Jan Voogsgeerd
v.
Navimer SA

C-384/10
15 December 2011

Rome Convention on the law applicable to contractual obligations – contract of employment – choice made by the parties – mandatory rules of the law applicable in the absence of choice – determination of that law – employee carrying out his work in more than one Contracting State

OPERATIVE PART:

1. Article 6(2) of the Rome Convention on the law applicable to contractual obligations, opened for signature in Rome on 19 June 1980, must be interpreted as meaning that the national court seised of the case must first establish whether the employee, in the performance of his contract, habitually carries out his work in the same country, which is the country in which or from which, in the light of all the factors which characterise that activity, the employee performs the main part of his obligations towards his employer.

2. In the case where the national court takes the view that it cannot rule on the dispute before it under Article 6(2)(a) of that convention, Article 6(2)(b) of the Rome Convention must be interpreted as follows:

- **the concept of 'the place of business through which the employee was engaged' must be understood as referring exclusively to the place of business which engaged the employee and not to that with which the employee is connected by his actual employment;**
- **the possession of legal personality does not constitute a requirement which must be fulfilled by the place of business of the employer within the meaning of that provision;**
- **the place of business of an undertaking other than that which is formally referred to as the employer, with which that undertaking has connections, may be classified as a 'place of business' if there are objective factors enabling an actual situation to be established which differs from that which appears from the terms of the contract, and even though the authority of the employer has not been formally transferred to that other undertaking.**

EXCERPT FROM THE REASONS:

1 This reference for a preliminary ruling concerns the interpretation of Article 6 of the Convention on the law applicable to contractual obligations, opened for signature in Rome on 19 June 1980 (OJ 1980 L 266, p. 1) ('the Rome Convention'), which relates to individual employment contracts.

Jan Voogsgeerd
protiv
Navimer SA

C-384/10
15. prosinca 2011.

Rimska konvencija o pravu mjerodavnom za ugovorne obveze – ugovor o radu – izbor mjerodavnog prava – prisilni propisi prava koje je mjerodavno ako nema stranačkog izbora – određivanje toga prava – radnik koji obavlja posao u više država ugovornica

IZREKA:

1. Članak 6. stavak 2. Konvencije o pravu mjerodavnom za ugovorne obveze koja je otvorena za potpisivanje u Rimu 19. lipnja 1980. treba tumačiti tako da nacionalni sud najprije treba utvrditi je li radnik u ispunjenju ugovora uobičajeno radio samo u jednoj državi, i to u onoj u kojoj ili iz koje uobičajeno ispunjavao svoje obveze prema svom poslodavcu, uzimajući u obzir sve okolnosti karakteristične za tu djelatnost.

2. Za slučaj da je nacionalni sud koji je postavio prethodno pitanje mišljenja da na temelju članka 6. stavka 2. točke a. te Konvencije ne može donijeti odluku u odnosnom pravnom sporu, članak 6. stavak 2. točku b. Konvencije treba tumačiti kako slijedi:

- **pod pojmom "sjedište poslovnog nastana putem kojeg je radnik zaposlen" podrazumijeva se isključivo sjedište poslovnog nastana putem kojeg je radnik zaposlen, a ne sjedište poslovnog nastana gdje on doista radi;**
- **posjedovanje pravne osobnosti nije pretpostavka koju sjedište poslovnog nastana poslodavca mora ispuniti u smislu ove odredbe;**
- **sjedište poslovnog nastana drugog poduzeća, osim onoga koje formalno nastupa kao poslodavac i održava odnose s drugim poduzećem, može se smatrati "sjedištem poslovnog nastana" u smislu članka 6. stavka 2. točke b. ove Konvencije, ako se pomoću objektivnih okolnosti može dokazati da stvarno činjenično stanje ne odgovara stanju koje proizlazi iz teksta ugovora, i to i onda kada ovlasti za davanje naloga formalno nisu prenesene na to drugo poduzeće.**

IZ OBRAZLOŽENJA:

1 Prethodno pitanje odnosi se na tumačenje članka 6. Konvencije o pravu mjerodavnom za ugovorne obveze koja je otvorena za potpisivanje u Rimu 19. lipnja 1980. (SL L 266, str. 1, u daljnjem tekstu: Rimska konvencija), koji se odnosi na pojedinačne ugovore o radu.

2 The reference has been made in the course of proceedings between Mr Voogsgeerd, residing at Zandvoort (Netherlands), and Navimer SA ('Navimer'), an undertaking established in Mertert (the Grand Duchy of Luxembourg), regarding a payment in lieu of notice to Mr Voogsgeerd for breach of the employment contract which he had entered into with that undertaking.

Legal context

The rules on the law applicable to contractual obligations

3 Article 1(1) of the Rome Convention provides:

'The Rome Convention is to apply to contractual obligations in any situation involving a choice between the laws of different countries.'

4 Article 3(1) of the Rome Convention is worded as follows:

'A contract shall be governed by the law chosen by the parties. The choice must be expressed or demonstrated with reasonable certainty by the terms of the contract or the circumstances of the case. By their choice the parties can select the law applicable to the whole or a part only of the contract.'

5 Article 4(1) of that convention provides:

'To the extent that the law applicable to the contract has not been chosen in accordance with Article 3, the contract shall be governed by the law of the country with which it is most closely connected...'

6 Article 6 of the Rome Convention provides:

'1. Notwithstanding the provisions of Article 3, 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 him by the mandatory rules of the law which would be applicable under paragraph 2 in the absence of choice.

2. Notwithstanding the provisions of Article 4, a contract of employment shall, in the absence of choice in accordance with Article 3, be governed:

(a) by the law of the country in which the employee habitually carries out his work in performance of the contract, even if he is temporarily employed in another country; or

(b) if the employee does not habitually carry out his work in any one country, by the law of the country in which the place of business through which he was engaged is situated;

unless it appears from the circumstances as a whole that the contract is more closely connected with another country, in which case the contract shall be governed by the law of that country.'

National law

7 Article 80(2) of the Luxembourg Law of 9 November 1990 establishing a Luxembourg Public Maritime Register (*Mémorial* A 1990, p. 808), provides:

'The wrongful termination of a seaman's contract of employment confers entitlement to damages and to the payment of interest.

A dismissal which is contrary to law or is not based on genuine and serious grounds is wrongful and constitutes a socially and economically unacceptable measure.

2 Zahtjev za tumačenjem postavljen je u okviru spora između gospodina Voogsgeerda s prebivalištem u Zandvoortu (Nizozemska) i društva Navimer SA (u daljnjem tekstu: Navimer) sa sjedištem u Mertertu (Luksemburg) radi plaćanja odštete gospodinu Voogsgeerdu zbog otkazivanja njegova radnog odnosa s tim društvom.

Pravni okvir

Propisi o pravu mjerodavnom za ugovorne odnose

3 Članak 1. stavak 1. Rimske konvencije predviđa sljedeće:

"Odredbe ove Konvencije primjenjuju se na ugovorne obveze za situacije koje su povezane s pravima više država."

4 Članak 3. stavak 1. Rimske konvencije određuje:

"Za ugovor je mjerodavno pravo koje stranke izaberu. Izbor mora biti izričit ili dovoljno jasno proizlaziti iz odredaba ugovora ili iz okolnosti slučaja. Stranke mogu izabrati mjerodavno pravo za cijeli ugovor ili za neki njegov dio."

5 Članak 4. stavak 1. Rimske konvencije propisuje:

"Ako pravo mjerodavno za ugovor nije izabrano prema članku 3, na ugovor se primjenjuje pravo države s kojom je najuže povezan..."

6 Članak 6. Rimske konvencije previđa:

"(1) Neovisno o članku 3., izbor mjerodavnog prava stranaka za ugovor o radu i radne odnose ne može radnika lišiti zaštite koju mu jamče propisi koji se ne mogu isključiti sporazumom prema pravu koje bi, da nije bilo izbora, bilo mjerodavno na temelju ovoga članka.

(2) Iznimno od članka 4., a u nedostatku izbora prava prema članku 3., za ugovore o radu i radne odnose mjerodavno je:

a) pravo države u kojoj radnik uobičajeno u skladu s ugovorom obavlja rad, čak ako rad privremeno obavlja u drugoj državi; ili

b) pravo države u kojoj se nalazi sjedište poslovnog nastana putem kojeg je radnik zaposlen, ako on svoj rad uobičajeno ne obavlja u istoj državi,

osim ako iz svih okolnosti proizlazi da je ugovor o radu ili radni odnos u bližoj vezi s drugom državom, onda se primjenjuje pravo te druge države."

Nacionalno pravo

7 Članak 80. stavak 2. luksemburškog zakona od 9. studenog 1990. godine o ustrojavanju luksemburškog javnog brodskog registra (*Mémorial* A 1990, str. 808) predviđa:

"U slučaju zloporabnog otkaza pomorskog radnog odnosa postoji pravo na naknadu štete.

Otkaz koji je protivan zakonu i/ili se ne temelji na istinitim i važnim razlozima zloporaban je te se radi o radnji koja je suprotna društvenim i gospodarskim pravilima.

Legal proceedings for compensation in respect of the wrongful termination of a seaman's contract of employment shall be brought before the court having jurisdiction in employment matters within three months of notification of dismissal or communication of the reasons, or else be time-barred.

That period shall be validly interrupted where a written complaint is submitted to the employer by the seaman, his legal representative or his trade union.'

8 Article 39 of the Belgian Law of 3 July 1978 on employment contracts (*Belgisch Staasblad*, 22 August 1978), states:

'In the case of a contract of indefinite duration, the party terminating the contract without urgent cause or without observing the period of notice laid down by Articles 59, 82, 83, 84 and 115 is required to pay the other party compensation equal to the current salary for the duration of the period of notice or for the period of notice remaining.'

The dispute in the main proceedings and the questions referred for a preliminary ruling

9 On 7 August 2001 at the headquarters of Naviglobe NV ('Naviglobe'), an undertaking established at Antwerp (Belgium), Mr Voogsgeerd entered into a contract of employment of indefinite duration with Navimer. The parties chose Luxembourg law to be the law applicable to that contract

10 From August 2001 until April 2002, Mr Voogsgeerd served as chief engineer on the ships MS Regina and Prince Henri, which belonged to Navimer, and whose navigation area extended to the North Sea.

11 By letter of 8 April 2002, that undertaking served a notice of dismissal on Mr Voogsgeerd. On 4 April 2003, Mr Voogsgeerd commenced proceedings against Naviglobe and Navimer before the arbeidsrechtbank te Antwerpen (Labour Court, Antwerp), seeking an order that those undertakings, jointly and severally, make a payment in lieu of notice in accordance with the Belgian Law of 3 July 1978 on employment contracts, plus interest and costs.

12 In support of his application, Mr Voogsgeerd claimed that, based on Article 6(1) of the Rome Convention, the mandatory rules of Belgian employment law were applicable, irrespective of the choice made by the parties regarding the applicable law. In that respect, Mr Voogsgeerd claimed that he was bound, by his contract of employment, to the Belgian undertaking Naviglobe, and not to the Luxembourg undertaking Navimer, and that he had principally carried out his work in Belgium where he received instructions from Naviglobe and to which he returned after each voyage.

13 By judgment of 12 November 2004, the arbeidsrechtbank te Antwerpen declared that it lacked jurisdiction to rule on the action against Navimer. However, it declared the proceedings brought against Naviglobe admissible, but unfounded.

14 Mr Voogsgeerd lodged an appeal against that judgment before the arbeidshof te Antwerpen (Higher Labour Court, Antwerp). Having ruled that it had territorial jurisdiction, that court, firstly, rejected the claim against Naviglobe as unfounded, on the ground that the applicant in the main proceedings had not adduced evidence to show that he had been seconded to that company.

Tužba radi naknade štete zbog zloporabnog otkaza pomorskog radnog odnosa mora se podići pred radnim sudom unutar prekluzivnog roka od 3 mjeseca od dostave otkaza ili njegova obrazloženja.

Taj se prekluzivni rok valjano prekida u slučaju pisanog prigovora pomorca, njegova opunomoćenika ili sindikata upućenog poslodavcu."

8 Članak 39. belgijskog zakona od 3. srpnja 1978. godine o ugovorima od radu (*Belgisch Staatsblad* od 22. kolovoza 1978.) određuje:

"Ako je ugovor zaključen na neodređeno vrijeme, stranka koja je ugovor otkazala bez valjanog razloga ili pridržavanja otkaznog roka iz članaka 59., 82., 83., 84. i 115. obvezna je drugoj stranci platiti odštetu u visini tekuće naknade za rad (plaće) koja odgovara čitavom ili preostalom trajanju otkaznog roka."

Predmet glavnog postupka i prethodna pitanja

9 Gospodin Voogsgeerd 7. kolovoza 2001. u sjedištu društva Naviglobe NV (u daljnjem tekstu: Naviglobe), društva sa sjedištem u Antwerpenu (Belgija), s društvom Navimer zaključio je ugovor o radu na neodređeno vrijeme. Stranke su ugovorile da je mjerodavno luksemburško pravo.

10 Od kolovoza 2001. do travnja 2002. radio je kao prvi strojar na brodovima u vlasništvu društva Navimer MS Regina i Prince Henri. Područje rada bilo je Sjeverno more.

11 Dopisom od 8. travnja 2002. društvo je gospodinu Voogsgeerdu otkazalo ugovor o radu. Isti je 4. travnja 2003. tužio društva Naviglobe i Navimer pred sudom *Arbeidsrechtbank te Antwerpen* (Radnim sudom u Antwerpenu) te je tražio da se oba društva sukladno belgijskom zakonu od 3. srpnja 1978. o ugovorima o radu solidarno osude na isplatu odštete za otkaz, zajedno s kamatama i troškovima.

12 U obrazloženju svoje tužbe gospodin Voogsgeerd naveo je da su na temelju članka 6. stavka 1. Rimske konvencije mjerodavni prisilni propisi belgijskog Zakona o ugovorima o radu, i to neovisno o izboru prava ugovornih strana. Pritom je istaknuo da je on na temelju svog ugovora o radu bio povezan s belgijskim društvom Naviglobe, a ne s luksemburškim društvom Navimer te da je svoj rad uobičajeno obavljao u Belgiji, gdje je primao upute od Naviglobea, kamo se i vraćao nakon svakog putovanja.

13 Presudom od 12. studenog 2004. *Arbeidsrechtbank te Antwerpen* odlučio je da nije mjesno nadležan za odlučivanje o tužbi protiv društva Navimer. Nasuprot tomu je tužba protiv Naviglobea proglašena dopustivom, ali neutemeljenom.

14 Protiv te presude gospodin Voogsgeerd uložio je žalbu kod suda *Arbeidshof te Antwerpen* (Visoki radni sud u Antwerpenu). Nakon što se taj sud proglasio nadležnim, odbio je zahtjeve protiv Naviglobea kao neutemeljene, budući da žalitelj nije dokazao da je bio prepušten tom poduzeću.

15 Secondly, as regards the employment relationship with Navimer, the arbeidshof te Antwerpen found that, having regard to all the circumstances in issue, Mr Voogsgeerd had not habitually carried out his work in a single Member State, in the present case Belgium, and that, consequently, Article 6(2)(a) of the Rome Convention was not applicable. In that context, the court stated, firstly, that Mr Voogsgeerd did not have a contract of employment with Naviglobe, that his salary was paid by Navimer and that he was affiliated to a Luxembourg sickness insurance fund and, secondly, that he had failed to establish that he worked mainly in Belgian territorial waters. Therefore, the arbeidshof te Antwerpen found that, since Navimer was the business which engaged Mr Voogsgeerd, the mandatory provisions of Luxembourg law applied to the contract of employment, in accordance with Article 6(2)(b) of the Rome Convention.

16 As is apparent from the order for reference, the arbeidshof te Antwerpen considered that Mr Voogsgeerd had proved in support of his appeal that Antwerp was the place where he always boarded and from where he received the instructions for each of his missions.

17 However, the arbeidshof te Antwerpen found that, on the basis of Article 6(2(b) of the Rome Convention, only Luxembourg law was applicable to the contract of employment and that the action for damages for the wrongful termination of that contract must be dismissed insofar as it was brought after the expiry of the 3-month limitation period prescribed by Article 80 of the Luxembourg Law of 9 November 1990 establishing a Luxembourg Public Maritime Register.

18 Mr Voogsgeerd appealed on a point of law against the section of that judgment concerning Navimer, which therefore remains as the only defendant in the main proceedings. The ground of appeal relied upon alleges an error of law by the arbeidshof te Antwerpen regarding the determination of the law applicable to the contract of employment.

19 In support of his appeal, the applicant in the main proceedings claims that the arbeidshof te Antwerpen infringed Articles 1, 3, 4 and 6 of the Rome Convention by finding that the evidence which he had put forward to establish the habitual carrying out of his work in Belgium under the authority of Naviglobe had no bearing on whether the provisions of the Rome Convention, and in particular Article 6(2)(b) of that convention, applied.

20 The referring court observes that, insofar as that evidence is accurate, Naviglobe, which is established in Antwerp, could be regarded as being the business with which Mr Voogsgeerd is connected for his actual employment, for the purposes of Article 6(2)(b) of the Rome Convention.

21 In those circumstances, the Hof van Cassatie decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'1. Must the country in which the place of business is situated through which an employee was engaged, within the meaning of Article 6(2)(b) of the [Rome Convention], be taken to mean the country in which the place of business of the employer is situated through which, according to the contract of employment, the employee was engaged, or the country in which the place of business of the employer is situated with which the employee is connected for his actual employment, even though that employee does not habitually carry out his work in any one country?

2. Must the place to which an employee who does not habitually carry out his work in any one country is obliged to report and where he receives administrative briefings, as well as instructions for the performance of his work, be deemed to be the place of actual employment within the meaning of the first question?

15 Vezano za radni odnos s društvom Navimer, *Arbeidshof te Antwerpen* ustanovio je da, uzimajući u obzir sve okolnosti ovoga slučaja, gospodin Voogsgeerd svoj rad nije uobičajeno obavljao samo u jednoj državi članici, u ovom slučaju u Belgiji te da se prema tomu ovdje ne može primijeniti članak 6. stavak 2. točka a. Rimske konvencije. S jedne strane, nije sklopio ugovor o radu s društvom Naviglobe, plaću mu je isplaćivalo društvo Navimer i bio je osiguran kod luksemburškog fonda za zdravstveno osiguranje. A s druge strane nije dokazao da je uobičajeno radio u belgijskim teritorijalnim vodama. Iz tog je razloga *Arbeidshof te Antwerpen* odlučio da je Navimer bio sjedište poslovnog nastana putem kojeg je zaposlen gospodin Voogsgeerd te da su stoga sukladno članku 6. stavku 2. točki b. Rimske konvencije za ugovor mjerodavni prisilni propisi luksemburškog prava.

16 Kao što proizlazi iz odluke suda koja je dostavljena u okviru prethodnog pitanja, *Arbeidshof te Antwerpen* je činjenice koje je gospodin Voogsgeerd naveo u obrazloženju svoje žalbe, naime da je Antwerpen bilo mjesto gdje se uvijek ukrcavao na brod i odakle je primao upute vezane za svaku svoju plovidbu, smatrao dokazanima.

17 Unatoč tomu, sud je odlučio da je na temelju članka 6. stavka 2. točke b. Rimske konvencije za taj ugovor o radu mjerodavno samo luksemburško pravo i da se treba odbiti žalba radi naknade štete zbog zloporabnog otkaza ugovora o radu jer je tužba podnesena po isteku prekluzivnog roka od tri mjeseca koji je predviđen u članku 80. luksemburškog zakona od 9. studenog 1990. godine o ustrojavanju javnog registra brodova.

18 Gospodin Voogsgeerd uložio je kasacijsku žalbu protiv onog dijela presude koji se odnosio na društvo Navimer koje je tako preostalo kao jedini protivnik kasacijske žalbe u glavnom postupku. Kao razlog za kasaciju on navodi da je *Arbeidshof te Antwerpen* pogrešno odredio mjerodavno pravo za ugovor o radu.

19 U obrazloženju svoje kasacijske žalbe žalitelj je istaknuo da je *Arbeidshof te Antwerpen* povrijedio članke 1., 3., 4. i 6. Rimske konvencije kada je odlučio da su činjenice, koje je žalitelj naveo kako bi potvrdio da je uobičajeno radio u Belgiji pod kontrolom društva Naviglobe, nevažne za pitanje primjene odredaba ove Konvencije, a posebice članak 6. stavak 2. točku b.

20 Po mišljenju suda koji je uputio prethodno pitanje, sjedištem poslovnog nastana kod kojeg je gospodin Voogsgeerd u smislu članka 6. stavka 2. točka b. Rimske konvencije doista bio zaposlen moglo bi se smatrati društvo Naviglobe sa sjedištem u Antwerpenu, pod uvjetom da su te činjenice istinite.

21 Pod tim je okolnostima *Hof van Cassatie* prekinuo postupak te je Sudu u okviru prethodnog postupka uputio sljedeća pitanja:

1. Treba li se državom u kojoj se nalazi sjedište poslovnog nastana putem kojeg je radnik zaposlen u smislu članka 6. stavka 2. točke b. Rimske konvencije smatrati ona država u kojoj se nalazi sjedište poslovnog nastana poslodavca koji je zaposlio radnika sukladno ugovoru o radu ili država u kojoj se nalazi sjedište poslovnog nastana poslodavca kod kojeg je radnik stvarno zaposlen, iako svoj rad uobičajeno ne obavlja u jednoj te istoj državi?

2. Treba li se mjesto u kojem radnik, koji svoj rad uobičajeno ne obavlja u jedno te istoj državi, ali je obvezan tamo se javljati te tamo prima upute i naloge vezane za obavljanje svoga rada, smatrati mjestom stvarnog zaposlenja u smislu prvoga pitanja?

3. Must the place of business with which the employee is connected for his actual employment within the meaning of the first question satisfy certain formal requirements such as, inter alia, the possession of legal personality, or does the existence of a *de facto* place of business suffice for that purpose?

4. Can the place of business of another company, with which the corporate employer is connected, serve as the place of business within the meaning of the third question, even though the authority of the employer has not been transferred to that other company?'

Consideration of the questions referred

Preliminary observations

22 The Court of Justice of the European Union has jurisdiction to rule on the present reference for a preliminary ruling, which has been made by one of the two Belgian courts which have the power to do so under Article 2(a) of the First Protocol on the interpretation of the Rome Convention (OJ 1998 C 27, p. 47), which entered into force on 1 August 2004.

23 By its questions, the referring court asks, in essence, whether factors such as the place where the employee is actually employed, the place to which that employee is obliged to report and where he receives administrative briefings necessary for the performance of his work, and the *de facto* place of business of the employer affect the determination of the law applicable to the contract of employment under Article 6(2) of the Rome Convention.

24 It should be borne in mind at the outset that Article 6 of the Rome Convention lays down special conflict rules concerning individual employment contracts which derogate from the general rules contained in Articles 3 and 4 of the Rome Convention, concerning, respectively, the freedom of choice of the applicable law and the criteria for determining that law in the absence of such a choice.

25 Thus, Article 6(1) of the Rome Convention provides that the choice made by the parties regarding the law applicable to the contract of employment cannot lead to the employee being deprived of the guarantees laid down by the mandatory provisions of the law which would be applicable to the contract in the absence of a choice. Article 6(2) sets out the connecting criteria of the employment contract on the basis of which the *lex contractus* must be determined in the absence of a choice by the parties.

26 Those criteria are, first, the country in which the employee 'habitually carries out his work' (Article 6(2)(a)) and, secondly, in the absence of such a place, 'the place of business through which he was engaged' (Article 6(2)(b)).

27 Furthermore, according to the last sentence of Article 6(2), those two connecting criteria are not to apply where it appears from the circumstances as a whole that the contract of employment is more closely connected with another country, in which case the law of that other country is to apply.

28 In the case in the main proceedings, it is not disputed that the parties to the contract chose Luxembourg law as the *lex contractus*. However, irrespective of that choice, the question remains as to what is the law applicable to the contract, since the applicant in the main proceedings invokes the mandatory provisions of Belgian law as the basis of his right to a payment in lieu of notice. As is apparent from paragraph 19 above, Mr Voogs-

3. Treba li sjedište poslovnog nastana poslodavca kod kojeg je radnik stvarno zaposlen u smislu prvog pitanja ispunjavati određene formalne pretpostavke, kao što je vlastita pravna osobnost ili je za to dovoljno postojanje stvarnog sjedišta poslovnog nastana?

4. Treba li se sjedište poslovnog nastana drugog društva s kojim društvo poslodavca održava odnose smatrati sjedištem poslovnog nastana u smislu trećeg pitanja, čak i ako ovlasti za davanje uputa nisu prenesene na to drugo društvo?

O pitanjima iz zahtjeva za prethodnim tumačenjem

Prethodne napomene

22 Sud je nadležan za odlučivanje o ovom zahtjevu za prethodnim tumačenjem koji je uputio jedan od dva belgijska suda koji su za to ovlašteni sukladno članku 2. točki b. Prvog protokola o tumačenju Rimske konvencije od strane Suda (SL 1998, C 27, str. 47) koji je stupio na snagu 1. kolovoza 2004.

23 Sud putem tih pitanja želi znati jesu li određene okolnosti kao npr. mjesto stvarnog zaposlenja radnika, mjesto gdje se treba javljati i gdje dobiva upute potrebne za obavljanje svoga rada ili faktično sjedište poslovnog nastana važni za određivanje prava koje je u smislu članka 6. stavka. 2. Rimske konvencije mjerodavno za ugovor o radu.

24 Članak 6. Rimske konvencije propisuje posebne kolizijske norme za pojedinačne ugovore o radu koje odstupaju od općih kolizijskih normi iz članka 3. i 4. ove Konvencije, a koje se odnose na slobodni izbor prava, odnosno poveznice za određivanje mjerodavnog prava, u slučaju da se isto ne može birati.

25 Tako članak 6. stavak 1. Rimske konvencije predviđa da pravo ugovornih strana na izbor mjerodavnog prava vezano za ugovor o radu ili radni odnos ne smije dovesti do toga da se radnika liši zaštite koja mu je zajamčena prisilnim propisima prava koje bi bilo mjerodavno da nije izabrano mjerodavno pravo. Članak 6. stavak 2. utvrđuje poveznice ugovora o radu ili radnog odnosa na temelju kojih se mora odrediti *lex contractus,* ako nema izbora mjerodavnog prava.

26 To je u prvom redu poveznica države u kojoj radnik "uobičajeno obavlja rad" (članak 6. stavak 2. točka a.) te supsidijarno, ako takvo mjesto ne postoji, poveznica "sjedišta poslovnog nastana putem kojeg je radnik zaposlen" (članak 6. stavak 2. točka b.).

27 Osim toga, posljednja rečenica članka 2. predviđa da te dvije poveznice nisu primjenjive ako iz svih okolnosti proizlazi da su ugovor o radu ili radni odnos u užoj vezi s drugom državom; u tom je slučaju mjerodavno pravo te druge države.

28 U glavnom je postupku nesporno da su ugovorne strane izabrale luksemburško pravo kao *lex contractus.* No, neovisno o ovom izboru prava ostaje pitanje koje je pravo mjerodavno za ugovor, budući da se žalitelj glavnog postupka vezano za svoj odštetni zahtjev zbog otkaza poziva na prisilne odredbe belgijskog prava. Kao što proizlazi iz točke 19. ove presude, on navodi da je žalbeni sud sa svojim stajalištem, da je za predmetni ugovor

geerd claims that the court of appeal, which found, on the basis of Article 6(2)(b) of the Rome Convention, that Luxembourg law was applicable to the contract in issue, infringed several provisions of that convention and, in particular, Article 6 thereof. In that regard, Mr Voogsgeerd claims that, in the course of the carrying out of his work, he had no contact with Navimer, but that he was obliged to report for boarding at Antwerp with Naviglobe, which gave him instructions.

29 By its questions, the Hof van Cassatie essentially asks the Court to interpret Article 6(2) of the Rome Convention, and, in particular, the connecting criterion of the country in which the place of business which engaged the employee is situated, referred to in Article 6(2)(b).

30 Nevertheless, it should be recalled that, according to the case-law of the Court, in the context of the preliminary ruling procedure, while it falls to the referring court to apply the rule of European Union law to a dispute before it and, thus, to characterise a provision of national law by reference to such a rule, it is the Court's duty to provide that referring court with an interpretation of European Union law which may be useful to it in assessing the effects of that provision (see, to that effect, Case C-6/01 *Anomar and Others* [2003] ECR I-8621, paragraph 37 and the case-law cited), to extract from all the information provided by the national court, and, in particular, from the statement of grounds for the reference, the elements of European Union law requiring an interpretation, having regard to the subject-matter of the dispute (see, to that effect, Case 20/87 *Gauchard* [1987] ECR 4879, paragraph 7).

31 In the present case, although the questions referred concern Article 6(2)(b) of the Rome Convention, it must be noted, as the Advocate General has pointed out in paragraph 60 of her Opinion and as observed by the Belgian Government and the European Commission, that the factors characterising the employment relationship in issue in the main proceedings, which were highlighted by the referring court to justify the submission of the reference for a preliminary ruling, seem to correspond more with the criteria set out in Article 6(2)(a) than with those in Article 6(2)(b).

32 Furthermore, it must be observed that, for the purposes of determining the applicable law, the criterion connecting the employment contract in issue to the country where the employee habitually carries out his work should be taken into consideration first, and the application of that criterion excludes the taking into consideration of the secondary criterion of the country in which the place of business through which he was engaged is situated.

33 In that regard, it must be recalled that in Case C-29/10 *Koelzsch* [2011] ECR I-0000 the Court, interpreted Article 6(2)(a) of the Rome Convention as meaning that it is first necessary to examine, on the basis of evidence such as that put forward by Mr Voogsgeerd, whether the employee principally carries out his work within one single country.

34 Indeed, it follows from the wording of Article 6(2) of the Rome Convention that the intention of the legislator was to establish a hierarchy between the criteria to be taken into account for the determination of the law applicable to the contract of employment.

35 That interpretation is also supported by the analysis of the objective of Article 6 of the Rome Convention, which is to guarantee adequate protection to the employee. Thus, as the Court has already stated, the criterion of the country in which the employee 'habitually carries out his work', set out in Article 6(2)(a) of the Rome Convention, must be

sukladno članku 6. stavku 2. točki b. Rimske konvencije mjerodavno luksemburško pravo, povrijedio nekoliko odredaba ove Konvencije, a posebice članak 6. S tim u vezi ističe da u okviru svoga rada nije imao nikakav kontakt s Navimerom, već da se prilikom svakog ukrcaja morao javljati društvu Naviglobe u Antwerpenu od kojeg je i dobivao upute.

29 Svojim pitanjima *Hof van Cassatie* moli Sud za tumačenje članka 6. stavka 2. Rimske konvencije, a posebice poveznice države u kojoj se nalazi sjedište poslovnog nastana putem kojeg je radnik zaposlen iz točke b. ove odredbe.

30 Treba napomenuti da je, sukladno praksi Suda, u okviru postupka prethodnog pitanja zadaća nacionalnog suda koji je postavio prethodno pitanje da primijeni odredbu europskoga prava na spor koji vodi i da prema toj odredbi mora ocijeniti propis nacionalnog zakonodavstva, ali da je stvar Suda da mu osigura tumačenje tog europskog prava koje bi mu moglo biti od koristi kod ocjene učinaka te odredbe (vidi u tom smislu presudu od 11. rujna 2003., *Anomar i dr.*, C-6/01, [2003] ECR, I-8621, točka 37. i tamo navedenu praksu) te da na temelju cjelokupnog izlaganja nacionalnog suda utvrdi one elemente europskoga prava koji zahtijevaju tumačenje, uzimajući u obzir predmet spora (vidi u tom smislu presudu od 8. prosinca 1987. godine, *Gauchard,* 20/87, [1987], 4879, točka 7.).

31 Iako se prethodna pitanja u ovom predmetu odnose na članak 6. stavak 2. točku b. Rimske konvencije, čini se, kao što je i navela nezavisna odvjetnica u točki 60. svoga mišljenja te belgijska vlada i Europska komisija, da okolnosti koje karakteriziraju radni odnos iz glavnog postupka, a koje je sud koji traži prethodno tumačenje naveo u obrazloženju zahtjeva za prethodnim tumačenjem, prije zadovoljavaju kriterije iz članka 6. stavak 2. točka a. Rimske konvencije, nego kriterije iz točke b. te odredbe.

32 Osim toga, za određivanje mjerodavnoga prava kod ugovora o radu koji je predmet glavnog postupka prvenstveno se mora voditi računa o kriteriju mjesta na kojem radnik uobičajeno obavlja svoje zadaće, a njegova primjena isključuje primjenu supsidijarnog kriterija mjesta gdje se nalazi sjedište poslovnog nastana putem kojeg je radnik zaposlen.

33 Sud je u svojoj presudi od 15. ožujka 2011., *Koelzsch*, (C-29/10, [2011] ECR, I-0000), članak 6. stavak 2. točku a. Rimske konvencije protumačio tako da se ponajprije na temelju okolnosti, poput onih što ih je istaknuo gospodin Voogsgeerd, treba preispitati je li radnik svoj rad uobičajeno obavljao samo u jednoj zemlji.

34 Naime, iz teksta članka 6. stavka 2. Rimske konvencije proizlazi da je zakonodavac namjeravao odrediti redoslijed kriterija o kojima se mora voditi računa kod određivanja mjerodavnog prava za ugovor o radu ili radni odnos.

35 U korist tog tumačenja govori i cilj koji se želi postići člankom 6. Rimske konvencije. Kao što je Sud već utvrdio, kriterij države u kojoj radnik "uobičajeno obavlja svoj rad" iz članka 6. stavka 2. točke a. ove Konvencije treba tumačiti široko, dok se kriterij sjedišta "poslovnog nastana putem kojeg je radnik zaposlen" iz članka 6. stavka 2. točke

given a broad interpretation, while the criterion of 'the place of business through which [the employee] was engaged', set out in Article 6(2)(b) thereof, can apply only in cases where the court seised is not in a position to determine the country in which the work is habitually carried out (see *Koelzsch*, paragraph 43).

36 Thus, in a case such as that in the main proceedings, which concerns an employee carrying out his work in more than one Contracting State, the criterion contained in Article 6(2)(a) of the Rome Convention should nonetheless apply when it is possible for the court seised to determine the State with which the work has a significant connection (see *Koelzsch*, paragraph 44).

37 In such a case, the criterion of the country in which the work is habitually carried out must be understood as referring to the place in which or from which the employee actually carries out his working activities and, in the absence of a centre of activities, to the place where he carries out the majority of his activities (see *Koelzsch*, paragraph 45).

38 Therefore, in the light of the nature of work in the maritime sector, such as that at issue in the main proceedings, the court seised must take account of all the factors which characterise the activity of the employee and must, in particular, determine in which State is situated the place from which the employee carries out his transport tasks, receives instructions concerning his tasks and organises his work, and the place where his work tools are situated (see *Koelzsch*, paragraphs 48 and 49).

39 If it is apparent from these findings that the place from which the employee carries out his transport tasks and also receives the instructions concerning his tasks is always the same, that place must be considered to be the place where he habitually carries out his work, within the meaning of Article 6(2)(a). As stated at paragraph 32 above, the criterion of the place where the employee habitually carries out his work applies in priority.

40 Therefore, the factors characterising the employment relationship, as referred to in the order for reference, namely the place of actual employment, the place where the employee received instructions or to where he must report before discharging his tasks, are relevant for the determination of the law applicable to that employment relationship in that, when those places are located in the same country, the court seised may take the view that the situation falls within the scope of Article 6(2)(a) of the Rome Convention.

41 It follows that Article 6(2) of the Rome Convention must be interpreted as meaning that the national court seised of the case must first establish whether the employee, in the performance of his contract, habitually carries out his work in the same country, which is the country in which or from which, in the light of all the factors which characterise that activity, the employee performs the main part of his obligations towards his employer.

42 In case the national court were to take the view that it cannot rule on the dispute before it under Article 6(2)(a) of that convention, it is necessary to answer the questions as set out in the reference for a preliminary ruling.

Question 1 and 2

43 By its first and second questions, which should be considered together, the referring court asks, in essence, whether the concept of 'the place of business through which the employee was engaged', within the meaning of Article 6(2)(b) of the Rome Convention, must be understood as referring to the place of business which concluded the contract of

b. treba koristiti samo onda kada sud pred kojim se vodi postupak ne može odrediti državu u kojoj se uobičajeno obavlja rad (vidi presudu *Koelzsch*, točka 43.).

36 Sukladno tomu se i u slučaju kao što je ovaj glavni postupak, u kojem radnik svoj rad obavlja u više država članica, treba primijeniti kriterij iz članka 6. stavka 2. točke a. Rimske konvencije ako sud pred kojim se vodi postupak ne može odrediti državu s kojom je rad najuže povezan (vidi presudu *Koelzsch*, točka 44.).

37 U takvu se slučaju kriterij države u kojoj se uobičajeno obavlja rad mora shvatiti tako da se odnosi na mjesto na kojem ili iz kojeg radnik doista obavlja svoje poslovne aktivnosti te, ako ne postoji središte njegovih aktivnosti, na mjesto u kojem radnik obavlja veći dio svojih aktivnosti (vidi presudu *Koelzsch*, točka 45.).

38 Iz tog razloga nacionalni sud, uzimajući u obzir bit rada na moru, što je slučaj u predmetnom glavnom postupku, mora uzeti u obzir sve okolnosti koje karakteriziraju aktivnosti radnika, a posebice mora odrediti u kojoj se državi nalazi mjesto iz kojeg radnik obavlja svoje plovidbe, prima upute za plovidbe i organizira svoj rad, kao i mjesto na kojem se nalaze njegova sredstva za rad (vidi presudu *Koelzsch*, točke 48. i 49.).

39 Ako iz toga proizlazi da se kod mjesta iz kojeg radnik obavlja svoje plovidbe i gdje dobiva upute za plovidbe uvijek radi o istom mjestu, onda se ono mora smatrati mjestom na kojem radnik obično obavlja svoj rad u smislu članka 6. stavka 2. točke a. Kao što je naime u točki 32. ove presude ponovljeno, prioritetno se primjenjuje kriterij mjesta u kojem radnik uobičajeno obavlja svoj rad.

40 Stoga su okolnosti koje karakteriziraju radni odnos, poput onih istaknutih u prethodnom pitanju, tj. mjesto stvarnog zaposlenja, mjesto gdje radnik dobiva svoje upute ili mjesto na koje se mora javiti prije plovidbe, utoliko mjerodavne za određivanje mjerodavnog prava za ovaj radni odnos ukoliko sud pred kojim se vodi postupak može poći od pretpostavke da to činjenično stanje ispunjava pretpostavke iz članka 6. stavka 2. točke a. Rimske konvencije, ako se ta mjesta nalaze u istoj državi.

41 Sukladno tomu, članak 6. stavak 2. Rimske konvencije mora se tumačiti tako da nacionalni sud prvo mora ustanoviti je li radnik u ispunjenju ugovora svoj rad uobičajeno obavljao u istoj državi, i to u državi u kojoj ili iz koje uobičajeno ispunjava svoje obveze prema poslodavcu, uzimajući u obzir sve okolnosti koje su karakteristične za taj posao.

42 Za slučaj da sud koji je zatražio prethodno tumačenje smatra da u predmetnom sporu ne može odlučiti na temelju članka 6. stavka 2. točke a. te Konvencije, treba pronaći odgovor na pitanja kao ona postavljena u zahtjevu za prethodnim tumačenjem.

O prvom i drugom pitanju

43 Prvim i drugim pitanjem, koja treba sagledati zajedno, sud želi znati podrazumijeva li se pod pojmom "sjedište poslovnog nastana putem kojeg je radnik zaposlen" u smislu članka 6. stavka 2. točke b. Rimske konvencije sjedište poslovnog nastana koji je zaključio ugovor o radu ili sjedište poslovnog nastana gdje radnik doista radi ili može li u poto-

employment or as referring to the place of business of the undertaking to which the employee is connected through his actual employment and, in the latter case, if that connection can follow from the fact that the employee must report regularly to and receive instructions from that undertaking.

44 As is apparent from paragraphs 39 and 40 above, when the court seised establishes that the employee must always report to the same place where he receives instructions, that court must regard the employee as habitually carrying out his work in that place, within the meaning of Article 6(2)(a) of the Rome Convention. Those factors, which characterise the actual employment, all concern the determination of the law applicable to the contract of employment on the basis of that connecting criterion and they cannot also be relevant to the application of Article 6(2)(b) of the Rome Convention.

45 As stated by the Advocate General in paragraphs 65 to 68 of her Opinion, to interpret Article 6(2)(b) in order to determine the undertaking which engaged the employee by taking into account factors that do not just relate to the conclusion of the contract, would be inconsistent both with the language and with the spirit and purpose of that provision.

46 Indeed, the use of the term 'engaged' in Article 6(2)(b) of the Rome Convention, clearly refers just 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.

47 Furthermore, the schematic interpretation of Article 6(2)(b) requires that the – subsidiary – criterion laid down in that provision be applied when it is impossible to place the employment relationship in a Member State. Therefore, only a strict interpretation of that subsidiary criterion can guarantee the complete foreseeability of the law applicable to the contract of employment.

48 Since the criterion of the place of business of the undertaking which employs the worker is unrelated to the conditions under which the work is carried out, the fact that the undertaking is established in one place or another has no bearing on the determination of that place of business.

49 It is only if factors concerning the engagement procedure lead to the conclusion that the undertaking which concluded the contract, in reality, acted in the name of and on behalf of another undertaking that the referring court might consider that the connecting criterion contained in Article 6(2)(b) of the Rome Convention refers to the law of the country where the place of business of the latter undertaking is situated.

50 Consequently, for the purposes of that assessment, the referring court should not take factors relating to the performance of the work into account, but only those relating to the procedure for concluding the contract, such as the place of business which published the recruitment notice and that which carried out the recruitment interview, and it must endeavour to determine the real location of that place of business.

51 In any event, as noted by the Advocate General in paragraph 73 of her Opinion, for the purposes of the last subparagraph of Article 6(2), the referring court can take other elements of the employment relationship into account when it appears that those concerning the two connecting criteria set out in that article which relate to the place where the work is carried out and the place of business of the undertaking which employs the worker suggest that the contract is more closely connected with a State other than those indicated by those criteria.

njem slučaju ta povezanost proizaći iz toga što se radnik redovito mora javljati potonjem društvu i od njega primati upute.

44 Kao što proizlazi iz točaka 39. i 40. ove presude, nacionalni sud pred kojim se vodi postupak, kada ustanovi da se radnik uvijek mora javljati na isto mjesto, na kojem i prima upute, može poći od pretpostavke da radnik svoj rad uobičajeno obavlja na tome mjestu u smislu članka 6. stavka 2. točke a. Rimske konvencije. Te okolnosti koje su karakteristične za stvarni rad sve dolaze u obzir kada se mjerodavno pravo za ugovor o radu ili radni odnos mora odrediti na temelju tog posljednjeg kriterija, ali ne mogu ujedno biti mjerodavni i za primjenu članka 6. stavka 2. točke b. Rimske konvencije.

45 Kao što je nezavisna odvjetnica navela u točki 65. do 68. svoga mišljenja, bilo bi u suprotnosti s tekstom i svrhom ovoga propisa kada bi se tumačio za određivanje poduzeća koje je zaposlilo radnika, uzimajući u obzir i okolnosti koje se ne odnose isključivo na sklapanje ugovora o radu.

46 Pojam "zaposlen" iz članka 6. stavka 2. točke b. Rimske konvencije odnosi se naime samo na zaključenje ugovora o radu, odnosno kod faktičkog radnog odnosa na zasnivanje radnog odnosa, a ne na način stvarnog obavljanja posla.

47 Osim toga, ako se razmotri struktura članka 6. stavka 2. točke b., nužno proizlazi da se kriterij iz ove odredbe koji se primjenjuje supsidijarno, mora primijeniti onda kada se radni odnos ne može lokalizirati u jednoj državi članici. Stoga samo usko tumačenje tog pomoćnog kriterija može zajamčiti da je jasno predvidivo koje je pravo mjerodavno za ugovor o radu.

48 Budući da kriterij sjedišta poslovnog nastana društva putem kojeg je radnik zaposlen nema nikakve veze s pretpostavkama pod kojima se obavlja rad, za određivanje sjedišta poslovnog nastana nebitno je nalazi li se sjedište poslovnog nastana tog poduzeća u ovom ili onome mjestu.

49 Samo ako iz okolnosti koje se odnose na postupak zapošljavanja proizlazi da je društvo koje je zaključilo ugovor o radu djelovalo u ime i za račun drugog poduzeća, nacionalni sud mogao bi poći od toga da kriterij iz članka 6. stavka 2. točke b. Rimske konvencije ukazuje na pravo države u kojoj se nalazi sjedište poslovnog nastana potonjeg društva.

50 Prema tomu, sud u okviru te ocjene ne smije u obzir uzimati okolnosti koje se odnose na obavljanje rada, već samo one koje se odnose na postupak zaključenja ugovora, npr. koje je sjedište poslovnog nastana raspisalo natječaj za radno mjesto ili je vodilo razgovor za zapošljavanje te se mora potruditi da utvrdi stvarno mjesto sjedišta poslovnog nastana.

51 No, nacionalni sud u svakom slučaju, kao što je to istakla nezavisna odvjetnica u točki 73. svoga mišljenja, sukladno članku 6. stavku 2. posljednjem podstavku, može uzeti u obzir i druge okolnosti vezane za radni odnos, ako iz toga proizađe da okolnosti koje se odnose na poveznice iz toga članka, tj. mjesto u kojem se obavlja rad i mjesto u kojem je sjedište poslovnog nastana društva koje je zaposlilo radnika, vode do zaključka da je ugovor uže povezan s drugom državom, a ne s onima na koje ti kriteriji upućuju.

52 The answer to Question 1 and 2 must therefore be that the concept of 'the place of business through which the employee was engaged', within the meaning of Article 6(2)(b) of the Rome Convention, must be understood as referring exclusively to the place of business which engaged the employee and not to that with which the employee is connected by his actual employment.

Question 3

53 By its third question, the referring court asks, in essence, whether, for the purposes of applying the connecting criterion set out in Article 6(2)(b) of the Rome Convention, the place of business must fulfil some formal requirements, such as the possession of legal personality.

54 In that context, it must be noted at the outset that it is apparent from the wording of that provision that it does not only concern the business units of the undertaking which have legal personality, the term 'place of business' covering every stable structure of an undertaking. Consequently, not only the subsidiaries and branches but also other units, such as the offices of an undertaking, could constitute places of business within the meaning of Article 6(2)(b) of the Rome Convention, even though they do not have legal personality.

55 However, as highlighted by the Commission and noted by the Advocate General at paragraph 81 of her Opinion, that provision requires that the undertaking has a degree of permanence. Indeed, the purely transitory presence in a State of an agent of an undertaking from another State for the purpose of engaging employees cannot be regarded as constituting a place of business which connects the contract to that State. That would be contrary to the connecting criterion provided for by Article 6(2)(b) of the Rome Convention, which is not the place of the conclusion of the contract.

56 If, however, the same representative travels to a country in which the employer maintains a permanent establishment of his undertaking, it would be perfectly reasonable to suppose that that establishment constitutes a 'place of business', within the meaning of Article 6(2)(b) of the Rome Convention.

57 Moreover, the place of business which is taken into consideration for the application of the connecting criterion must, in principle, belong to the undertaking which engages the employee, that is to say forms an integral part of its structure.

58 On the basis of those considerations, the answer to Question 3 is that Article 6(2)(b) of the Rome Convention must be interpreted as meaning that the possession of legal personality does not constitute a requirement which must be fulfilled by the place of business of the employer within the meaning of that provision.

Question 4

59 By its fourth and last question, the referring court asks whether, for the purposes of applying the connecting criterion provided for in Article 6(2)(b) of the Rome Convention, the place of business of an undertaking other than that which is the employer can be regarded as acting in that capacity even though the authority of the employer has not been transferred to that other undertaking.

60 In that context, the order for reference appears to suggest that this question arises because the applicant claims to have always received instructions from Naviglobe and

52 Dakle, na prvo i drugo pitanje treba odgovoriti da se pod pojmom "sjedište poslovnog nastana putem kojeg je radnik zaposlen" u smislu članka 6. stavka 2. točke b. Rimske konvencije isključivo podrazumijeva sjedište poslovnog nastana putem kojega je radnik zaposlen, a ne sjedište poslovnog nastana kod kojega stvarno radi.

O trećem pitanju

53 Trećim pitanjem nacionalni sud koji je uputio prethodno pitanje želi znati mora li sjedište poslovnog nastana za primjenu kriterija iz članka 6. stavka 2. točke b. Rimske konvencije ispunjavati određene formalne zahtjeve kao što je posjedovanje vlastite pravne osobnosti.

54 S tim u vezi ponajprije treba napomenuti da iz teksta te odredbe jasno proizlazi da se ona ne odnosi isključivo na poslovne jedinice društva koje posjeduju pravnu osobnost, budući da pojam "sjedište poslovnog nastana" obuhvaća svaku trajnu strukturu nekog društva. Iz tog razloga sjedište poslovnog nastana u smislu članka 6. stavka 2. točke b. Rimske konvencije nisu samo društva kćeri ili poslovnice, nego i druge jedinice kao npr. uredi društva, čak i ako oni nemaju pravnu osobnost.

55 Međutim, kao što je istakla Komisija i nezavisna odvjetnica objasnila u točki 81. svoga mišljenja, ta odredba pretpostavlja trajnost sjedišta poslovnog nastana jer puka privremena nazočnost povjerenika društva iz druge države radi zapošljavanja radnika ne može se smatrati sjedištem poslovnog nastana koje uspostavlja vezu između ugovora i te države. To bi bilo u suprotnosti s poveznicom iz članka 6. stavka 2. točke b. Rimske konvencije koja se ne odnosi na mjesto zaključenja ugovora.

56 Ako međutim isti taj povjerenik otputuje u zemlju u kojoj poslodavac ima stalno predstavništvo svoga društva, onda bi se mogla zastupati pretpostavka da je to predstavništvo "sjedište poslovnog nastana" u smislu članka 6. stavka 2. točke b. Rimske konvencije.

57 Osim toga, sjedište poslovnog nastana koje je bitno za primjenu poveznice u pravilu će biti sastavni dio društva koje zapošljava radnika, tj. mora biti integralni dio njegove strukture.

58 Na temelju tih razmišljanja, na treće pitanje treba odgovoriti da članak 6. stavak 2. točku b. Rimske konvencije treba tumačiti tako da posjedovanje vlastite pravne osobnosti nije zahtjev koji sjedište poslovnog nastana mora ispunjavati u smislu ove odredbe.

Vezano za četvrto pitanje

59 U četvrtom i posljednjem pitanju sud koji je postavio prethodno pitanje želi znati može li se u svrhu primjene poveznice iz članka 6. stavka 2. točke b. Rimske konvencije smatrati da sjedište poslovnog nastana nekog drugog društva, osim onoga koje nastupa kao poslodavac, djeluje u tom svojstvu, iako ovlast za davanje naloga nije prenesena na njega.

60 To se pitanje sukladno zahtjevu za prethodnim tumačenjem očito postavlja zato što podnositelj žalbe u glavnom postupku iznosi da je upute dobivao uvijek od društva Naviglobe te je voditelj tog poduzeća u mjerodavnom razdoblju bio i voditelj društva Navimer koje je formalno zaposlilo žalitelja.

that, for the period under consideration, the director of that undertaking was also the director of Navimer, the undertaking which formally engaged the applicant in the main proceedings.

61 As regards the first factor, it must be recalled that, as is clear from paragraphs 39 and 40 above, this situation must be taken into account in determining the place where the work is habitually carried out, for the purpose of applying Article 6(2)(a) of the Rome Convention, since it concerns the performance of the work.

62 As regards the claim of the applicant concerning the fact that the same person was the director of Naviglobe and of Navimer, it is a matter for the referring court to assess what is the real relationship between the two companies in order to establish whether Naviglobe is, indeed, the employer of the personnel engaged by Navimer. The court seised must, in particular, take into consideration all the objective factors enabling it to establish the actual situation which differs from that which appears from the terms of the contract (see, by analogy, Case C-341/04 *Eurofood IFSC* [2006] ECR I-3813, paragraph 37).

63 In making this assessment, the fact pleaded by Navimer, namely the absence of a transfer of authority to Naviglobe, constitutes one of the factors to be taken into consideration, but it is not, in itself, decisive in the determination whether the employee was, in reality, engaged by a different company than that which is referred to as the employer.

64 It is only where one of the two companies acted for the other that the place of business of the first could be regarded as belonging to the second, for the purposes of applying the connecting criterion provided for in Article 6(2)(b) of the Rome Convention.

65 On the basis of those considerations, the answer to Question 4 is that Article 6(2)(b) of the Rome Convention must be interpreted as meaning that the place of business of an undertaking other than that which is formally referred to as the employer, with which that undertaking has connections, may be classified as a 'place of business' if there are objective factors enabling an actual situation to be established which differs from that which appears from the terms of the contract, and even though the authority of the employer has not been formally transferred to that other undertaking.

61 U vezi s prvom okolnosti treba reći da se ona, kao što proizlazi iz točke 39. i 40. ove presude, mora uzeti u obzir kod određivanja uobičajenog mjesta obavljanja rada, a radi primjene članka 6. stavka 2. točke a. Rimske konvencije, budući da se odnosi na mjesto obavljanja rada.

62 U vezi s tvrdnjom žalitelja glavnog postupka da je ista osoba bila voditelj društava Naviglobe i Navimer, nacionalni sud morat će ocijeniti koji odnos doista postoji između tih dvaju društava, kako bi mogao utvrditi je li Naviglobe doista imao svojstvo poslodavca u odnosu na osoblje zaposleno od strane Navimera. Nacionalni sud posebice mora uzeti u obzir sve objektivne okolnosti koje potvrđuju da stvarna situacija ne odgovara situaciji koja proizlazi iz teksta ugovora (vidi odgovarajuću presudu od 2. svibnja 2006., *Eurofood IFSC*, C-341/04, [2006] ECR, I-3813, točka 37.).

63 Kod te je ocjene okolnost koju je istaklo društvo Navimer, naime da na društvo Naviglobe nije prenesena ovlast za davanje uputa predstavlja jednu od okolnosti koje će trebati uzeti u obzir, ali ona sama po sebi nije ključna za pretpostavku da je radnik u stvarnosti zaposlen putem drugog društva, a ne onoga koje je nastupalo kao poslodavac.

64 Samo ako je jedno od ovih dvaju društava djelovalo na račun drugoga, onda bi se u svrhu primjene poveznice iz članka 6. stavka 2. točke b. Rimske konvencije moglo smatrati da je sjedište poslovnog nastana prvog društva u sastavu drugog društva.

65 Na temelju tih razmišljanja, na četvrto pitanje može se odgovoriti da članak 6. stavak 2. točku b. Rimske konvencije treba tumačiti tako da se sjedište poslovnog nastana drugog društva, a ne onoga koje formalno nastupa kao poslodavac i održava odnose s drugim društvom može smatrati "sjedištem poslovnog nastana", ako se na temelju objektivnih okolnosti može dokazati da se stvarna situacija ne podudara sa situacijom koja proizlazi iz teksta ugovora, i to i onda ako ovlast za davanje uputa nije formalno prenesena na to drugo društvo.

Wolf Naturprodukte GmbH
v.
SEWAR spol. s r. o.

C-514/10

21 June 2012

Jurisdiction and the enforcement of judgments in civil and commercial matters – Regulation (EC) No 44/2001 – Temporal scope – Enforcement of a judgment delivered before the accession of the State of enforcement to the European Union

OPERATIVE PART:

Article 66(2) of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters must be interpreted as meaning that, for that regulation to be applicable for the purpose of the recognition and enforcement of a judgment, it is necessary that at the time of delivery of that judgment the regulation was in force both in the Member State of origin and in the Member State addressed.

EXCERPT FROM THE REASONS:

1 This reference for a preliminary ruling concerns the interpretation of Article 66(2) of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ 2001 L 12, p. 1).

2 The reference has been made in proceedings between Wolf Naturprodukte GmbH ('Wolf Naturprodukte'), a company established in Graz (Austria), and SEWAR spol. s r. o. ('SEWAR'), a company established in Šanov (Czech Republic), concerning the recognition and enforcement in the Czech Republic of a judgment delivered in Austria.

Legal context

European Union law

3 Recital 5 in the preamble to Regulation No 44/2001 states:

'On 27 September 1968 the Member States, acting under Article 293, fourth indent, of the Treaty, concluded the Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters [OJ 1978 L 304, p. 36], as amended by Conventions on the Accession of the New Member States to that Convention (hereinafter referred to as the "Brussels Convention") ... On 16 September 1988 Member States and EFTA States concluded the Lugano Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters [OJ 1988 L 319, p. 9], which is a parallel Convention to the 1968 Brussels Convention. Work has been undertaken for the revision of those Conventions, and the Council has approved the content of the revised texts. Continuity in the results achieved in that revision should be ensured.'

Wolf Naturprodukte GmbH
protiv
SEWAR spol. s r.o.

C-514/10

21. lipnja 2012.

Nadležnost i ovrha sudskih odluka u građanskim i trgovačkim stvarima – Uredba (EZ) br. 44/2001 – vremensko područje primjene – ovrha odluke koja je donesena prije pristupa države ovrhe Europskoj uniji

IZREKA:

Članak 66. stavak 2. Uredbe Vijeća (EZ) br. 44/2001 od 22. prosinca 2000. o nadležnosti i priznanju i ovrsi sudskih premeta u građanskim i trgovačkim stvarima treba tumačiti tako da se Uredba primjenjuje samo ako je u trenutku donošenja odluke bila na snazi u državi članici podrijetla, kao i u zamoljenoj državi članici.

IZ OBRAZLOŽENJA:

1 Zahtjev za prethodnim tumačenjem odnosi se na tumačenje članka 66. stavka 2. Uredbe Vijeća (EZ) br. 44/2001 od 22. prosinca 2000. o nadležnosti i priznanju i ovrsi sudskih odluka u građanskim i trgovačkim stvarima (Sl. L 2001, L 12, str. 1).

2 Zahtjev za prethodnim tumačenjem upućen je u okviru spora između Wolf Naturprodukte GmbH (u daljnjem tekstu: Wolf Naturprodukte), društva sa sjedištem u Grazu (Austrija) i SEWAR spol. s r.o. (u daljnjem tekstu: SEWAR), društva sa sjedištem u Šanovu (Republika Češka), o priznanju i ovrsi odluke donesene u Austriji, u Republici Češkoj.

Pravni okvir

Pravo Unije

3 U petoj uvodnoj izjavi Uredbe br. 44/2001 stoji:

"Države članice 27. rujna 1968., djelujući u skladu s odredbama članka 293. četvrte alineje Ugovora, sklopile su Konvenciju iz Bruxellesa o nadležnosti i ovrsi sudskih odluka u građanskim i trgovačkim stvarima, koja je izmijenjena i dopunjena konvencijama o pristupanju novih država članica toj Konvenciji [Sl. 1972, L 299, str. 32] (u daljnjem tekstu: "Bruxelleska konvencija"). Države članice i EFTA sklopile su 16. rujna 1988. Konvenciju iz Lugana o nadležnosti i ovrsi sudskih odluka u građanskim i trgovačkim stvarima [Sl. L 319, str. 9], a riječ je o usporednoj konvenciji uz Konvenciju iz Bruxellesa iz 1968. Obavljen je rad na reviziji tih konvencija, a Vijeće je odobrilo sadržaj revidiranih tekstova. Trebalo bi osigurati kontinuitet rezultata postignutih tom revizijom."