AG Campos Sánchez-Bordona on choice of law to the individual employment contracts under the Rome I Regulation in the joined cases C-152/20 and C-218/20

On 22 April 2021, Advocate General Campos Sánchez-Bordona presented his Opinion in the joined cases SC Gruber Logistics and Sindicatul Lucratorilor din Transporturi, C-152/20 and 218/20, in which he addresses in a pedagogical manner a number of issues of relevance to the choice of law to an individual employment contract under Article 8 of the Rome I Regulation as well as, indirectly, to the choice made in relation to a consumer contract under Article 6 of the Regulation.

Since numerous judgments and opinions were delivered at the Court of Justice at the end of April, we are only now reporting on the present cases, which are by no means less interesting than those previously covered.

Factual context

The factual contexts of the two requests for a preliminary ruling are somewhat similar. Both in the case C-152/20 and in the case C-218/20, the procedure pending before the national court (same for these two cases) concerns an action on payment of certain sums to the employees engaged as lorry drivers.

Notwithstanding the existence of some nuance discussed below, in both cases the employment contracts are said to contain a choice of law clause in favour of Romanian law.

In the former case, the employment contracts provided that the employees shall carry out their work in Romania and in “any location in the country and abroad as may be requested”. However, the employees argue that the place of performance

lied within the territory of Italy and thus, according to Article 8 of the Rome I Regulation, it is the law of this Member State that governs at least their minimal wage.

In the latter case, the contract did not mention any specific place of performance. It is argued though that the employee carried out his work in Germany.

Preliminary questions and their assessment in the Opinion

It is in this context that the referring court decided to stay the main proceedings in these two cases and to refer to the Court nearly identical sets of three questions.

At the outset, AG notices that while the referring court is not asking for the interpretation of the Directive 96/71 (Posted Workers Directive 1996), it cannot be a priori excluded that the provisions thereof are of relevance in the context of the present cases. With respect to the terms and conditions of employment specified in its Article 3(1), the Directive would mandate the application of the law of the Member State where the work is carried out, rather than of the law applicable to the employment contract under the Rome I Regulation (points 29 to 33). However, in the absence of any clear information supporting the relevance of the Directive, AG deems it appropriate to follow the premise on which the national court relies: at present, it is the Rome I Regulation at stake (point 34).

In essence, the requests for a preliminary ruling raise three intertwined issues, namely: first, the interplay between the law chosen by the parties and the law that would be applicable in the lack of that choice, next, the qualification of the provisions on minimum wage as the "provisions that cannot be derogated from by agreement" within the meaning of Article 8(1) of the Regulation and finally, the admissibility of a compulsory (ex lege and de facto) choice of law clause in an individual employment contract.

1) Interplay between the law chosen by the parties and the law that would be applicable in the lack of that choice

The first question as phrased by the referring court reads: "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 [the Rome I Regulation]?"

At first glance, the intention of the referring court may not seem perfectly clear. At least since the Rome Convention, the choice of law for the employment contract may not have the result of depriving the employee of the protection afforded to him (her) by provisions that cannot be derogated from by agreement under the law that would have been applicable in the absence of choice.

Indeed, as the referring court puts it in the requests for a preliminary ruling where it adopts a different perspective, by its first question it asks, in essence, whether Article 8(1) of the Rome I Regulation implies that a national court may override the parties' choice of law where it appears from all the circumstances that the contract is more closely connected with a different country. It is not clear whether the reference to a 'more closely connected' country implies that the referring court is envisaging the application of Article 8(4) of the Regulation instead of Article 8(2) of the Regulation. This seems however to be irrelevant in the context of the issue at stake.

In his Opinion, mirroring the first question as phrased by the referring court, AG considers that the law chosen by the parties applies also with respect to "the protection afforded to [employee] by provisions that cannot be derogated from by agreement", as long as the chosen law offers equal or higher standard of protection (point 107, first indent).

In actuality, AG seems to identify in a precise manner the point of hesitation that inspired the specific wording of the first question. For the referring court, the law applicable in the absence of choice seems to be starting point and the law chosen by the parties is seen as a subsequent intervening factor.

Regardless where such starting point is set, the law that would have been applicable in the absence of choice applies insofar as the law chosen by the parties is less protective towards the employee. This is arguably also the case under Article 6 of the Rome I Regulation.

2) Qualification of the provisions on minimum wage as the "provisions that cannot be derogated from by agreement"

By its second question, the referring courts seeks to establish whether the provisions on minimum wage may be qualified as the "provisions that cannot be derogated from by agreement" within the meaning of Article 8(1) of the Rome I Regulation.

In this context, AG clarifies that the notion of "provisions that cannot be derogated from by agreement" is not equivalent to the notion of "overriding mandatory provisions" in the sense of Article 9 of the Regulation (points 64 to 68).

Answering the second question, he considers that the provisions on minimum wage of the country where the employee has habitually carried out his (her) work may in principle be qualified as "provisions that cannot be derogated from by agreement under the law that, in the absence of choice, would have been applicable". This consideration is accompanied by a caveat. The prevalence of these provisions depends on their "configuration" in the national legal system in question, which it is for the referring court to verify (point 107, second indent).

3) Admissibility of a compulsory (ex lege and de facto) choice of law clause in an individual employment contract

The third question contains some nuance. In essence, the referring courts is attempting to determine whether a compulsory (ex lege in the case C-152/20 and de facto in the case C-218/20) choice of law clause in an individual employment contract is admissible under Article 3 of the Rome I Regulation.

On the one hand, in the case C-152/20, the third questions reads: "[does] 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 there is *a legal obligation to include such a choice-of-law clause* in individual employment contracts? In other words, is Article 3 of [of the Rome I Regulation] to be interpreted as precluding national rules and practices pursuant to which a clause specifying the choice of Romanian law must necessarily be included in individual employment contracts?"

On the other hand, in the case C-218/20, the third question is phrased as follows:

“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?”.

In his assessment of the third questions, AG distinguishes these two scenarios but evaluates them in the light of single core question: if a choice of law clause is compulsory, may one still consider that the parties have exercised their freedom of choice of the law applicable to their contract? (see, in that vein, points 98 and 104).

Ultimately, the proposed answer to the third question in the two cases is that Articles 3 and Article 8 of the Rome I Regulation are to be interpreted to the effect that a choice of the law applicable to an individual employment contract, explicit or implicit, “must be free for both parties” (“ha de ser libre para ambas partes”), which is not the case where a national provision requires a choice of law clause to be inserted in that contract. However, Articles 3 and 8 of the Regulation do not prevent such a clause from being drafted in the contract in advance by decision of the employer, to which the employee gives his consent (point 107, third indent).

The Opinion can be consulted here (the English version is not available).