of Art. 9 (3) to overriding mandatory provisions of the place of performance.Still, Art. 9 (3) Rome I Regulation should not prohibit indirectly considering the content of third country overriding mandatory provisions as a matter of fact within the scope of blanket clauses of the substantive lex causae:

First, the indirect consideration of third country overriding mandatory provisions as a matter of fact should not be equated with a direct application on a conflict of laws level. Therefore, the conflict of law provisions of the Rome I Regulation cannot prohibit the consideration of third country overriding mandatory provisions on the substantive law level. Thus, even if the CJEU approves of the application of the Rome I Regulation *ratione temporae*, the German Federal Labour Court will not be prevented from considering the Greek Saving Laws within blanket clauses of the German lex causae – which is exactly how German

courts considered third country overriding mandatory provisions before the Rome I Regulation entered into force.

Secondly, the German Federal Labour Court raises the question whether it is actually obliged to apply the Greek Saving Laws pursuant to the principle of sincere cooperation between Member States. This principle provides for the Member States to assist each other in full mutual respect in carrying out tasks flowing from the Treaties, Art. 4 (3) TEU. It is questionable whether Art. 4 (3) TEU as part of the primary law actually obligates the Member States to apply any overriding mandatory provision of other Member States simply due to the fact that another Member State's s legislature enacted them without any further statutory basis providing for such an application. However, as the Greek Saving Laws in question have their origins in obligations arising from the TFEU as well as a council decision, the situation might be regarded differently in the given case, especially because the situation affects the entire European Union. In this case, both Art. 4 (3) TEU as well as reasons of legal policy might actually oblige the German Federal Labour Court to apply the Greek Saving Laws to the claim for payment in question. Now it is up to the CJEU to decide.