

Measure twice, cut once: Dutch case *Presta v VLEP* on choice of law in employment contracts

Presta v VLEP (23 June 2023) illustrates the application of the CEJU's *Gruber Logistics* (Case C-152/20, 15 July 2021) by the Dutch Supreme Court. In order to determine the law applicable to an individual employment contract under article 8 Rome I, one must compare the level of protection that would have existed in the absence of a choice of law (in this case, Dutch law) with the level of protection offered by the law chosen by the parties in the contract (in this case, the laws of Luxembourg), thereafter, the law of the country offering the highest level of employee protection should be applied.

Facts

Presta is a Luxembourg based company. It employs workers of different nationalities who carry out cross-border work in various EU countries. Their employment contracts contain a choice of Luxembourg law.

From 2012 to 2017, Presta provided employees to Dutch companies working in the meat processing industry. This industry has a compulsory (Dutch) pension fund VLEP. Membership in VLEP and payments to the fund are compulsory for the meat processing industry companies, even for the companies, which are not bound by the collective labour agreement.

According to VLEP, Presta falls within the scope of the compulsory membership in the pension fund. Based on this assertion, VLEP sent payment notices to Presta for the period from 2012 to 2017, but Presta left the invoices unpaid.

Proceedings

In 2016, VLEP obtained a writ of execution against Presta for the payment of €1,779,649.86 for outstanding pension premiums, interest, a fine, and costs. Presta objected, filing a claim before a Dutch court. The first instance court dismissed its claim. Presta appealed, but the appellate court has also dismissed its claims, reasoning as follows.

On the one hand, the employment contracts between Presta and the employees contained a choice of Luxembourg law as referred to in Article 8(1) Rome I. On the other hand, the employees 'habitually' carried out work in the sense of Article 8(2) Rome I Regulation in the Netherlands. Although some factors assessed pointed to Luxembourg, the court considered that these factors carried insufficient weight to apply Article 8(4) Rome I. Therefore, Dutch law would apply if the parties had not made a choice of law.

Based on this, the court held that since the Dutch law would apply if the parties had not made a choice of law, the employees should not lose the protection of mandatory Dutch law, including the rules which oblige Presta to pay the pension premiums. The court went on to apply the said Dutch rules and confirmed Presta's obligations to pay VLEP.

EU freedom of services?

On a side note: noteworthy is that one of Presta's arguments relied on article 56 Treaty on the Functioning of the European Union (TFEU) on freedom of services. According to Presta, the rules that oblige to participate in VLEP's pension scheme constituted a restriction on the freedom to provide services, violating article 56 TFEU. The argument was rejected: as the relevant legal provisions cover all employees working in the meat industry in the Netherlands, excluding workers employed by foreign employers would result in an unjustified difference in their treatment.

Cassation based on *Gruber Logistics*

Back to Presta's main argument in cassation: Presta filed a cassation claim, invoking the CJEU ruling of 15 July 2021, C-152/20 *Gruber Logistics*. In that case, the CJEU has ruled that under Article 8 Rome I Regulation, the court must compare the level of protection that would have existed in the absence of a choice of law with the level of protection offered by the law chosen by the parties in an employment contract. The CJEU has thereby dismissed an interpretation of article 8 Rome I, according to which courts need not to compare the two relevant legal systems, but have to apply, next to chosen law, mandatory law of the country where the employee habitually carries out work. According to Presta, lower courts had to compare the level of employees' protection provided by the Dutch law to the level of protection under the Luxembourg law.

As the lower courts made no such comparison, the Dutch Supreme Court has followed *Gruber Logistics*, Presta's cassation claim has been honoured, and the dispute is referred back to a lower court. It shall have to determine whether the Dutch law or the law of Luxembourg offers a higher level of protection and thereafter apply the law to the dispute.

Presta v VLEP offers an illustration of a dispute in which a national court has followed CJEU's reasoning in *Gruber Logistics*. Article 8 Rome I, as interpreted by the CJEU, charges national judges or anyone who needs to define applicable law, with a complex task. To identify applicable law, one should engage with two legal systems, identify the relevant sets of rules, define the parameters of comparison, and make the actual comparison, before drawing the conclusion on the applicable law. This is a proper comparative law exercise. For example, in this case, may the comparison be limited to specific pension payments? May it be extended to a broader range of issues forming in their entirety high level of protection? Answering such questions requires a rigorous method, and given the various existing methods and diverging views on the proper way(s) to conduct a comparative law study, can imply new uncertainties. Meanwhile, the task reconfirms the relevance of comparative law for private international law, and has the potential to offer the highest possible tailor-made solutions.