OPINION OF ADVOCATE GENERAL TRSTENJAK delivered on 8 September 2011 [1]

I — Introduction

1. In this reference for a preliminary ruling under Article 267 TFEU, the Belgian Hof van Cassatie ('the referring court') has submitted to the Court of Justice a series of questions on the interpretation of the Rome Convention on the law applicable to contractual obligations, opened for signature in Rome on 19 June 1980 ('the Rome Convention'). [2] According to the recitals in its preamble, that convention was concluded in order to continue in the field of private international law the work of unification of law which had already been done within the European Union, in particular in the field of jurisdiction and enforcement of judgments, and with a view to establishing uniform rules concerning the law applicable to contractual obligations. The unification of the conflict-of-law rules concerned was intended to contribute towards legal certainty in the European judicial area. The same aim is also pursued by 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) [3] ('Rome I'), which replaced the Rome Convention with effect from 17 December 2009. As that regulation is applicable only to contracts concluded after that date and the employment contract at issue was concluded on 7 August 2001, the provisions of the Rome Convention are alone applicable to it.

2. The reference for a preliminary ruling was made in the course of a dispute between Mr Voogsgeerd, a Netherlands national, and his former employer, Navimer, a firm established in the Grand Duchy of Luxembourg, for which he worked as a First Engineer, concerning a claim for compensation for the alleged wrongful termination of his employment relationship. The point at issue in that context is which national law should ultimately be applicable to the main proceedings, particularly given that, in the event of the applicability of Luxembourg law (which had originally been agreed as the *lex contractus*), the action for damages brought by Mr Voogsgeerd would be precluded by a three-month limitation period which has now expired. Mr Voogsgeerd himself takes the view that that limitation period does not apply, as it is contrary to the mandatory rules of Belgian law which he considers to be applicable to his employment contract. In support of his claim as to the applicability of Belgian law, he relies in particular on the

1 — Original language of the Opinion: German
Language of the case: Dutch

2 — OJ 1980 L 266, p. 1.

3 — OJ 2008 L 177, p. 6.

fact that, in the performance of his employment contract, he always took instructions from an undertaking other than, although closely connected with, his employer, that is to say Naviglobe, a firm established in Antwerp. He concludes from this that Naviglobe must be regarded as a place of business of his employer within the meaning of Article 6(2)(b) of the Rome Convention, and that, in the final analysis, regard must be had to the specific rules laid down there.

3. The purpose of the questions referred is, in essence, to obtain information on the meaning to be ascribed to the term 'place of business' as it is used in the aforementioned provision and the requirements to be attached to that criterion for the purposes of applying the conflict-of-law rule contained in that provision. In the light of the parallels between this case and *Koelzsch*,[4] which concerned the interpretation of Article 6(2)(a) of the Convention, it is necessary to examine the relationship between those two provisions.

4 — Case C-29/10 *Koelzsch* [2011] ECR I-1595.

II — Legislative context

A — *The Rome Convention*

4. Article 3 ('Freedom of choice') of the Rome Convention provides:

'1. 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 to part only of the contract.

…'

5. Article 4 ('Applicable law in the absence of choice') of the Convention provides:

'1. 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. Nevertheless, a severable part of the contract which has a closer connection with another country may by way of exception be governed by the law of that other country.

…'

6. Article 6 ('Individual employment contracts') 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 to 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.'

7. Article 1 of the First Protocol on the interpretation by the Court of Justice of the European Communities of the Convention on the law applicable to contractual obligations, opened for signature in Rome on 19 June 1980 [5] ('First Protocol on the interpretation of the Rome Convention') provides:

'The Court of Justice of the European Communities shall have jurisdiction to give rulings on the interpretation of:

(a) the Convention on the law applicable to contractual obligations, opened for signature in Rome on 19 June 1980, …;

(b) the Convention on accession to the Rome Convention by the States which have become Members of the European Communities since the date on which it was opened for signature;

…'

8. Article 2 of the First Protocol on the interpretation of the Rome Convention provides as follows:

'Any of the courts referred to below may request the Court of Justice to give a preliminary ruling on a question raised in a case pending before it and concerning interpretation of the provisions contained in the instruments referred to in Article 1 if that

5 — OJ 1998 C 27, p. 47.

court considers that a decision on the question is necessary to enable it to give judgment:

…

(b) the courts of the Contracting States when acting as appeal courts.'

B — *The Brussels Convention*

9. Article 5 of the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters ('the Brussels Convention') [6] provides:

'A person domiciled in a Contracting State may, in another Contracting State, be sued:

…

5. as regards a dispute arising out of the operations of a branch, agency or other establishment, in the courts for the place in which the branch, agency or other establishment is situated.'

C — *National law*

10. In accordance with Article 80 of the Luxembourg Law of 9 November 1990 [7] establishing a Luxembourg Public Maritime Register, the unlawful termination of a seaman's contract of employment confers entitlement to damages and to the payment of interest; the legal action to remedy that unlawful termination must, on pain of inadmissibility, be brought before a labour court within three months of the service of the notice of termination or the provision of reasons for the termination.

6 — The 1968 Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters (OJ 1972 L 299, p. 32), as amended by the Convention of 9 October 1978 on the accession of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland (OJ 1978 L 304, p. 1, and – amended version – p. 77), the Convention of 25 October 1982 on the accession of the Hellenic Republic (OJ 1982 L 388, p. 1), the Convention of 26 May 1989 on the accession of the Kingdom of Spain and the Portuguese Republic (OJ 1989 L 285, p. 1) and the Convention of 29 November 1996 on the accession of the Republic of Austria, the Republic of Finland and the Kingdom of Sweden (OJ 1997 C 15, p. 1).

7 — Law of 9 November 1990 establishing a Luxembourg Public Maritime Register, Mémorial A-No 58, *Journal Officiel du Grand-Duché de Luxembourg*, p. 807 et seq.

III — Facts, main proceedings and questions referred

11. On 7 August 2001, Mr Voogsgeerd, a Netherlands national, concluded an employment contract of unlimited duration with Navimer, an undertaking established in the Grand Duchy of Luxembourg. Luxembourg law was agreed as the law applicable to that employment contract.

12. Mr Voogsgeerd received his wages from Navimer's payroll office, also established in Luxembourg, and, furthermore, was affiliated to a Luxembourg sickness insurance fund.

13. During the period from August 2001 to April 2002, he worked as First Engineer on the vessels MS Regina and MS Prins Henri, owned by Navimer, the North Sea having been indicated as the area of operation.

14. By letter of 8 April 2002, Navimer dismissed Mr Voogsgeerd, who contested the unilateral termination of his employment contract by bringing an action for wrongful dismissal on 4 April 2003 before the Antwerp Labour Court.

15. In support of his action, Mr Voogsgeerd relied, with reference to Article 6(1) of the Rome Convention, on the mandatory rules of Belgian law, which, in his submission, are applicable in the absence of a choice of law made by the contracting parties, in accordance with Article 6(2)(b) of the Convention.

16. In this regard, he claimed that he must be regarded as bound by an employment contract with the Belgian undertaking Naviglobe and not with the Luxembourg undertaking Navimer, as his work always required him to go to Antwerp to be present when the ships were loaded and to take instructions from his employer, which were passed to him via Naviglobe.

17. The Antwerp Labour Court decided that, in the light of all the circumstances of the employment relationship, Navimer must be regarded as the place of business through which Mr Voogsgeerd was engaged and that, accordingly, the mandatory rules of Luxembourg law must be applicable to the employment contract, in accordance with Article 6(2)(b) of the Convention.

18. The Antwerp Labour Court also held that the action for damages for the unlawful termination of his employment contract should be dismissed, as it had been brought after the three-month limitation period laid down for such actions in Article 80 of the Law establishing a Luxembourg Public Maritime Register had expired.

19. Mr Voogsgeerd brought an appeal against that judgment before the competent court in Antwerp. The order for reference shows that,

although the appeal court dismissed the appeal, it did not rule out the possibility that the facts presented by Mr Voogsgeerd with respect to the place of loading and his having to take instructions from Naviglobe might also be taken into account.

20. In his appeal in cassation before the referring court, Mr Voogsgeerd advances the same arguments as in the appeal proceedings. The referring court points out that, if the information provided is correct, the Antwerp-based undertaking Naviglobe could be regarded as the place of business, within the meaning of Article 6(2)(b) of the Convention, with which Mr Voogsgeerd was connected by virtue of his actual employment.

21. In view of the remaining doubts as to interpretation, the Hof van Cassatie stayed the proceedings and referred the following questions to the Court 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 Convention on the law applicable to contractual obligations, opened for signature in Rome on 19 June 1980, 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?

(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?'

IV — Procedure before the Court

22. The order for reference of 7 June 2010 was lodged at the Registry of the Court of Justice on 29 July 2010.

23. Written observations were submitted by Mr Voogsgeerd, the Belgian and Netherlands Governments and the European Commission within the period laid down in Article 23 of the Statute of the Court of Justice.

V — Main arguments of the parties

A — *First and second questions*

24. By letter of 4 April 2011, which was lodged at the Court Registry on 21 April 2011, the referring court answered the Court's question as to whether, in the light of the judgment of 15 March 2011 in Case C-29/10 *Koelzsch*, of which, moreover, it had been informed, it was maintaining its reference for a preliminary ruling, in the affirmative.

27. The *Netherlands Government* and the *Commission* take the view that the expression 'country in which the place of business through which he was engaged is situated' as used in Article 6(2)(b) of the Convention is to be taken to mean the country in which is situated the place of business of the undertaking that concluded the employment contract with the employee.

25. Exercising its powers to adopt measures of organisation of procedure, the Court addressed to the parties a question concerning the applicability of Article 6(2)(b) of the Rome Convention to the situation in the main proceedings, which they answered in writing within the period laid down.

28. The *Netherlands Government* considers that Article 6(2)(b) of the Convention must be interpreted literally. For that provision is intended to establish uniform conflict-of-law rules in order to prevent forum shopping, promote legal certainty and facilitate the determination of the applicable law. For this to be possible, however, the conflict-of-law rules must be largely foreseeable. Nevertheless, it is not clear exactly what 'place of actual employment' means, particularly in cases where the employee does not habitually carry out his work in any one country.

26. As none of the parties to the proceedings applied for the oral procedure to be opened, it was possible to draft the Opinion in this case after the general meeting of the Court on 17 May 2011.

29. The *Commission* submits that the main conflict-of-law rule must be regarded as

that contained in Article 6(2)(a), so that the relevant court must first establish whether there is a centre to the activity pursued by the employee in question. When considering this question, the court must, to the extent possible, take as its point of reference the place of activity that best reflects reality, even if the employee carries out his activity in more than one Member State. If interpreted broadly, that rule affords the greatest possible measure of legal certainty, as it is largely foreseeable, and also best reflects reality. The Commission therefore considers that, in most cases, that rule makes it possible to determine the applicable law. The conflict-of-law rule contained in Article 6(2)(b) is applicable only in the alternative, that is to say where it is not possible to establish a centre for the activity.

30. On the basis of that conflict-of-law rule, there are two possible approaches. The provision in question can be interpreted as meaning that it relates either to the place of business with which the employee is connected by virtue of his activity (fact-based criterion) or to the place of business which, according to the employment contract, engaged the employee (formal criterion). The Commission advocates the second interpretation. First, the wording of subparagraph (b) itself supports that interpretation: the term 'engaged' suggests the time when the employment contract was drawn up rather than the time when the activity was actually carried out, in contrast to the criterion in subparagraph (a), which expressly refers to the habitual carrying out of work in performance of the employment contract. Secondly, from a schematic point of view, it makes little sense to employ a criterion which is again fact-based even though the centre of the activity cannot be determined even on a broad interpretation of the criterion contained in subparagraph (a).

31. On the other hand, *Mr Voogsgeerd* and the *Belgian Government* take the view that the expression 'country in which the place of business is situated of the undertaking that concluded the employment contract with the employee' in Article 6(2)(b) of the Convention refers to the country in which is situated the place of business with which the employee is connected when actually carrying out his work.

32. In this regard, *Mr Voogsgeerd* submits that, in a situation such as that in the main proceedings, the employment relationship is only very loosely connected with the place of business of the undertaking that engaged the employee. To apply the law of that country would run counter to the approach that forms the basis of the Convention, to the effect that the applicable law is that of the country more closely connected with the employment relationship. Consequently, the fact that a contract is concluded with the place of business of a parent company solely for the purpose of working abroad for the branch of that company can have no bearing on the determination of the applicable law.

33. In fact, it would be contrary to the purpose of Article 6 of the Convention if the employer were able at his will to evade the mandatory rules of the country with which the employment contract is genuinely and closely connected simply by having the employment contract signed by another place of business. If the law of the country of the place of business in which he works were applied, the employee would enjoy the same protection as employees who normally discharge their duties in that place of business in performance of their employment contract. Finally, Mr Voogsgeerd points out that the English-language version of Article 6(2)(b) of the Convention makes it absolutely clear that that provision does not refer to the undertaking with which the employee concluded an employment contract.

34. The *Belgian Government* submits that 'country in which the place of business through which he was engaged is situated' means the country in which is situated the place of business with which the employee is connected by virtue of actually carrying out his work.

35. It points out first that the effect of interpreting that provision as referring to the country stated in the contract might be that the mandatory rules of the law of that country bear no relation to the work actually carried out. If this were the criterion, the establishment of a connection with a legal system would depend on a circumstance which often bears no relation to the work itself. Secondly, that provision cannot be understood as referring to the conclusion of an employment contract in a company's head office unless the work is actually carried out in the country in which that head office is situated. This could easily lead to abuse, inasmuch as the employer might move the company's head office to a country offering only limited welfare guarantees to employees, for example. Thirdly, the Belgian Government's approach is based on the 'closer connection theory', according to which the law applicable must be that of the country to which, taking into account all the circumstances, there is a closer connection. There are many factors which may be indicative of a closer connection, such the language of the contract, the currency used, the entry in the staff register, the nationality of the contracting parties and the place where the employer exercises its directive authority.

B — *Third and fourth questions*

36. In *Mr Voogsgeerd's* view, an economic operator may be classified as a place of business within the meaning of Article 6(2)(b) of the Convention if it has an agency or office with a degree of permanency and possesses legal personality or meets other requirements.

37. He none the less considers that recognition of its status as such does not require that the organisational entity in question should have directive authority or that such authority should have been delegated to it by the principal undertaking. It may be both a branch without legal personality and a subsidiary with legal personality.

38. The *Belgian Government* takes the view that the possession of legal personality is not a formal condition of being regarded as a 'place of business' within the meaning of Article 6(2)(b) of the Convention, and that any branch or agency of a company which is set up in accordance with the law of the State of establishment may be classified as a place of business.

39. None the less, any secondary undertaking must have received from the parent undertaking directive authority in relation to the determination of terms of pay and conditions of dismissal.

40. The *Commission* also takes the view that classification as a place of business requires a minimum degree of stability. It refers in this regard to the judgment in *Somafer*, [8] in which the Court, when interpreting Article 5(5) of the Brussels Convention, held that the concept of branch, agency or other establishment implies a place of business which has the appearance of permanency, such as the extension of a parent body. The Commission submits that such an approach makes it impossible to establish a connection between the contract and a State which affords a lower level of protection to employees.

VI — Legal assessment

A — *Introductory remarks*

41. It is in this very context of employment relationships which have a cross-border dimension that conflicts of law between individual legislative systems in the area of employment law raise complex questions of law. One of the consequences of this is that they often present the courts of the Member States which are called upon to determine the law applicable to an employment contract with considerable problems. Alongside the customary difficulties associated with interpreting the employment contract comes the uncertainty as to what the best approach is to determining the law applicable. These difficulties in judicial practice are on the increase as it becomes more common for workers to be posted, more EU citizens avail themselves of the freedom of movement for workers and more undertakings enter into relationships with firms overseas or operate places of business in other countries. The – temporary or indefinite – posting of large numbers of

8 — Case 33/78 [1978] ECR 2183.

employees has become an important aspect of international economic relations, not only within the European internal market but, more generally, throughout the world. It is for that very reason that there is an urgent need for conflict-of-law rules which offer the contracting parties foreseeable solutions to the numerous problems that affect employment relationships, such as, for example, the question of what the redundancy terms should be, what, if any, compensation is to be paid to the employee, what leave arrangements are to apply or whether a dispute-settlement clause is to be regarded as valid. [9]

42. The national court, too, is faced with such a problem in the main proceedings, in so far as it has to decide whether it should apply Luxembourg or Belgian law to the situation in those proceedings. The many references to the law of both Member States do not at first sight make it clear how that situation is to be classified. In Mr Voogsgeerd's submission, however, it is fundamentally important to determine the applicable law, since, in the event that Luxembourg law is applicable, his action for damages for wrongful dismissal would be precluded by the three-month limitation period laid down in Article 80 of the Luxembourg Law of 9 November 1990 establishing a Luxembourg Public Maritime Register, which has now expired. In such an event, his action would have to be dismissed. Accordingly, the competent national court will base its decision on the relevant provisions of the Rome Convention and, in so doing, will have to take into account various issues of a legal and factual nature. The interpretation of the relevant provisions and terms that the Court will give in the present preliminary ruling proceedings must help the national court to reach a legally correct decision which, in addition, takes into account, as far as possible, the purpose of Article 6 of the Convention, that is to say to afford appropriate protection to the employee concerned.

B — *Outline of the scheme of analysis for determining the applicable law*

43. In order to place the questions of law raised in the correct thematic and schematic context, I shall, before addressing the questions referred themselves, look briefly at the scheme of analysis which the national court must follow when determining the applicable law. So as to offer the national court answers to the questions of law raised which are as relevant as possible to the situation at issue, this outline will not depart from the facts of

9 — See Déprez, J., 'La loi applicable au contrat de travail dans les relations internationales'. *Revue de jurisprudence sociale*, 4/1994, p. 237.

the main proceedings but will refer as far as possible to specific aspects of those facts.

1. Free choice of law as a basic rule

44. The Rome Convention is characterised by the fact that it attaches central importance to the autonomy of the parties, inasmuch as, in Article 3(1), it gives the contracting parties a free choice of law as a basic rule. [10] In this way, the principles underpinning that Convention are ultimately consistent with the view already expressed by the Court in its case-law to the effect that 'contractual provisions expressing the common intention of the parties must take precedence over any other criterion which might be used only where the contract is silent on a particular point'. [11] However, where the parties do not make a choice of law, the applicable law is determined in accordance with Article 4 of the Convention, which provides, as a basic criterion, that application is to be given to the law of the country with which the contract is most closely connected.

45. It should be pointed out in this regard that, in the main proceedings, the conditions laid down in Article 3(1) of the Convention are fully satisfied, since Navimer and Mr Voogsgeerd expressly established the law of the Grand Duchy of Luxembourg as the applicable law when they concluded the employment contract. It could therefore be assumed that Luxembourg employment law is applicable in principle, provided that none of the special provisions of that Convention is relevant.

2. Special provisions on the protection of employees

46. After all, in the situation in the main proceedings, Articles 3 and 4 might be set aside by other provisions of that Convention on account of there being between them a relationship of general rule to special rule, pursuant to the principle of *lex specialis derogat legi generali*. This may be the case with Article 6 of the Convention, which governs the law applicable to employment contracts and employment relationships. It constitutes a special provision in relation to Articles 3 and 4 of the Convention in so far as it contains provisions on the protection of the weaker contracting

10 — See Plender, R., *The European Contracts Convention – The Rome Convention on the Choice of Law for Contracts*, London 1991, p. 87, paragraph 5.01, Schneider, G., 'Einfluss der Rom-I-VO auf die Arbeitsvertragsgestaltung mit Auslandsbezug', *Neue Zeitschrift für Arbeitsrecht*, 2010, p. 1380, and Ofner, H., 'Neuregelung des Internationalen Vertragsrechts: Römisches Schuldvertragsübereinkommen', *Recht der Wirtschaft*, No. 1/1999, p. 5, who emphasise the special status of the free choice of law. Lein, E., 'The new Rome I/Rome II/Brussel I synergy', Yearbook of Private International Law, Volume 10, 2008, p. 179, goes so far as to take the view that the principle of freedom of choice, on which the free choice of law is based, constitutes one of the general principles of law recognised by civilised nations within the meaning of Article 38(1)(c) of the Statute of the International Court of Justice.

11 — Case 318/81 *Commission* v *CODEMI* [1985] ECR 3693, paragraph 21.

party, that is to say the employee,[12] which derogate from those articles.

47. On the one hand, Article 6(1) provides that the choice of law made by the parties must not have the result of depriving the employee of the protection afforded to him by the mandatory rules of the law which would have been applicable in the absence of choice. On the other hand, Article 6(2) of the Convention contains special provisions which are applicable in the absence of choice. In this case, the applicable law is that of the country in which the employee habitually carries out his work, or – if it is not possible to determine any country in which the work is habitually carried out – the law of the country in which the place of business through which he was engaged is situated. Both of these basic connecting factors are characterised, first, by the fact that they are alternatives to each other, which is to say that they are mutually exclusive, and, secondly, by the fact that they cover the full spectrum of possible circumstances.[13] Finally, the last subparagraph of Article 6(2) contains an escape clause[14] to the effect that none of those provisions is applicable if the employment contract is more closely connected with another country. In that event, the law of that other country is to be applicable. The rationale behind those provisions is that, in the interests of the employee meriting protection, the applicable law should be that which is more closely related to the employment contract.

48. In order for it to be possible to set aside the basic rule laid down in Article 3, the national court must therefore ascertain, in accordance with Article 6(1) of the Convention, which law would have been applicable if the parties had not made a choice of law and whether that choice of law may have deprived the employee of the protection afforded to him by the mandatory rules of the law of the other country. This is for the national court to determine, in essence by assessing which law – the law chosen or the law otherwise applicable – affords greater protection to the

12 — See Van Eeckhoutte, W., 'The Rome Convention on the law applicable to contractual obligations and labour law', *Freedom of services in the European Union – Labour and Social Security Law: The Bolkestein Initiative* (ed. Roger Blanpain), The Hague 2006, p. 168, Wojewoda, M., 'Mandatory rules in private international law: with special reference to the mandatory system under the Rome Convention on the law applicable to contractual obligations', *Maastricht journal of European and comparative law*, No. 2/2000, p. 197, 201, Boskovic, O., 'La protection de la partie faible dans le règlement Rome I', *Recueil Dalloz*, 2008, p. 2175, Pfeiffer, T./Weller, M./Nordmeier, F., *Recht der elektronischen Medien – Kommentar* (ed. Gerald Spindler/Fabian Schuster), 2nd ed. Munich 2011, Rome I Article 8, paragraph 1, and Lein, E., cited above (footnote 10), p. 187, who view it as a special provision which, in the interests of protecting employees, limits the freedom of choice of law also available, in principle, in respect of employment contracts.

13 — See Juncker, A., 'Gewöhnlicher Arbeitsort im Internationalen Privatrecht', *Festschrift für Andreas Heldrich zum 70. Geburtstag*, Munich 2005, p. 722.

14 — See Ofner, H., cited above (footnote 10), p. 5, Magnus, U., 'Die Rom I-Verordnung', *Praxis des internationalen Privat- und Verfahrensrechts*, No. 1/2010, p. 41, and Martiny, D., *Internationales Vertragsrecht – Das internationale Privatrecht der Schuldverträge* (ed. Christoph Reithmann/Dieter Martiny), Cologne 2010, p. 1431, who expressly refer to the provision contained in the last subparagraph of Article 6(2) as an 'escape clause'.

employee (conflict-of-law principle of the more favourable provision) and whether the relevant rules of the more favourable law have mandatory status under the legal system in question. [15] If the law chosen has no mandatory protection provisions or falls short of the standard set by the law applicable under Article 6(2) of the Convention, it is the mandatory rules of the latter legal system, being more favourable to the employee, which apply. This may mean that the employment relationship is subject to different legal systems. [16] Where, on the other hand, the law chosen by the parties affords the employee just as much protection as, or more protection than, the law applicable under Article 6(2) of the Convention, the law chosen will remain applicable. [17]

49. Given, on the one hand, that certain provisions within the same legal system may prove to be more favourable than others and, on the other hand, that the provisions in the two legal systems may be different from or incompatible with each other, the assessment of the first-mentioned criterion – which law contains the more favourable provisions – cannot readily be confined to an overall comparison of the two bodies of employment law that is entirely divorced from the case under consideration. This would present the national court with all but insuperable problems, particularly since a particular provision of employment law may have different effects depending on whether it is applied alone or in conjunction with other provisions. [18] Rather, the assessment to be carried out must first and foremost take into account those matters which relate directly to the subject-matter of the dispute. [19]

15 — See Schäfer, K., *Application of mandatory rules in the private international law of contracts*, Frankfurt am Main 2010, p. 62 et seq., Wojewoda, M., cited above (footnote 12), p. 197, 201, and Boskovic, O., cited above (footnote 12), p. 2175, who point out the difficulty of determining which national provisions are more favourable and whether the provisions in question have mandatory status in law.

16 — See Schneider, G., cited above (footnote. 10), p. 1382.

17 — See Martiny, D., cited above (footnote 14), p. 1431 et seq.

18 — See Van Eeckhoutte, W., cited above (footnote 12), p. 173.

19 — See Déprez, J., 'La loi applicable au contrat de travail dans les relations internationales', *Revue de jurisprudence sociale*, 3/1999, p. 130, Pfeiffer, T./Weller, M./Nordmeier, F., cited above (footnote 12), paragraph 7, who takes the view that the favourability comparison must be based on the specific subject-matter of the dispute, Schäfer, K., cited above (footnote 15), p. 62 et seq., and Martiny, D., cited above (footnote 14), p. 1361, paragraph 1883, according to whom the conflict-of-law principle of the more favourable provision applies. The provisions of the legal systems in question must be compared. The provision that is more favourable to the employee takes precedence. The assessment compares what results the legal systems concerned would produce in the case in question. The comparison must not be extended to the entire legal system, but must be based on the substantive issue on which judgment is to be given. There should be no overall comparison. The more favourable solution is that which, quantitatively or qualitatively, best satisfies the employee's claims under the employment relationship in question and affords him better protection, for example which best protects the maintenance of his employment relationship. The monetary values attaching to the legal positions under the different legal systems may also be compared.

50. The main proceedings concern provisions on the protection of employees against dismissal and actions to have those provisions enforced by the courts. [20] The fact that, under Luxembourg law, the bringing of an action for damages for wrongful dismissal is subject to a three-month limitation period, whereas Belgian law would appear, in the absence of any information to the contrary from the referring court, not to contain such a time-limit, might therefore have a bearing on the assessment of the situation in the main proceedings. In my view, it seems only reasonable that the special employment protection provisions contained in the Convention should be applied to the situation in those proceedings, particularly in the light of the explanations which the Giuliano/Lagarde report on the Rome Convention [21] gives on the operation of Article 6, which refer to a similar example of a provision which is more favourable to the employee: 'In so far as the provisions of the law applicable pursuant to paragraph 2 give employees better protection than the chosen law, for example by giving a longer period of notice, these provisions set the provisions of the chosen law aside and are applicable in their place'. Given that both cases concern a time-limit the purpose of which is to protect the employee from the adverse effects of dismissal, the rationale embodied in the example appears to be transferable to the provision at issue. On that basis the fact that there is a longer limitation period, or even no limitation period at all in Belgian law for actions to enforce a claim for damages would justify the setting aside of the Luxembourg provisions, which are in principle applicable.

51. If the Belgian provisions on protection against dismissal were classified as 'mandatory' within the meaning of Article 6(1) of the Convention, the choice of Luxembourg law could certainly be regarded as 'depriving' the employee of protection.

3. Relationship between Article 6(2)(a) and (b) of the Convention

52. The purpose of Article 6 of the Convention, which, as has already mentioned, is to protect the employee, is justified by the fact that the employee is generally regarded as the socially and economically weaker party. That protection is achieved by requiring that the law applicable to the contract is to be that of the country with which the employment contract is most closely connected. That is, as the Court held in *Koelzsch,* the law of the

20 — Schneider, G., cited above (footnote 10), p. 1382, and Schlachter, M., 'Grenzüberschreitende Arbeitsverhältnisse', *Neue Zeitschrift für Arbeitsrecht*, 2/2000, p. 61, takes the view that the assessment of which law contains the more favourable provisions may be carried out on the basis of comparable subject areas (e.g. right to leave, protection against dismissal and/or the protection of acquired rights). The subject-matter of this dispute (protection of employees against dismissal and actions to have that protection enforced by the courts) has been limited in accordance with the approach advocated by those authors.

21 — Report on the Convention on the law applicable to contractual obligations by M. Giuliano and P. Lagarde (OJ 1980 C 282, p. 1).

country in which the employee carries out his working activities rather than the law of the country in which the employer is established. For, in the Court's view, it is in the former country that the employee performs his economic and social duties and it is there that the business and political environment also affects employment activities. Therefore, in the Court's view, compliance with the employment protection rules provided for by the law of that country must, so far as is possible, be guaranteed. [22]

53. In order to take due account of the protective purpose of Article 6 of the Convention, the Court also held in *Koelzsch* that the criterion of the country in which the employee 'habitually carries out his work', set out in Article 6(2)(a) thereof, must be 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, ought to apply in cases where the court dealing with the case is not in a position to determine the country in which the work is habitually carried out. [23]

54. It follows from the purpose of the legislation, the scheme of Article 6 and the wording of the individual provisions ('*if* the employee does not habitually carry out his work in any one country') that, in determining the applicable law, the national court must take into account paragraph 2(a) before it has recourse to subparagraph (b). In so doing, it must determine the *centre of the employee's activities*. In principle, therefore, the application of Article 6(2)(a) of the Convention is not precluded by the fact that the employee may have been temporarily posted to other countries in the course of his work. [24]

55. The Court, which, in *Koelzsch*, was called upon to interpret the criterion of [the country in which the employee] 'habitually carries out his work' in Article 6(2)(a) of the Convention, put this into words in paragraph 44 of that judgment by stating that that provision is relevant 'if it is possible, for the court seised, to determine the State with which the work has a *significant connection*'. As the Court went on to say in paragraph 45 of that judgment, such a connection exists with the place

22 — *Koelzsch* (cited in footnote 4, paragraph 42).

23 — *Koelzsch* (cited in footnote 4, paragraph 43).

24 — See to this effect Van Eeckhoutte, W., cited above (footnote 12), p. 169, who points out that the purpose of that provision is to create legal certainty and to prevent manipulation in the event of a temporary posting abroad.

'in which or from which the employee actually carries out his working activities and, in the absence of a *centre of activities*, [with] the place where he carries out the majority of his activities' (emphasis added).

4. Criteria for determining the centre of activities

56. The broad interpretation given to Article 6(2)(a) of the Convention in *Koelzsch* has consequences for the legal assessment of the present case, particularly as regards the choice of the correct conflict-of-law rule. After all, the criteria for determining the centre of an employee's activities which the Court developed in that case appear to be applicable to the situation in the main proceedings. I shall explain this in detail with reference to the appropriate passages from the judgment and the relevant facts of the main proceedings.

57. As the Court rightly recognised in that judgment, the place where the work is habitually carried out can be understood as referring not only to the place *in which* the employee actually carries out his working activities. Rather, the requirements of employment protection and a consistent interpretation in accordance with the relevant rules of the Brussels Convention and Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [25] ('Brussels I'), [26] as they have been interpreted in the Court's case-law, demand that it must also be understood as referring to the place *from which* the employee actually carries out his working activities. It is worth mentioning in this regard that that interpretation has found confirmation in the fact that the EU legislature expressly included that possibility in the successor provision of Ar-

25 — OJ 2001 L 12, p. 1.

26 — There must generally be assumed to be a relationship of continuity between Regulation No 44/2001 and the Brussels Convention ('continuity principle'). The importance of that principle in interpreting Regulation No 44/2001 is apparent from recital 19 in the preamble to that regulation, which states that continuity between the Brussels Convention and the Regulation should be ensured and also that the Court of Justice must ensure continuity in the interpretation of the Regulation. In its case-law, the Court has already made clear the importance of a uniform interpretation of the two acts (see in this regard my Opinion in Case C-533/07 *Falco Privatstiftung und Rabitsch* [2009] ECR I-3327).

ticle 8(2) of Regulation (EC) No 593/2008, [27] which clarified the existing legal position. [28]

58. On the basis of that finding, in paragraphs 48 et seq. of the judgment in *Koelzsch*, the Court developed criteria which are intended to help the national court to determine the centre of the employee's activities. In view of the fact that that case was concerned with determine the habitual place of work of a lorry driver, those criteria therefore relate to the specific area of the international transport sector. However, that fact alone should not preclude the applicability of those criteria to the situation in the main proceedings, particularly since it appears from the information supplied by the referring court that Mr Voogsgeerd worked for a company engaged in the carriage of goods by sea. Although he was not employed as a ship's captain but as a first engineer, the documents before the Court show that he, like the rest of the crew, was clearly employed on board ships that operated for the company in the North Sea. Consequently, the criteria developed by the Court in *Koelzsch* could, in the absence of any indication to the contrary, be used directly for the purpose of assessing the facts in the main proceedings.

59. According to those criteria, the national court must take account of all the factors which characterise the activity of the employee, in the light of the nature of work in the international transport sector. It must, in particular, determine in which State is situated the place from which the employee carries out his transport tasks, receives instructions concerning those tasks and organises his work, and at which the tools of his trade are situated. It must also determine the places to which the goods are principally transported, where the goods are unloaded and the place to which the employee returns to after completion of his tasks. The deciding factor, ultimately, is where the employee performs the greater part of his obligations towards his employer. [29]

27 — Thus, Article 8(2) of Regulation (EC) No 593/2008 reads: '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'.

28 — The view expressed here, that Article 8(2) of Regulation (EC) No 593/2008 simply clarified the existing legal position, is consistent with that held by a number of authors to the effect that the objective of that new legal instrument was not to introduce new rules but to convert the existing Convention into a regulation. The changes were intended to modernise certain provisions of the Convention and give them a clearer or more precise wording with a view, ultimately, to enhancing legal certainty but without introducing new elements which would substantially change the existing legal position (see Ferrari, F., 'From Rome to Rome via Brussels: remarks on the law applicable to contractual obligations absent of a choice by the parties', *Rabels Zeitschrift für ausländisches und internationales Privatrecht*, No. 4/2009, p. 751 et seq.). See with specific reference to the criterion of habitual place of work Magnus, U., 'Die Rom I-Verordnung', *Praxis des internationalen Privat- und Verfahrensrechts*, No. 1/2010, p. 27, 41, who considers the amendment to be no more than a clarification. In his view, the new addition 'or from which' is intended to make it clear that it is sufficient for the employee to have a centre of activity from which his work is organised, from which he starts, to which he returns and at which he occasionally carries out some of his activities.

29 — *Koelzsch* (cited in footnote 4 above, paragraphs 48 to 50).

60. If the national court were to apply those criteria to the situation in the main proceedings, it might find that there is sufficient evidence to support the assumption that the centre of Mr Voogsgeerd's activity for the purposes of Article 6(2)(a) of the Convention was in Antwerp. After all, the order for reference shows that he was obliged to report to Antwerp before setting sail and received briefing and instructions from Naviglobe, which is established there, in performance of his contract of employment with Navimer. Antwerp was therefore the place at which Mr Voogsgeerd worked and was permanently based, and from which he also started his regular working trips. Given that the applicable law can readily be determined by reference to Article 6(2)(a), it is doubtful whether there is any further scope for applying Article 6(2)(b) in the situation in the main proceedings. [30]

61. However, the fact that certain aspects of the situation in the main proceedings indicate that it is actually Article 6(2)(a) of the Convention which should be regarded as the relevant provision must not prompt us to call in question whether the questions referred are themselves relevant to the judgment to be given. After all, according to the Court's case-law, it is for the referring court alone to determine the subject-matter of the questions it intends to refer to the Court. The national court dealing with the dispute, and which must assume responsibility for the subsequent judicial decision, must alone assess, in the light of the particular circumstances of the case, both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court. Consequently, where the questions submitted concern the interpretation of European Union law, the Court is, in principle, bound to give a ruling. [31]

62. It should also be remembered that the referring court carries ultimate responsibility for providing an exhaustive account of the facts so that those matters of fact and law which may furnish evidence of a connection with a particular legal system can be established and made available to the Court of

30 — See, in connection with the respective fields of application of the provisions of [Article 6(2)](a) and (b) of the Convention in the light of the clarification provided by Regulation (EC) No 593/2008, Boskovic, O., cited above (footnote 12), p. 2175, who refers to the aforementioned clarification from the legislature in Article 8(2) of Regulation (EC) No 593/2008 ('from where') and explains in this regard that that clarification will help to regulate the situation of crew who are assigned to a specific base. In the author's view, this clarification will further limit the scope of Article 8(3) of Regulation (EC) No 593/2008 (the successor provision to Article 6(2)(b) of the Rome Convention). Martiny, D., cited above (footnote 14), p. 1434, paragraph 4848, states that that clarification extends the connecting factor of the place of work and diminishes the relevance of the criterion of the place of business through which the employer is engaged. Both authors agree that the scope of the criterion of the place of habitual activity has been extended, while the scope of the criterion of the place of engagement has been reduced.

31 — See Case C-316/09 *MSD Sharp* [2011] ECR I-3249, paragraph 21, Joined Cases C-376/05 and C-377/05 *Brünsteiner and Autohaus Hilgert* [2006] ECR I-11383, paragraph 26, Case *Korhonen and Others* [2003] ECR I-5321, paragraph 19, Case C-373/00 *Adolf Truley* [2003] ECR I-1931, paragraph 21, Case C-390/99 *Canal Satélite Digital* [2002] ECR I-607, paragraph 18, and Case C-379/98 *PreussenElektra* [2001] ECR I-2099, paragraph 38.

Justice as a basis for its decision. This should enable the Court to exercise effectively its powers of interpretation within the relationship of cooperation that defines the preliminary ruling procedure, and to give the referring court a useful interpretation of European Union law which goes as far as it can to help resolve the dispute in the main proceedings. Although it must be assumed that the referring court has fulfilled that obligation and has established the factual and legal framework and defined it in sufficiently precise terms in its order for reference, it cannot in principle be ruled out that it has information which indicates that it is the connecting-factor rule laid down in subparagraph (b), rather than, as I have argued here, the connecting-factor rule laid down in subparagraph (a), which should be applied.

63. It must be assumed, at least for the purposes of these preliminary ruling proceedings, that the referring court did not err in law when it assumed that Article 6(2)(a) of the Convention was not applicable. For that reason, Article 6(2)(b) must be interpreted below in the light of the questions referred.

C — *Examination of the questions referred*

1. First and second questions

64. The purpose of the first and second questions is to obtain a definition of the term 'place of business [of the employer]' in Article 6(2)(b), the referring court wishing to ascertain, in essence, whether that term means the place in which the employee was engaged according to the employment contract or, rather, the place in which he was actually employed.

65. An interpretation to the effect that the term 'place of business [of the employer]' in Article 6(2)(b) means the place in which the employee was engaged according to the employment contract is supported by the very wording of that provision. The use of the term 'engaged' in the same sentence clearly indicates that the point of reference is the conclusion of the employment contract or, in the case of a *de facto* employment relationship, the commencement of work, not the employee's actual working activities. [32] The

32 — See Plender, R., cited above (footnote 10), paragraph 8.21, and Martiny, D., cited above (footnote 14), p. 1369, paragraph 1891. See to this effect Schneider, G., cited above (footnote 10), p. 1382, who takes the view that the applicable law is that of the State in which the place of the business through which the employee was engaged is situated, irrespective of whether the employee also fulfils his contractual obligations at that place of business. According to Martiny, D., cited above (footnote 14), p. 1439, paragraph 4859, the employee does not need to work at that place of business.

latter may none the less have a bearing on the interpretation of Article 6(2)(a), since that provision takes as its point of reference the factual criterion of where the work is habitually carried out.

66. Further indications of how the term 'place of business [of the employer]' in Article 6(2)(b) is to be interpreted can be found in a teleological and schematic interpretation of the provisions contained in Article 6(2) of the Convention.

67. As has already been mentioned, the purpose of the special provisions applicable to the employment contracts and employment relationships of individual persons is to protect the employee. Given that the place where the employee habitually carries out his work in performance of the contract is ultimately more closely connected with the employment contract and a connection with the law of that Member State is therefore best able to take into account the employee's protection, Article 6(2)(a) of the Convention must in principle be interpreted broadly, as the Court rightly held in *Koelzsch*. The need to give precedence to the applicability of that provision in the interests of employment protection therefore supports the view that Article 6(2)(b) must be given a correspondingly narrow interpretation.

68. If Article 6(2)(a) of the Convention were not potentially applicable in the specific circumstances on which judgment is to be given, the requirements of legal certainty in particular would militate in favour of a more formal interpretation of the provision contained in subparagraph (b), more specifically to the effect that it refers to the place of business through which the employee was engaged according to the employment contract. In this respect, I expressly concur with the view to this effect put forward by the Netherlands Government [33] and the Commission. [34] After all, using the place of engagement as the connecting factor has the advantage of making the applicable law foreseeable, unlike using a purely factual criterion such as the place where the work is habitually carried out. While the latter place is liable to change frequently over the course of a person's employment, the place of engagement usually remains unchanged, notwithstanding any relocations by the undertaking itself or any long-term overseas postings of the employee. [35] In the final analysis, the place of engagement provides the clearest indication of where the employee was first incorporated into the structure of the undertaking. In the case, as here, of employment relationships which require the employee to be highly mobile, this appears to be the criterion which

33 — See paragraph 14 of the Netherlands Government's observations.

34 — See paragraph 20 of the Commission's observations.

35 — See Plender, R., cited above (footnote 10), p. 144, paragraph 8.21. See also to similar effect Martiny, D., cited above (footnote 14), p. 1440, paragraph 4861, who points out that a subsequent relocation of the business through which the employee was engaged does not change the law applicable to the employment contract.

best serves the continuity of the legal relationships between the contracting parties. [36]

69. Against that background, it is not clear why the signatory States to the Rome Convention would have wished to forego the foreseeability of that criterion in order to rely instead on a less reliable criterion such as the place of actual employment. After all, an understanding of the provision at issue such as that advocated by Mr Voogsgeerd in his written observations [37] fails to take into account the fact that Article 6(2)(a) already sets out a factual criterion which, because interpreted broadly, will be relevant in most cases. From a schematic point of view, therefore, it would be illogical for subparagraph (b) to contain essentially the same provision, as it would then be purely superfluous. The existence of an independent, separate provision is more likely to indicate that that provision has an independent prescriptive content which must be clearly differentiated from that of the provision in subparagraph (a). As far as the prescriptive content itself is concerned, it cannot be assumed that the contracting parties to the Convention were unaware of the aforementioned advantages of a formal connecting criterion. Rather, it must be assumed that they wished to incorporate that criterion into the regulatory structure of the Convention. A schematic interpretation of Article 6(2)(b) of the Convention is therefore more likely to support the conclusion that it refers to the place where the contract was concluded.

70. This does not necessarily mean, however, that the term 'place of business' within the meaning of that provision refers only to the undertaking's head office. Such an interpretation would fail to take into account, on the one hand, the fact that business relationships between undertakings are nowadays characterised by extensive international interpenetration and, on the other hand, that a not inconsiderable number of companies operate branches and agencies in more than one Member State in order to benefit from the advantages of the internal market. Such branches and agencies are able to engage staff on their own behalf or on behalf of the company itself. It must also be possible, therefore, for such branches and agencies to be included in the meaning of the term 'place of business', provided that certain conditions are fulfilled. Indeed, such an interpretation is confirmed by the English-language version of Article 6(2)(b) ('the place of business *through which* he was engaged') of the Convention, the wording of which opens up the possibility that engagement may refer to a situation where the place of business acts merely as an intermediary between the company and the employee. [38] In order not to rob the provision in Article 6(2)(b) of the Convention of its

36 — See Martiny, D., cited above (footnote 14), p. 1438, paragraph 4857.

37 — See paragraph 5 of Mr Voogsgeerd's observations.

38 — The other language versions do not in any way preclude this interpretation of Article 6(2)(b) of the Convention, as they leave both options open, that is to say whether the employee was engaged by the place of business acting on its own behalf or on behalf of the principal undertaking. See the German ('Niederlassung …, die den Arbeitnehmer eingestellt hat'), French ('établissement qui a embauché le travailleur'), Spanish ('establecimiento que haya contratado al trabajador'), Dutch ('vestiging … die de werknemer in dienst heeft genomen'), Italian ('sede che ha proceduto ad assumere il lavoratore') and Portuguese ('estabelecimento que contratou o trabalhador') versions.

function as an easily applicable criterion and at the same time to reduce the risk of abuse, there should in any event be a requirement that the branch or agency in question has been actively involved in the conclusion of the employment contract on the instructions of the employer, for example, by taking part in contractual negotiations with the employee. [39]

71. Of course, use of the place of engagement as the point of reference cannot completely eliminate the risk of abuse, particularly since it is perfectly conceivable that an employer may be inclined to choose as the place for the conclusion of the employment contract a State whose employment law provisions ensure only a low level of protection for the employee. [40] In some circumstances, therefore, reliance on the place of engagement as the connecting factor might appear to be capricious or even arbitrary, as it may sometimes be a matter of chance, ultimately, where the employee is recruited. To avoid that risk, in extreme cases, there should be a requirement, applicable as an additional condition for classification as the 'place of business' within the meaning of Article 6(2)(b) of the Convention, that the employee is also actually employed at the place in question and that that place is not merely the place where the contract was concluded. [41]

72. As far as the situation in the main proceedings is concerned, it should be noted that the scant information contained in the order for reference and in Mr Voogsgeerd's written observations does not make it possible to draw any conclusions as to the precise circumstances under which the contract was concluded or as to whether Naviglobe was involved in the recruitment process. If, according to the contract, Mr Voogsgeerd was engaged on behalf of Navimer, this does not necessarily rule out the possibility that Naviglobe may have been involved in the recruitment process, for example by publishing the

39 — See Plender, R., cited above (footnote 10), p. 145, paragraph 8.22, who takes the view that the place of business through which the employee was engaged must be understood as referring not only to the head office a 'letterbox' company but also to the place of business which was actively involved in engaging the employee, for example, by entering into contractual negotiations with the employee.

40 — See Juncker, A., cited above (footnote 13), p. 731, who refers to a widespread practice in the recruitment of sailors. According to his information, sailors are often recruited by so-called 'hire agencies' or 'crewing companies' based in States with low minimum standards of employment law and low rates of pay. In those circumstances, the 'place of business through which the employee was engaged' is not the shipping company, but, for example, an employment agency in the island state of Antigua.

41 — See to this effect Van Eeckhoutte, W., cited above (footnote 12), p. 171, who points out that there must be an actual business at the place of the undertaking and that the employee must actually have been employed by a branch of that undertaking. It is not sufficient for the employment contract simply to have been concluded at the place of business. According to Schlachter, M., cited above (footnote 20), p. 60, the place of engagement must in principle be understood as being the place where the contract was concluded. In his view, the fear that, because a company has set up a branch with the sole purpose of recruiting employees, a legal system will be declared applicable which affords the lowest possible level of protection, can be allayed by attaching detailed conditions to the use of the term 'place of business'. The author therefore considers that that term must be understood as referring only to establishments which, by at least controlling and organising the working activities of the persons recruited, served the commercial purpose of the undertaking, but not to mere recruitment agencies.

vacancy notice, conducting the job interview, drawing up the details of the employment contract or making its premises available for the conclusion of the employment contract. The referring court will therefore have to shed light on the background to Mr Voogsgeerd's engagement and Naviglobe's precise role in that process.

73. Should it emerge that there is a clear difference between the place of engagement and the place of actual employment, a closer connection between the employment contract or the employment relationship and the place of the applicable law could be established, in the interests of affording greater protection to the employee, by recourse to the exception provided for in the last subparagraph of Article 6(2). That provision stipulates – in derogation from the other provisions mentioned above – that the applicable law is that of the country with which the employment contract or the employment relationship is 'more closely connected'. The purpose of that provision is to avert the risk that an employer will deliberately move his undertaking's registered office to a country whose employment law affords the employee a low level of protection, in order to ensure that the law of that country will be applied. It offsets some of the disadvantages of the rather rigid system of standard connecting factors set out in Article 6(2) of the Convention by making provision, in exceptional circumstances, for the national court to exercise its discretion with a view to achieving a flexible solution that is appropriate to the circumstances in question. [42] After all, it may be inappropriate to take account exclusively of the place where the contract was concluded when applying Article 6(2)(b) not only where there is a difference between the place of business through which the employee was engaged and the place where he carries on his activities but also where the employment relationship is long-standing and the actual circumstances have subsequently changed. [43]

74. The employment contract must have a close connection with that other country. The relevance of that law may emerge from the circumstances taken as a whole. [44] The following criteria may be indicative of a closer connection with a specific country: the language of the contract, the use of legal concepts from a specific legal system, the currency used, the duration of the employment contract, its entry in the staff register, the nationality of the contracting parties, the normal place of residence, the place where the employer supervises his staff and the place where the

42 — See Déprez, J., cited above (footnote 19), p. 119. Juncker, A., cited above (footnote 13), p. 720, describes the provision in the last subparagraph of Article 6(2) as an escape clause which lends flexibility to the rigid system of standard connecting factors. Corneloup, S., 'La loi applicable aux obligations contractuelles – Transformation de la Convention de Rome en règlement communautaire, Rome I', *La Semaine Juridique. Édition Générale*, No. 44/2008, p. 26 et seq., paragraph 11, points out the advantages and disadvantages of rigid connecting rules. On the one hand, giving the courts extensive discretion does not always lead to foreseeable solutions. On the other hand, an excessively rigid rule does not always lead to the application of the law which is more closely connected with the employment contract.

43 — See Martiny, D., cited above (footnote 14), p. 1369, paragraph 1891.

44 — Ibid., p.1371, paragraph 1893, and Schneider, G., cited above (footnote 10), p. 1383.

contract is concluded. [45] Any one of these criteria may reveal a closer connection with a country other than the country in which the worker is employed or in which the place of business through which he was engaged is situated. However, it must be borne in mind in this regard that the last subparagraph of Article 6(2) simply contains a derogation which is applicable only after the relevance of the provisions in Article 6(2)(a) and (b) has been examined. [46]

75. In summary, it must be concluded that the country in which the place of business through which the employee was engaged is situated, within the meaning of Article 6(2)(b) of the Convention, means the country in which is situated the employer's place of business through which the employee was engaged according to the employment contract. As the second question was clearly raised only in the event that the Court took a different view, in other words that that country means the country in which is situated the employer's place of business at which the employee is actually employed, there is no need to comment on that question.

45 — See Van Eeckhoutte, W., cited above (footnote 12), p. 171 et seq.

46 — See Juncker, A., loc. cit. (footnote 13), p. 720, who points out that direct recourse to that clause before examining the two basic connections in Article 6(2)(a) and (b) is methodically prohibited.

2. Third question

76. The third and fourth questions are essentially concerned with the legal requirements which a 'place of business' within the meaning of Article 6(2)(b) of the Convention must satisfy in order to be classified as such.

77. More specifically, by its third question, the referring court wishes to ascertain whether the employer's place of business at which the employer is actually employed within the meaning of the first question must satisfy certain formal requirements such as the possession of its own legal personality or whether the existence of a *de facto* place of business is sufficient for that purpose. Although that question was obviously raised only in the event that the Court's answer to the first question is different from that proposed here, I take the view that the referring court should none the less be given some useful guidance on interpretation in order to enable it to give judgment in the main proceedings, particularly since such guidance is still relevant. After all, it might be of use to the referring court in its assessment of whether Naviglobe can, if appropriate, be classified from a functional point of view as a place of business of the firm Navimer for the purposes of Article 6(2)(b) of the Convention.

78. It must be noted first of all in this regard that Article 6(2)(b) of the Convention, at least from the point of view of its wording,

does not impose a requirement that a place of business within the meaning of that provision must always possess legal personality. This in itself indicates the need for a less formal interpretation of the term 'place of business'. Taking into account also the aforementioned purpose of that provision and of the Rome Convention as a whole, [47] that is to say to secure greater legal certainty in relation to the question of which law is applicable, in the interests of the contracting parties, it would in all likelihood fail to achieve its purpose if the establishment of a connection with the law of a specific country depended ultimately on whether the place of business in question fulfils the conditions governing the acquisition of legal personality under the provisions of that legal system. In view of the differences between the legal systems and the minimum requirements conceivably connected with them, it would not always be easy for a national court faced with a foreign legal system also to determine whether those conditions have been fulfilled in relation to a particular branch or agency.

79. Given that, as I have already said, a place of business may in certain circumstances also operate as an 'intermediary' in the engagement of an employee, without needing to recruit on its own behalf, [48] the requirement that the place of business should have legal personality ultimately seems too strict for the purposes of meeting the need for legal certainty, on the one hand, while also taking into account the requirements of simple and flexible management, on the other. The requirement to understand the 'place of business' within the meaning of Article 6(2)(b) of the Convention as always referring to the company's registered office itself should therefore be regarded as too restrictive. In any event, the requirements of legal certainty and flexibility would probably be satisfied immediately if that term were understood as referring also to a *de facto* place of business, for example the office of a representative of the employer.

80. In any event, however, it must be required that the employer exercises actual control over the place of business, so that the actions taken by the place of business are attributable to the employer as actions taken by him himself. This is likely to be the case not only in circumstances where a place of business in the broadest sense of the term, that is to say a branch without legal personality or even a subsidiary with legal personality, takes instructions from the management of the dominant undertaking but also in a situation such as that in the main proceedings, where two undertakings have the same management. Mr Voogsgeerd's reference to the existence of one manager common to both undertakings [49] must therefore be regarded as relevant in this regard. After all, where the composition of the management structure is

47 — See point 1 of this Opinion.

48 — See point 70 of this Opinion.

49 — See point I of Mr Voogsgeerd's observations.

identical in this way, the differences between the two undertakings largely disappear, as both their decision-making and their actions are those of a single entity.

81. Although the acquisition of legal personality is not a mandatory condition for classification as a 'place of business' within the meaning of Article 6(2)(b) of the Convention, it is none the less necessary to lay down as a minimum requirement that – as Mr Voogsgeerd [50] and the Commission [51] rightly remark – the place of business of the company concerned has a degree of permanency in the place in question. This is intended to prevent the employer from taking advantage of a merely temporary presence in a particular country in order to secure the application of the law of that State, which may be characterised by a low level of employment protection. The fact that a representative of a foreign employer regularly presents himself at that place in order to recruit workers for employment abroad could not therefore be regarded as sufficient. [52] 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 is a 'place of business', within the meaning of Article 6(2)(b) of the Convention, in which the employee has been engaged. [53]

82. On the basis of my conclusions concerning the interpretation of the criterion of the place of engagement [54] and in accordance with the minimum requirement of permanency referred to above, the term 'place of business' within the meaning of Article 6(2)(b) of the Convention should be understood as referring first and foremost to the establishment which has overall responsibility for organising the employee's working activities. However, the term is probably open to more extensive interpretation as also covering other organisational entities which carry out an activity on behalf of the employer, such as one of the undertaking's business units or operational facilities, for example, but do not have to fulfil the requirements applicable to an establishment. [55] After all, the place of business must, in principle, be distinguished from the employer's registered office, that is to say the legal person constituting the undertaking. Put in simple terms, for the purposes of classification as a place of business, it is sufficient

50 — See point IV. 3. of Mr Voogsgeerd's observations.

51 — See paragraph 28 of the Commission's observations.

52 — See Martiny, D., cited above (footnote. 14), p. 1439, paragraph 4859. Schneider, G., cited above (footnote 10), p. 1382, also considers the permanence of the place of business to be decisive.

53 — See to this effect Lagarde, P., 'Le nouveau droit international privé des contrats après l'entrée en vigueur de la Convention de Rome du 19 juin 1980', *Revue critique de droit international privé*, 1991, p. 318 et seq., who defines the characteristics of a place of business within the meaning of Article 6(2)(b) of the Convention by reference to these two scenarios.

54 — See point 70 of this Opinion.

55 — According to Schneider, G., cited above (footnote 10), p. 1382, place of business refers to an organisational unit of the undertaking which is set up for a certain period of time in order to pursue commercial activities but which does not have to satisfy the requirements applicable to an establishment.

that the employer carries on business from there and employs workers to that end. [56]

83. Support for such an interpretation can be found in the Court's case-law concerning Article 5(5) of the Brussels Convention, which states that the concept of branch, agency or other establishment within the meaning of that provision implies 'a place of business which has the appearance of permanency, such as the extension of a parent body, has a management and is materially equipped to negotiate business with third parties so that the latter, although knowing that there will if necessary be a legal link with the parent body, the head office of which is abroad, do not have to deal directly with such parent body but may transact business at the place of business constituting the extension' [57]. As I explained at length in my Opinion in *Koelzsch*, [58] the connections between the Brussels Convention and the Rome Convention are numerous. Not least for that reason, the Court, in its case-law on the two conventions, has attempted to adopt a parallel interpretation of similarly worded provisions, in so far as the subject-matter of the relevant provisions made this possible. There is no reason to depart from that approach here. In the interests of securing an interpretation of the concepts of private international law which is as uniform as possible, it seems reasonable to transpose that definition of 'place of business' established by the Court in relation to Article 5(5) of the Brussels Convention to Article 6(2)(b) of the Rome Convention.

84. It follows from the foregoing submissions that a 'place of business' within the meaning of Article 6(2)(b) of the Convention may quite legitimately be legally dependent on the principal company. Consequently, if the referring court should conclude in its assessment of the facts of the main proceedings that Naviglobe is to be regarded as a branch or even a subsidiary of Navimer, any lack of legal personality on the part of Navimer does not preclude its classification as a 'place of business' within the meaning of Article 6(2)(b) of the Convention.

85. In the light of all the foregoing, I conclude that the possession of legal personality is not a requirement that must be fulfilled by a place of business of the employer, provided that that place of business has been set up in accordance with the relevant provisions of

56 — See Martiny, D., cited above (footnote 14), p. 1369, paragraph 1891.

57 — Cited in footnote 8, paragraph 12.

58 — See my Opinion in *Koelzsch* (cited in footnote 4 above), point 44 et seq. See also Lein, E., cited above (footnote 10), p. 178, who rightly remarks that Rome I, Rome II and Brussels I are characterised by the fact that they are intended to create a uniform scheme of private international law and pursue a number of common objectives in this regard: improving the foreseeability of the law, strengthening legal certainty within the European legal area and promoting transparency. The regulations form a uniform and autonomous set of rules and there are therefore synergies between them.

the State in which it is established and has a degree of permanency. [59]

criterion for the purposes of classification as a 'place of business', the question should therefore be answered in the affirmative.

3. Fourth question

86. By its last question, the referring court wishes to ascertain whether the place of business of another company with which the corporate employer is connected can serve as the 'place of business' within the meaning of Article 6(2)(b) of the Convention, even though the employer's authority to issue instructions has not been transferred to that other company.

87. It should be made clear at the outset – as I have already explained in my observations on the first question [60] – that that provision takes as its point of reference the formal act of 'engagement' of the employee, not the factual criterion of where the work is carried out. The interpretation of that provision cannot therefore depend on who has authority to issue instructions in the case in question. As the possession of such authority is not a relevant

88. An alternative examination of the legal characteristics of an employment relationship does not lead to a different conclusion. According to the Court's case-law on the term 'worker' in Article 45 TFEU, which must be interpreted independently for the purposes of European Union law, 'the essential feature of an employment relationship is that for a certain period of time a person performs services for and under the direction of another person in return for which he receives remuneration'. [61] It follows from this that the fact that the employee acts under direction is a characteristic feature of any employment relationship which, in essence, requires that the person concerned should work under the direction or supervision of another person who determines the services to be performed by him and/or his working hours and with whose instructions or rules the employee must comply. [62] That characteristic serves

59 — See to this effect Martiny, D., cited above (footnote 14), p. 1369, paragraph 1891, and Schneider, G., cited above (footnote 10), p. 1382.

60 — See point 75 of this Opinion.

61 — See Case 66/85 *Lawrie-Blum* [1986] ECR 2121, paragraphs 16 and 17, Case C-3/90 *Bernini* [1992] ECR I-1071, paragraph 14, Case C-85/96 *Martínez Sala* [1998] ECR I-2691, Case C-337/97 *Meeusen* [1999] ECR I-3289, paragraph 13, Case C-138/02 *Collins* [2004] ECR I-2703, paragraph 26, Case C-456/02 *Trojani* [2004] ECR I-7573, paragraph 15, Case C-109/04 *Kranemann* [2005] ECR I-2421, paragraph 12, and Case C-10/05 *Mattern* [2006] ECR I-3145, paragraph 18.

62 — See *Lawrie-Blum* (cited in footnote 61 above, paragraph 18).

primarily to differentiate employees' activities from the activities of self-employed persons, which are covered either by the freedom of establishment under Article 49 et seq. TFEU or by the freedom to provide services under Article 56 et seq. TFEU.

89. Although it can realistically be assumed that it will usually be the employer who exercises exclusive authority to issue instructions within the employment relationship, that definition does not in principle rule out the possibility that the employer may in certain circumstances delegate his authority, in whole or in part, to a third party. The scope of such a delegation of authority is subject to independent private agreement. In so far as it is contractually stipulated that the employee must provide services for a company with which the company employing him is connected, it is to be expected that the employer will also delegate to that company the authority to direct how the work is to be carried out.

90. The fact that the third party is entitled, with the employer's consent, to control the employee's activities by issuing instructions and carrying out supervisory duties does nothing, from a legal point of view, to alter the fact that the employee ultimately performs his contractual obligations for the employer. In so far as Mr Voogsgeerd usually took instructions directly from Naviglobe, he clearly did so in performance of his contractual obligations towards Navimer. Legally, however, the employer might just as conceivably retain or take back his authority to issue instructions to the employee where he considers this necessary. Again, in the final analysis, this does nothing to alter the fact that any delegation of such authority to a place of business is just one of the many options which the employer has at his disposal for the purpose of achieving his aims. However, such delegation cannot in itself have any bearing on the assessment of whether the third party must be classified as a 'place of business' of the employer within the meaning of Article 6(2)(b) of the Convention.

91. Consequently, the answer to the fourth question must be that the place of business of another company with which the company employing the worker is connected can also serve as the place of business within the meaning of Article 6(2)(b) of the Convention, even if the employer's authority to issue instructions has not been delegated to that other company.

VII — Conclusion

92. In the light of the foregoing considerations, I propose that the Court should answer the questions referred by the Hof van Cassatie as follows:

1. If, after examining all the circumstances of the situation in the main proceedings, the national court finds that the employee habitually carries out his work in a specific country, in performance of his contract, it must apply Article 6(2)(a) of the Convention on the law applicable to contractual obligations, opened for signature in Rome on 19 June 1980, even if the employee has been temporarily posted to another country. Recourse to Article 6(2)(b) is precluded in such circumstances.

2. Should the national court take the view that the conditions laid down in Article 6(2)(a) have not been fulfilled, Article 6(2)(b) is to be interpreted as follows:

   (a) The country in which the place of business through which the employer was engaged is situated means the country in which is situated the employer's place of business which concluded the employment contract with the employee, the place of actual employment being in principle irrelevant in this regard.

   (b) The possession of legal personality is not a requirement that must be fulfilled by a place of business of the employer within the meaning of that provision, provided that that place of business has been set up in accordance with the relevant provisions of the State in which it is established and has a degree of permanency.

   (c) The place of business of another company with which the company employing the worker is connected can serve as the place of business within the meaning of Article 6(2)(b) of the Convention, even if the employer's directive authority has not been delegated to that other company.