Rome 1 and Rome 2

Etienne Pataut

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) –

Articles 8 and 9

Etienne Pataut

Professor at the Sorbonne School of Law (University Paris 1)

Working Paper

Article 8

Individual employment contracts

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.

Article 9

Overriding mandatory provisions

1. Overriding mandatory provisions are provisions the respect for which is regarded as crucial by a country for safeguarding its public interests, such as its political, social or economic organisation, to such an extent that they are applicable to any situation falling within their scope, irrespective of the law otherwise applicable to the contract under this Regulation.

2. Nothing in this Regulation shall restrict the application of the overriding mandatory provisions of the law of the forum.

3. Effect 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 mandatory provisions render the performance of the contract

unlawful. In considering whether to give effect to those provisions, regard shall be had to their nature and purpose and to the consequences of their application or non-application.

Introduction.

Regulation 593/2008, the so-called Rome 1 Regulation [1], is the European text governing choice of laws in contractual matters. It was preceded by the well-known 1980 Rome Convention, adopted between the Member States of the then European Community and entered into force in 1991[2]. Attached to the Rome Convention was an official Report, which is still of great help for the interpretation of both the Convention and the subsequent Regulation[3]. The Rome Convention is applicable to contracts concluded between April 1st 1991 and June 17th 2008. Contracts concluded before April 1991 are governed by national choice of law rules, contract concluded after June 2008 are governed by Rome 1 Regulation.

The decision to transform the Rome Convention into an European Regulation was taken the entry into force of the Amsterdam Treaty in 1999. The Amsterdam Treaty added to the EC Treaty article 65 (now article 81 TFEU) which gave the European Community competence to adopt measures in the field of private international law. Article 65 TEC is therefore the legal basis of the Rome 1 Regulation[4] as it is for the many other private international law regulations adopted since 2000.

The Rome 1 Regulation concerns contracts in general and therefore is not a text specifically devoted to labour law. However, it contains a specific provision on individual employment contracts, which led to case law from the Court of Justice (Section 1). Eventually, the mandatory nature of labour law in many European countries triggered an important discussion about the applicability of international mandatory rules to labour law issues (section 2).

Section 1. Individual Employment Contracts (Article 8)

1. Party autonomy.

a. Choice of law

Party autonomy is one of the corner stones of the Rome 1 Regulation. Like the the Rome Convention, Article 3 of the Regulation allows for a broad freedom of choice. The parties are therefore free to choose the law applicable to their contract.

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[1] 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* L 177, 4 july 2008, p. 6.
[2] *Convention on the law applicable to contractual obligations*, *OJ* L 266, 9 oct.1980, p. 1.
[3] M. Giuliano and P. Lagarde, "Report on the Convention on the law applicable to contractual obligations", *OJ* C 282 , 31 oct. 1980, p. 1.
[4] Preamble, par. 2 :

The same solution does not apply, however to employment contracts. It is widely accepted that for contracts involving a weaker party, freedom of choice of the parties should be limited. Comparative studies show that national and international choice of law rules either provide for a limited party autonomy for employment contract[5] or exclude labour contracts from the Scope of the instruments.

An example of a full exclusion can be found in the recent Hague Principles on Choice of Law in International Commercial Contracts. As the commentary clearly puts it [6] :

"This exclusion is justified by the fact that the substantive law of many States subjects consumer and employment contracts to special protective rules from which the parties may not derogate by contract. These rules are aimed at protecting the weaker party - consumer or employee - from an abuse of the freedom of contract and this protection extends to private international law where it appears as an exclusion or limitation on party autonomy."

To the contrary, the Rome 1 Regulation does not fully exclude party autonomy for employment contracts, but provides for limited party autonomy. Article 8 of the Regulation states that "an individual employment contract shall be governed by the law chosen by the parties". In other words, the freedom of choice is explicitly accepted and the chosen law is the law of the contract.

However, article 8 further provides that:

"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".

The rationale behind this solution is to apply the most protective law : either the chosen law or the law applicable in the absence of choice.

b. Interpretation

A particular difficulty arose from the wording of Article 6 of the Rome convention, which provides that:

"in a contract of employment a choice of law made by the parties shall not have the result of depriving the employee of the protection afforded to him by the mandatory rules of the law which would be applicable under paragraph 2 in the absence of choice".

This wording was somewhat unclear: the words "mandatory rules", could either refer to the internationally mandatory rules of the then Article 7 (now 9) or to the broader concept of internal mandatory rules, *i.e*: the rules that cannot be derogated from by agreement.

Recitals 15 and 37 of the Regulation and the new wording of Article 8 of the Regulation clarified the situation. They clearly refer to all the labour law rules that cannot be departed from in the designated State. Therefore the parties can choose to govern the contract by a law different to the one applicable in the absence of choice, but only to the extent that this latter law allows for party autonomy within its own system.

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[5] See the comparative elements given by S. Symeonides, *Codifying Choice of law around the world*, Oxford UP, 2014, at p. 127.

[6] Hague Conference of Private International Law, " Principles on Choice of Law in International Commercial Contracts", 2015, par. 1.10 of the commentaries. Accessible at: https://assets.hcch.net/docs/5da3ed47-f54d-4c43-aaef-5eafc7c1f2a1.pdf (last visit 30 June 2017).

c. Comparison between the chosen law and the law applicable in the absence of choice

If the law applicable in the absence of choice allows for such a choice of law, a comparison must be made between the chosen law and the law applicable in the absence of choice.

The very wording of Article 8, stating that the choice of a particular law should not "have the result of *depriving* the employee of the protection afforded to him" by the law applicable in the absence of choice, shows that the provision grants a substantive protection to the worker. The objective is to ensure that the worker benefits from the most protective rule of the two potentially applicable laws.

The difficulty is to determine how to compare the two systems. Three possibilities appear: (i) comparison between individual situations, (ii) comparison between legal systems as a whole, (iii) comparison between substantive legal categories[7]. Scholarly usually prefer the third option, although the exact outcome of the various possibilities is not always very clear[8].

This important methodological difficulty has yet to be tackled by the European Court of justice, and clear guidance in this respect would be of great help.

2. Place of performance and place of engagement

a. Determining the place of performance of the Contract

The law applicable in the absence of choice is 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 place of performance of the contract is the main connecting factor in private international labour law. It is indeed the main connecting factor for international jurisdiction (Reg. Brussels 1, art. 21)[9], and it is the primary connection for social security purposes (Reg. 883/2004, art. 11)[10]. There are many reasons for giving an important role to this connecting factor. Workers are not only governed by individual contracts, they are also part of a local labour force which, in search for as much social coherence as possible, should be governed by the same rules. Moreover, individual rules of labour law are also part of a wider network of rules governing industrial relations, and, once again, for social coherence purposes, choice of law rules should lead as much as possible to a global and coherent legal regime.

It can sometimes be difficult to determine the place of performance of a specific labour contract. Different situations must be distinguished.

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[7] See O. Deinert, *International Labour Law under the Rome Conventions*, CH Beck – Hart – Nomos, 2017, at. 122.

[8] See, e.g., the ambiguous position of the French Cour de cassation in : Soc, 12 november 2002, *Briand*, *Rev. Crit.DIP.,* 2003. 446, note Jault, *JDI* 2004, p. 131, note S. Dion, *Dr. Soc.* 2003. 339, note MA Moreau, *RdC* 2003. 206, obs. P. Deumier.

[9] Regulation (EU) No 1215/2012 of 12 December 2012 *on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters*, *OJ* L 351, 20.12.2012 ; For an extensive commentary on this text, see *Supra*, p. **XXX.**

[10] Regulation (EC) No 883/2004 of 29 April 2004 *on the coordination of social security systems, OJ* L 166, 30.4.2004, 1-123 ; for an extensive commentary on this text, see *Supra*, p. **XXX**.

For posted workers, Article 8 of the Regulation states that

"the Country where the work is habitually carried out shall not be deemed to have changed if he is temporarily employed in another country".

Thus, in case of temporary posting of a worker in another country, the law applicable to the contract does not change and remains the law of the place where the worker used to work. This solution led to many difficulties, partly tackled by the use of international mandatory rules, as will be seen below.

For mobile workers or workers that have different places of works over the course of time, the ECJ has adopted in two decisions the same approach than the one adopted in the jurisdiction context for mobile workers[11].

In short, the ECJ decided that a broad and favourable interpretation of the concept of "place of performance" should be adopted.

As the Courts puts it in the *Koelzsch* case (n°50):

"In a situation in which an employee carries out his activities in more than one Contracting State, the country in which the employee habitually carries out his work in performance of the contract, within the meaning of that provision, is that in which or from which, in the light of all the factors which characterise that activity, the employee performs the greater part of his obligations towards his employer."

Such a broad interpretation ensures both stability to the applicable law and protection to the worker. First, the stability lies in the necessity to take into account a global analysis of the situation in order to determine the country with which the labour relation has the closest connection. To that extent, the wording of the Court, based on Article 6 of the Rome Convention, is in line with the new wording of article 8 of the Regulation. The new provision has been slightly modified to allow for the taking into account the country "from which" the employee habitually carries out his work.

Second, the protection of the worker is based on the necessity to find one and only one applicable law to the employment contract, refusing therefore the possibility, sometimes considered by some authors, that a contract could be governed alternatively by several laws[12]. Moreover, it lies also on the will of the Court to diminish the importance of the secondary connecting factor: the place of engagement.

b. Place of engagement

Article 8 states that if there is no place of performance of the contract, then it should be governed by "the law of the country where the place of business through which the employee was engaged is situated".

This connecting factor has always been narrowly interpreted by the ECJ, which showed great reluctance to fall back to the place of engagement factor. The main reason, which was clearly stated by the Court in the jurisdiction context[13], is that the place of performance can be unilaterally determined by the employer, thus allowing for opportunistic behaviour. In a labour mobility context, the risk is that the place of

[11] ECJ, 15 march 2011, *Koelzsch,* case C-29/10 ; ECJ, 15 december 2011, *Voogsgerd,* caseC-384/10.
[12] See the discussion in : F. Pocar, « La protection de la partie faible en droit international privé », *Rec. Cours* 1984, vol. 188, p. 339.
[13] ECJ, 15 feb. 1989, *Six Constructions*, case 32/88

engagement be selected in order to select both the competent courts and the applicable law.

The EJC took this risk very seriously, and decided to use this secondary factor as little as possible, precisely by giving a broad interpretation to the concept of "place of work", as has been seen above.

Moreover, the Court disregarded a legal or abstract interpretation of the concept of place of engagement, deciding that, where it was to be used, it was to be understood as a purely "factual" concept.

As the Court held in the *Voogsgerd* case (n° 46) :

"Indeed, the use of the term 'engaged' in Article 6(2)(b) of the Rome Convention, clearly refers purely to the conclusion of the contract or, in the case of a *de facto* employment relationship, to the creation of the employment relationship and not to the way in which the employee's actual employment is carried out."

Due to the broad interpretation given to the very concept of place of performance, and the narrow and factual interpretation of the concept of place of engagement, the subsidiary connecting factor is seldom used in private international labour law.

3. Escape clause

The escape clause was an important innovation of the Rome Convention, and was kept in the Regulation. When the parties do not choose the law, it allows the judge to apply a law other than the one that should be applicable, "where it is clear from all the circumstances of the case that the contract is manifestly more closely connected with a country other than indicated in paragraphs 1 and 2 " (article 4§3 of the Rome 1 regulation, former 4§5 of the Rome Convention). This solution is designed to allow for some flexibility if the connecting factor of the choice of law rule leads to a law that does not have sufficient links with the situation. This general rule is not very easy to construe.

One of the important issues is whether the escape clause applies only if the connecting factors adopted by the choice of law rule have no value, or if it is enough to establish that it is clear that there is a stronger connection with the law of another country. The ECJ, in its very first decision on the Rome Convention, opted for the latter solution, affirming that:

"Article 4(5) of the Convention must be construed as meaning that, where it is clear from the circumstances as a whole that the contract is more closely connected with a country other than that determined on the basis of one of the criteria set out in Article 4(2) to (4) of the Convention, it is for the court to disregard those criteria and apply the law of the country with which the contract is most closely connected".[14]

Article 8 of the Rome 1 Regulation follows the same solution for employment contracts, with a slightly different wording. In particular, it is worth noting that the word "manifestly" is missing in Article 8, leading to questioning whether the escape clause should be construed identically in the context of Articles 4 and 8.

[14] ECJ, (Grand Chamber), 6 October 2009, Case C-133/08, *Intercontainer Interfrigo SC (ICF) v. Balkenende Oosthuizen BV, MIC Operations BV.*

Another question was whether the application of the escape clause should leave room to substantial protection of the worker. In the context of jurisdiction, and as soon as 1981, the ECJ made it clear that the connecting factors should be interpreted *in favorem*[15]. Should this favourable interpretation be imported in the functioning of the escape clause?

This question was raised before the ECJ in an important 2013 decision[16]. The Court decided in favour of an identical interpretation of the escape clause in contracts in general, and in employment contracts ; and this despite the different wording of Articles 4 and 8 and the peculiarities of the choice of law rule for employment contracts.

The facts of the case are particularly relevant to that extent. The employee had been working for 12 years in the Netherlands for her German employer. She was then asked to come back to Germany. Dissatisfied with the new employment contract, she initiated several judicial actions in the Netherlands. In that context, the question arose which law was applicable to her employment contract. The place of performance of the initial contract was undoubtedly in the Netherlands and therefore, *prima facie*, Dutch law was applicable to the contract. The employer nevertheless argued in favour of the application of German law, with which he claimed the contract had closer connections. It was clear from the factual context that German law was less favourable than Dutch law. Applying the escape clause would therefore be a disadvantage for the employee.

The Court nevertheless decided to apply the clause. It held that:

"Article 6(2) [now 8 (4)] (…), must be interpreted as meaning that, even where an employee carries out the work in performance of the contract habitually, for a lengthy period and without interruption in the same country, the national court may, under the concluding part of that provision, disregard the law of the country where the work is habitually carried out, if it appears from the circumstances as a whole that the contract is more closely connected with another country."

It is therefore clear from the decision of the Court that an escape clause can be used even if the main connecting factor is indeed stable and meaningful, and if the application of the law with which the situation has the closest connection is less favourable to the employee.

In order to establish a closest connection, the court took into account several factors. The Court noted that Germany was the place of residence of the employee and of the seat of the employer, the country of employee's taxation and social security. The Court considered that those factors tipped the balance in favour of German law rather than Dutch law. This solution should however remain quite rare, since the country that has competence for matters of social security is also, in principle, the country of performance of the employment contract[17]. In the case before the ECJ, the employee was in an exceptional situation, having her social security in a place different from the employment contract's place of performance. This resulted from a specific agreement between the Dutch and German social security administrations, proving therefore the importance of the connection between the German legal system and the plaintiff.

[15] ECJ, 26 may 1982, *Ivenel*, Case 133/81
[16] ECJ, 12 September 2013, Case C-64/12, *Anton Schlecker v Melitta Josefa Boedeker.*
[17] See *supra*, analysis of Reg. 883/2004.

In spite of the peculiarities of the case, it is nevertheless now clear that the application of the escape clause does not depend on the substantial level of protection granted by the law, which appear to have the closest connection with the case.

Section 2. Overriding mandatory rules (Article 9)

1. Definition

The possible application of international mandatory rules is another important innovation in the Rome convention, and subsequently in the Rome 1 regulation.

While the definition of concept of overriding mandatory rules (or "*lois de police*") has been the subject of extensive scholarly debate, their existence and applicability are widely accepted nowadays.

Indeed some rules are of such fundamental importance that, provided the situation falls within their scope, they must be applied in a given country. The aim of Article 9 of the Regulation is to frame the application of those rules as precisely as possible. As far as clarity is concerned, Article 9 is a welcome improvement compared to article 7 of the Rome Convention, even if the provision on the application of foreign mandatory rules is unduly restrictive, as will be seen in par. 3.

Article 9§1 gives a definition, largely inspired by the classic definition put forth by Francescakis in the 60's[18].

This definition puts weight both on the *substance* of those rules, which should be "provisions the respect for which is regarded as crucial by a country for safeguarding its public interests, such as its political, social or economic organisation", and on their *applicability*, since "they are applicable to any situation falling within their scope, irrespective of the law otherwise applicable to the contract under this Regulation". Even this definition is not specific enough to deal with all possible situations, experience shows that it has been extensively used by national courts in international litigation. Internationally mandatory rule (or *loi de police*) is now a widespread concept in modern private international law.

Labour law is, of course, only one area, amongst others, where *lois de police* can come into play; it is however, a particularly interesting area regarding overriding mandatory rules either from the forum State of from a foreign state.

2. Mandatory rules of the forum

The applicability of overriding mandatory rules of the forum is widely accepted in the context of choice of law for contracts in general. The Regulation provides that:

"Nothing in this Regulation shall restrict the application of the overriding mandatory provisions of the law of the forum."

[18] Ph. Francescakis, « Quelques précisions sur "les lois d'application immédiate" et leurs rapport avec les règles de conflit de lois », *Rev. Crit. DIP*. 1966. 1.

Therefore, in the presence of overriding mandatory rules in the forum, a State may disregard the law normally applicable (chosen or designated by an objective connecting factor) and apply the law of the forum instead.

In the European labour law context, the application of the mandatory rules was particularly discussed in the context of the posting of workers. Secondary law now governs this question and dir. 96/71 and 2014/67[19] have partly solved the difficulty.

Before those texts were adopted, the question led to considerable debate and numerous cases of the ECJ. In a nutshell, the difficulty arose from the possible difference between the law of the place of the habitual work and the law of the place where the worker was posted. According to Article 8 (then 6 of the Rome convention) the former law should remain applicable. However, Article 9 (then 7) allows the posting State to impose the application of the law of the forum if the relevant provision is an international mandatory rule. It was therefore possible, for example, for one State to impose application of rules on minimum wage to employment contracts governed by the law of another State. In private international law terms, the debate was therefore rather simple to handle. In sum, the so-called "law of origin" was applicable to the contract, but the law of the posting State could impose the application of some of its own rules, the internationally mandatory rules.

This analysis got however more complex, due to the particular nature of the freedom of movements of the EU. It was argued that the mandatory application of the law of the forum hindered the freedom of movement of services, since it led to increased cost and complexity for the employer. This argument was ultimately rejected by the Court of justice on several occasions, including the seminal *Arblade* case[20].

The case concerned two French building companies that posted workers in Belgium. After an inspection from the Belgian labour's administration, it occurred that the French employer violated some requirements of Belgian labour law. The administration therefore initiated proceeding against the employers before the Belgian courts.

The employers argued that they respected French law and that the mandatory application of Belgian law would be an obstacle to their free movement of services.

Following the reasoning it had adopted in previous decisions, the Court applied a threefold argument. First, it held that the application of internationally mandatory rules in the host State constituted a restriction to the freedom of services (n° 50); second it found that such an application could nevertheless be accepted since (n° 52) :

"the public interest relating to the social protection of workers in the construction industry and the monitoring of compliance with the relevant rules may constitute an overriding requirement justifying the imposition on an employer established in another Member State who provides services in the host Member State of obligations capable of constituting restrictions on freedom to provide services.

Third, the application of mandatory rules must benefit the workers. If they already enjoy an equivalent level of protection in the State of origin, there is no need to apply the

[19] Directive 96/71 of 16 December 1996 *concerning the posting of workers in the framework of the provision of services*, *OJ* L 18, 21.1.1997, p. 1–6 ; Directive 2014/67 of 15 May 2014 *on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services*, *OJ* L 159, 28.5.2014, p. 11–31 ; for a commentary on these texts, see *supra*, p. **XXX**.
[20] ECJ, 23 November 1999, *Arblade*, Case. C-369/96 and C-376/96.

mandatory rules of the host State. Accordingly, their application would constitute an undue restriction of the employer's freedom of movement.

In the words of the ECJ (operative part, n°2) :

"Articles 59 and 60 of the Treaty preclude the imposition by a Member State on an undertaking established in another Member State, and temporarily carrying out work in the first State, of an obligation - even if laid down in public-order legislation - to pay, in respect of each worker deployed, employers' contributions to schemes such as the Belgian `timbres-intempéries' and `timbres-fidélité' schemes, and to issue to each of such workers an individual record, where the undertaking in question is already subject, in the Member State in which it is established, to obligations which are essentially comparable, as regards their objective of safeguarding the interests of workers, and which relate to the same workers and the same periods of activity."

In sum, if the mandatory rule of the forum provides a clear benefit to the worker, it can be applied. If not, then the ECJ case law requires a comparison between the law of origin and the law of the host State, which will not be straightforward in many cases.

This case law is now largely outdated due to the entry into force of the 1996 posting of workers directive, which tackles directly the problem. It remains that the 1996 directive leaves many unanswered questions, and that the ECJ previous cases are thus still important to understand the interpretation of secondary legislation in the posting of workers field.

3. Foreign mandatory rules

The very possibility of applying foreign mandatory rules led to considerable debate among scholars, and this despite of the very few reported cases on the matter. Some argue against their application on the basis that there no is reason to give effect to an imperative policy of a foreign country unless the mandatory rules stem from the law applicable to the contract itself. Otherwise, they argue, the application of foreign mandatory rules could lead to judicial uncertainty and set off the balance of justice between the parties. To the contrary, according to other scholars, the application of foreign mandatory rule enhances judicial cooperation and mutual trust in the EU. The judicial discretion allows for nuanced solutions applying foreign mandatory rules, if and only if they correspond to the forum's policy[21].

The strict opposition to the applicability of foreign mandatory rules from some countries (among which UK and Germany) led to a possible reservation on the then Article 7§1 of the Rome Convention. Moreover, when the Rome Convention was transformed into the Rome 1 Regulation (which is incompatible with providing for a reservation) the applicability of foreign mandatory rules got restricted to narrow and specific circumstances.

Due to a cautious wording of article 9§3 of the Rome 1 Regulation, foreign mandatory rules will be rarely applied. According to the provision, the only mandatory rules that may be applied are those "of the law of the country where the obligations arising out of the contract have to be or have been performed", and they may be applied only "in so far as those overriding mandatory provisions render the performance of the contract

[21] On this debate, see e.g. : D. Bureau et H. Muir Watt, *Droit International Privé*, 3e éd., PUF, 2014, T. 1, at n° 914.

unlawful". Those strict conditions are to be used with extreme caution, since "in considering whether to give effect to those provisions, regard shall be had to their nature and purpose and to the consequences of their application or non-application."

This is particularly true in the labour law context. As mentioned above, the law of the place of performance is the law applicable to the employment contract and must be compared to the law chosen by the parties. Therefore, the law mentioned in article 9§3 is already applicable to the employment contract, and there is no need for foreign mandatory rules.

The question was directly addressed in a recent and important case from the ECJ[22]. The case concerned a Greek primary school teacher working in Germany for a Greek school. As a result of the crisis in Greece, his salary was significantly reduced. He claimed claimed additional payment before the German court. The applicability of German law, as the law of the place of performance, was not disputed. The Greek government, however, argued that Greek laws on salaries in the public sector were internationally mandatory rules and should therefore be applied.

The Court, did not follow this analysis. In its own words (n°45) :

"it is apparent from the drafting history of the Rome I Regulation that the EU legislature sought to restrict disturbance to the system of conflict of laws caused by the application of overriding mandatory provisions other than those of the State of the forum"

Therefore (n°50):

"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."e

It is worth noting that the Court left the possibility open to take into account the foreign mandatory rule (n° 52), but the exact nature of this solution remains somewhat unclear and proved useless before the German courts[23].

In conclusion, cases, particularly labour law cases, implying the application of a foreign mandatory rule are likely to remain rare.

[22] ECJ (Grand Chamber), 18 october 2016, *Nikiforidis*, Case C-135/15

[23] Bundesarbeitsgericht, 26 April 2017 ; for an english summary, see : http://conflictoflaws.net/2017/pay-day-the-german-federal-labour-court-gives-its-final-ruling-on-foreign-mandatory-rules-in-the-nikiforidis-case/ (last visit the 30th of June 2017).

Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II)

Article 9

Industrial action

Without prejudice to Article 4(2), the law applicable to a non- contractual obligation in respect of the liability of a person in the capacity of a worker or an employer or the organisations representing their professional interests for damages caused by an industrial action, pending or carried out, shall be the law of the country where the action is to be, or has been, taken.

The Rome 2 Regulation governs the law applicable to torts. The Regulation is not specifically designed to govern employment contracts, but a tortious action might relate to labour issues.

According to the general rule of the Rome 2 Regulation, a tort is governed by the law of the habitual residence, if both the person claimed to be liable and the person sustaining damage reside in the same country (Article 4§2). If those two persons do not have their habitual residence in the same country, the applicable law is "the law of the country in which the damage occurs irrespective of the country in which the event giving rise to the damage occurred and irrespective of the country or countries in which the indirect consequences of that event occur" (Article 4§1).

Articles 4§1 and §2, however, suffer some exceptions. First, the escape clause in Article 4§3 may apply. It provides:

"Where it is clear from all the circumstances of the case that the tort/delict is manifestly more closely connected with a country other than that indicated in paragraphs 1 or 2, the law of that other country shall apply".

Second, Article 14 opens for a limited possibility of party autonomy.

Third, other exceptions concern specific torts: Articles 5 to 9 give a list of torts that follow different, autonomous choice of law rules. One of those tort is the subject of this section: Article 9.

Article 9 is specific to the question of damages caused by an industrial action. The governing law is the one "of the country where the action is to be, or has been, taken." Article 9 puts the emphasis on the place of the harmful event, and is therefore diametrically opposed to Article 4§1, which points to the law where the damage is suffered.

I. Characterisation

What is understood to be an 'industrial action' varies greatly from one country to another, even within the European Union.[24] In order not to interfere with the various concepts of 'industrial action' existing in the Member States' internal legal orders, the Regulation contains Recital 28. It provides that [t]he special rule on industrial action in Article 9 is without prejudice to the conditions relating to the exercise of such action in accordance with national law and without prejudice to the legal status of trade unions or of the representative organisations of workers as provided for in the law of the Member States".

The aim is to protect internal legal systems from interference of the conflict of law rules contained in Article 9 of the Regulation.

Nevertheless, characterisation issues may arise in case of collective industrial action. Three type of legal procedures are most common: (i) actions on the validity of the collective action ; (ii) actions on the impact of the collective action on the employment contracts ; (iii) actions on damages caused by the industrial action.

Article 9 of the Rome 2 Regulation deals with the third type. The second type is clearly outside the scope of the Regulation: it is generally accepted that an action on the impact

[24] See Recital n° 27: "The exact concept of industrial action, such as strike action or lock-out, varies from one Member State to another and is governed by each Member State's internal rules."

of a strike on the employment contract is a matter for the law of the contract[25]. For the first type, however, is unclear whether the Rome 2 Regulation, and in particular its Article 9, applies.

A comparison can be drawn with the important, and, until now, unique decision on the matter by the ECJ, although rendered in the context of jurisdiction[26].

In this case, the action started after a collective action that took place in Sweden against a Danish ship owner, concerning a Polish crew. The ship owner wanted to obtain damages from the trade union and seized the Danish courts. The Danish court were not the court of the defendant's domicile, which led the plaintiff to argue that Danish courts had jurisdiction as the "courts of the place where the harmful event occurred" on th basis of Article 5-3 of the Convention.

The specific Danish judicial organisation is somewhat unusual, because two different courts must be seized in such a case. First, the plaintiff has to seize the *Arbejdsret*, which will hear the case concerning the validity of the collective action. Then, the plaintiff must seize the *Sø-og Handelsret*, which will hear the case concerning the employees' liability. In *DFDS*, the case was at the first level when the court's jurisdiction was challenged. The issue therefore was whether the action regarding the validity of the collective action was a tortious one.

The Court decided that a "case concerning a legality of industrial action (…) falls within the definition of tort, delict or quasi-delict".

Applying this decision *per analogiam* to the Rome 2 Regulation, an action concerning the legality of the collective action should be characterized as tortious and Article 9 should therefore be applicable.

2. Connecting factor

Article 9 is explicitly designed to protect the balance of interests between workers and employers in the country where the industrial action takes place.

As Recital 26 puts it:

"this Regulation assumes as a general principle that the law of the country where the industrial action was taken should apply, with the aim of protecting the rights and obligations of workers and employers".

The rationale behind this rule is to guarantee the application of the law of the place of the action. Are therefore disregarded the law chosen and, more importantly, the law where the damage occurred. Article 9, however, applies "without prejudice of article 4(2)" which means that the law of the habitual residence of the parties may still be relevant. It is difficult to imagine a situation where the place of the collective action and the place of the habitual residence of the parties do not coincide, and therefore, the application of the law of the place of the industrial action is likely to apply anyhow.

The solution of Article 9 is influenced by the following: the rules on industrial actions are often said to be of mandatory nature, and thus considered as international *lois de police*[27]. This argument is supported by the fundamental nature of the right to collective

[25] For a general and comparative overview, see : P. Dorssemont, T. Jaspers and A. van Hoek (dir.) *Cross-border collective actions in Europe : a legal challenge*, Intersentia, Social Europe Series 13, 2007.
[26] ECJ, 5 February 2004, *DFDS Torline v. SEKO*, C-18/02
[27] J.P. Laborde, « Conflits collectifs et conflits de lois », *Droit Social* 2001. 715, at p. 717.

action, which is, under many legal systems, of constitutional value and now explicitly recognised in the Charter of fundamental rights of the EU (article 28).

While the Rome 2 Regulation does not follow the idea to apply the rules on industrial actions as *lois de police*, the result under Article 9 will often be the same. The combined effect the tortious characterisation and the application of the law of the place where the industrial action took place, will likely guarantee that no other law will be applicable to legal actions deriving from the industrial action.

The exclusion of the law of the damage under Article 9 is to be welcomed; it could be very difficult for the State where the collective action took place to accept or recognise a decision which applied a law other than its own[28].

[28] E. Pataut, "La grève dans les rapport internationaux de travail: questions de qualifications", *Droit Social*, 2005. 303, at 306.