



## Reports of Cases

OPINION OF ADVOCATE GENERAL  
SZPUNAR  
delivered on 20 April 2016<sup>1</sup>

**Case C-135/15**

**Hellenic Republic**

**v**

**Grigorios Nikiforidis(Request for a preliminary ruling**

**from the Bundesarbeitsgericht (Germany))**

(Reference for a preliminary ruling — Judicial cooperation in civil matters — Law applicable to an employment contract — Regulation (EC) No 593/2008 (Rome I) — Article 28 — Scope *ratione temporis* — Article 9(3) — Foreign overriding mandatory provisions — Provision of a Member State reducing public sector workers' pay on account of the financial crisis)

### Introduction

1. The issue of foreign overriding mandatory provisions is one which, for many years, has inspired legal literature on private international law across most of the world. It is even difficult to take in the number of monographs and other academic studies devoted to this issue. At the same time, the number of court cases — including arbitration proceedings — in which direct reference is made to this issue is relatively small.

2. On 19 June 1980 the Member States of what was then the European Economic Community signed the Rome Convention on the law applicable to contractual obligations.<sup>2</sup> Article 7(1) thereof — which concerns foreign overriding mandatory rules — was not only an innovative provision, but also a very controversial one.

3. That convention entered into force on 1 April 1991. The First Protocol thereto, under which the Court of Justice acquired jurisdiction to interpret the provisions of the convention, entered into force on 1 August 2004.

4. The present case provides an opportunity for the Court to dispel some of the uncertainty surrounding foreign overriding mandatory provisions in the context of the provision which replaced Article 7(1) of the Rome Convention, that is to say, Article 9(3) of the Rome I Regulation. This issue, which remains a constant source of heated debate in legal literature on private international law, has come before the Court of Justice for the first time 36 years after the signing of the Rome Convention. Thus, the saying 'better late than never' comes to mind!

<sup>1</sup> — Original language: Polish.

<sup>2</sup> — OJ 1980 L 266, p. 1; 'the Rome Convention'.

## Legal framework

### *Rome Convention*

5. Article 7 of the Rome Convention, entitled ‘Mandatory rules’, provides:

‘1. When applying under this Convention the law of a country, effect may be given to the mandatory rules of the law of another country with which the situation has a close connection, if and in so far as, under the law of the latter country, those rules must be applied whatever the law applicable to the contract. In considering whether to give effect to these mandatory rules, regard shall be had to their nature and purpose and to the consequences of their application or non-application.

2. Nothing in this Convention shall restrict the application of the rules of the law of the forum in a situation where they are mandatory irrespective of the law otherwise applicable to the contract.’

6. Under Article 22(1)(a) of the Rome Convention, any Contracting State may, at the time of signature, ratification, acceptance or approval, reserve the right not to apply the provisions of Article 7(1).

7. The Rome Convention was replaced 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).<sup>3</sup>

### *EU law*

8. Article 9 of the Rome I Regulation, entitled ‘Overriding mandatory provisions’, states:

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

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

3. Effect may be given to the overriding mandatory provisions of the law of the country where the obligations arising out of the contract have to be or have been performed, in so far as those overriding mandatory provisions render the performance of the contract unlawful. In considering whether to give effect to those provisions, regard shall be had to their nature and purpose and to the consequences of their application or non-application.’

9. Article 28 of the Rome I Regulation, entitled ‘Application in time’, provides:

‘This Regulation shall apply to contracts concluded as from 17 December 2009.’

<sup>3</sup> — OJ 2008 L 177, p. 6, and corrigendum at OJ 2009 L 309, p. 87; ‘the Rome I Regulation’.

### *German law*

10. Article 34 of the Einführungsgesetz zum Bürgerlichen Gesetzbuch (EGBGB) (Introductory Law to the German Civil Code), which was repealed with effect from 17 December 2009, provided:

‘Nothing in this subsection shall restrict the application of rules of German law in a situation where they are mandatory irrespective of the law otherwise applicable to the contract.’

11. According to the case-law and legal literature on German law, that provision did not preclude applying mandatory overriding provisions of a third State and at least having regard to such provisions as matters of fact in connection with the application of provisions of applicable law which required further precision (‘ausfüllungsbedürftige Rechtsnormen’).

12. Paragraph 241(2) of the Bürgerliches Gesetzbuch (BGB) (German Civil Code) provides:

‘A relationship of obligation may, depending on its content, require each party to have regard to the other party’s rights, legally protected interests and other interests.’

### **Main proceedings**

13. The applicant in the main proceedings, Grigorios Nikiforidis, is a teacher employed at a primary school in Nuremberg, Germany, which is run by the Hellenic Republic.

14. As a result of the debt crisis the Greek Parliament adopted, at the beginning of 2010, Laws No 3833/2010 and No 3845/2010<sup>4</sup> to reduce public expenditure. Those laws reduced the pay of public sector workers, including teachers employed in State schools.

15. On the basis of those laws, the Hellenic Republic reduced the pay of Mr Nikiforidis.

16. Mr Nikiforidis brought before the German courts an action against his employer, the Hellenic Republic, represented by the Ministry of Education and Religious Affairs, in connection with settling his employment income for the period from October 2010 to December 2012.

17. By judgment of 30 March 2012 the Arbeitsgericht Nürnberg (Labour Court, Nuremberg) dismissed the action, pointing to the immunity of the Greek State. By judgment of 25 September 2013 the Landesarbeitsgericht Nürnberg (Higher Labour Court, Nuremberg) set aside the above judgment and found in favour of Mr Nikiforidis. The Hellenic Republic lodged an appeal on a point of law with the Bundesarbeitsgericht (German Federal Labour Court) against the decision of the Landesarbeitsgericht (Higher Labour Court).

18. In the appeal proceedings on a point of law, the Bundesarbeitsgericht (Federal Labour Court) found that the employment relationship between the parties was of a private law nature and did not come under the immunity of the Greek State. It also confirmed the jurisdiction of the German courts under Articles 18(1) and 19(2)(a) 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.<sup>5</sup>

4 — Law No 3833/2010 laying down urgent measures to address the crisis in public finances (*Official Gazette of the Hellenic Republic*, Part I, No 40 of 15 March 2010) and Law No 3845/2010 on measures for applying the support mechanism for the Greek economy of the euro area Member States and the International Monetary Fund (*Official Gazette of the Hellenic Republic*, Part I, No 65 of 6 May 2010).

5 — OJ 2001 L 12, p. 1; ‘the Brussels I Regulation’.

19. The Bundesarbeitsgericht (Federal Labour Court) further found that the employment relationship was governed by German law, under which a reduction in pay requires a rider to the employment contract (*Änderungsvertrag*) or termination with reengagement on amended terms (*Änderungskündigung*). For that reason, the question whether the referring court could apply Greek Laws No 3833/2010 and No 3845/2010 to the employment relationship between the parties or otherwise give effect to those provisions was also relevant to the resolution of the dispute.

### Questions referred for a preliminary ruling and the procedure before the Court

20. In those circumstances, the Bundesarbeitsgericht (Federal Labour Court) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

- (1) Is the Rome I Regulation applicable under Article 28 of that regulation to employment relationships exclusively in the case where the legal relationship was formed by a contract of employment entered into after 16 December 2009, or does every subsequent agreement by the contracting parties to continue their employment relationship, whether with or without variation, render that regulation applicable?
- (2) Does Article 9(3) of the Rome I Regulation exclude solely the direct application of overriding mandatory provisions of another country in which the obligations arising out of that contract are not to be performed, or have not been performed, or does that provision also exclude indirect regard to those mandatory provisions in the law of the Member State the law of which governs the contract?
- (3) Is the principle of sincere cooperation enshrined in Article 4(3) TEU relevant, for legal purposes, for the decision of national courts on whether overriding mandatory provisions of another Member State are directly or indirectly applicable?

21. The request for a preliminary ruling was received at the Court on 20 March 2015.

22. The German, Greek and United Kingdom Governments and the Commission submitted written observations. Those parties and Mr Nikiforidis took part in the hearing, which was held on 1 February 2016.

### Analysis

23. In the present reference for a preliminary ruling the Bundesarbeitsgericht (Federal Labour Court) raises several questions relating to the issue of foreign overriding mandatory provisions. This issue is known in private international law and also forms the subject matter of a great deal of controversy, primarily in legal literature.

24. The difficulties in examining the matters raised by those provisions arise largely from the fact that different rules governing them have been laid down in the Rome Convention, the private international law of the Member States and the Rome I Regulation.

25. Unlike Article 7(1) of the Rome Convention, Article 9(3) of the Rome I Regulation places strict conditions on giving effect to foreign provisions. Such effect is reserved for provisions of the country where the obligations arising out of the contract have to be or have been performed. Moreover, giving effect to those provisions is permitted only in so far as they render the performance of the contract unlawful. In the view of the referring court, that first condition is not fulfilled in this case. However, it has not ruled on whether or not the second condition is fulfilled in this case.

26. The referring court notes that the possibility of having regard to the provisions on reductions in pay contained in Greek Laws No 3833/2010 and No 3845/2010 when determining the obligations of the parties to an employment contract governed by German law is of decisive importance for the resolution of the dispute. It further stresses that those provisions — which are mandatory and respect for which is crucial to safeguarding Greece's economic interests — certainly constitute overriding mandatory provisions within the meaning of private international law.

27. However, that court asks whether the Rome I Regulation applies *ratione temporis* when determining the law applicable to a legal relationship established on the basis of an employment contract concluded before 17 December 2009<sup>6</sup> (first question referred).

28. The referring court then asks whether, if it is found that the Rome I Regulation does apply *ratione temporis* in this case, Article 9(3) thereof rules out the previous practice of the German courts consisting not in direct application of, but merely in indirect regard to, foreign provisions in the context of applying the law applicable to the contract (second question referred).

29. The referring court further raises the question whether the principle of sincere cooperation enshrined in Article 4(3) TEU is relevant in taking a decision on having regard to overriding mandatory provisions of another Member State (third question referred).

30. I will consider each of these questions in turn below.

*Scope ratione temporis of the Rome I Regulation (first question referred)*

31. In raising the issue of the scope *ratione temporis* of the Rome I Regulation, the referring court is seeking to ascertain whether, in the present dispute concerning an employment contract concluded before 17 December 2009, it is necessary to apply the provisions of that regulation or the previous provisions which were applicable before it entered into force.

32. I wish to stress that the legislature expressly laid down the scope *ratione temporis* of the Rome I Regulation in respect of existing legal relationships, providing, in Article 28, that that regulation is to apply to 'contracts concluded as from 17 December 2009'.<sup>7</sup>

33. The adoption by the legislature of a clear transitional arrangement rules out the possibility of relying on general principles, and in particular the principle relating to the immediate applicability of a new rule to the future effects of a situation which arose under the old rule.<sup>8</sup>

34. By way of derogation from that general principle, the arrangement set out in Article 28 'freezes' the legal regime governing the contract concerned on the day on which it was concluded.<sup>9</sup>

35. In order to interpret Article 28, it is necessary first to consider whether, by linking the scope of the Rome I Regulation to the conclusion of a contract, that provision introduces 'conclusion of a contract' as an autonomous concept of EU law or refers to the applicable provisions of national law.

36. I consider that a systemic and teleological interpretation of Article 28 clearly indicates that the term 'conclusion of a contract' should not be construed as an autonomous concept.

6 — Article 28 of that regulation provides that the latter is to apply to contracts concluded as from 17 December 2009.

7 — A similar rule was adopted in Article 17 of the Rome Convention.

8 — See judgments in *Licata v ESC* (270/84, EU:C:1986:304, paragraph 31); *Pokrzęptowicz-Meyer* (C-162/00, EU:C:2002:57, paragraph 50); and *Bruno and Others* (C-395/08 and C-396/08, EU:C:2010:329, paragraph 53).

9 — Under the principle of immediate applicability, the new provisions would apply to the future legal effects arising from that contract. See judgment in *Pokrzęptowicz-Meyer* (C-162/00, EU:C:2002:57, paragraph 52).

37. It is true that the terms used in acts of EU law are — in principle — to be interpreted autonomously. This also applies to the terms used in EU provisions of private international law.<sup>10</sup>

38. However, that principle does not, in my view, apply to the interpretation of the term ‘conclusion of a contract’ for the purposes of Article 28 of the Rome I Regulation.

39. As the United Kingdom Government and the Commission correctly point out, under Article 10 of the Rome I Regulation the applicable law as regards the determination of the existence and validity of a contract is the law which would govern the contract concerned under the regulation assuming that the contract is valid.

40. I consider that, when determining the time at which a contract was concluded for the purposes of applying Article 28 of the regulation, it is necessary to apply the provisions of the law which would govern that contract under the regulation.<sup>11</sup>

41. There are above all practical reasons for taking this view. The conclusion of a contract is inextricably linked to the legal system governing the particular contract. EU law contains no provisions governing the issue of the conclusion of contracts.<sup>12</sup> Therefore, it would be difficult to create an autonomous concept of the conclusion of a contract.

42. Even if such a concept were created, its application would still encounter fundamental practical problems. It would not be known how to act if a contract were regarded as concluded under the autonomous concept and were of no effect under the law applicable to the contract. Similar uncertainties would arise if the situation were reversed.

43. It is possible to imagine an approach whereby an autonomous interpretation of the term ‘time at which the contract was concluded’ should be relied upon only where it is established that the contract has been effectively concluded under the law governing the contract. In my view, however, such an approach would also be excessively complicated and impractical. It is not possible to determine the time at which a contract is concluded in isolation from the applicable law which determines what kind of action by the persons concerned results in effective conclusion of the contract.

44. There are also teleological grounds for the approach which I am proposing. By harmonising conflict-of-law rules, the EU legislature sought *inter alia* to increase legal certainty in relation to determination of the law applicable.<sup>13</sup> If the term ‘conclusion of a contract’ under Article 28 were interpreted autonomously, in isolation from the applicable law governing the other aspects associated with the conclusion and validity of the contract, that approach would certainly reduce the predictability of the law.

45. I therefore have no doubt that the time at which a contract is concluded for the purposes of Article 28 of the Rome I Regulation must be determined in accordance with the *lex causae*.

10 — See Ancel, M.E., ‘Le Règlement Rome I à l’épreuve du temps’, *La justice civile européenne en marche*, Douchy-Oudot, M., Guinchard, E. (ed.), Dalloz 2012, p. 60.

11 — See Calliess, G.P., Hofmann, H., ‘Article 28, Application in Time’, *Rome Regulations*, Calliess, G.P. (ed.), 2nd ed., Wolters Kluwer 2015, p. 438.

12 — In this context, note should be made of the results of studies, carried out in academic circles, on European private law. The issue of conclusion of a contract is addressed, for example, by Articles 4:101 to 4:110 of the draft ‘Principles of the Existing EC Contract Law (Acquis Principles)’, see Research Group on the Existing EC Private Law (Acquis Group), *Principles of the Existing EC Contract Law (Acquis Principles), Contract II — General Provisions, Delivery of Goods, Package Travel and Payment Services*, Sellier, Munich 2009, pp. 181 to 221. The term ‘contract’ was defined in Book Two, in Article II-1:101 of the ‘Draft Common Frame of Reference’, see Von Bar, C., Clive, E., Schulte Nölke, H. (ed.), *Principles, Definitions and Model Rules of European Private Law. Draft Common Frame of Reference (DCFR) — Outline Edition* (prepared by the Study Group on a European Civil Code and the Research Group on Existing EC Private Law (Acquis Group)), Sellier, Munich 2009, p. 181.

13 — See recital 6 of the Rome I Regulation.

46. In the present case, the uncertainty as to whether the employment contract between the parties to the dispute was concluded on or after 17 December 2009, and thus whether the contractual relationship falls within the scope of the Rome I Regulation, must be dispelled on the basis of the law applicable to the contract concerned. As is clear from the referring court's findings, in this case that is German law.

47. That law determines inter alia whether there has been, in the period since 17 December 2009, such amendment of the employment contract concluded between the parties that it can be regarded as constituting the conclusion of a new contract. That contract would then be governed by the conflict-of-law rules contained in the Rome I Regulation.<sup>14</sup>

48. This would appear unlikely having regard to the facts set out in the order for reference. The employment relationship between the parties was entered into on 16 September 1996 and no amendments were made to the employment contract from 17 December 2009 until the disputed unilateral reduction in pay.

49. However, I wish to point out that the approach which I am proposing may give rise to doubts in relation to long-term contractual legal relationships. This concerns, for instance, contracts such as a lease or an employment contract — which is the subject matter of the main proceedings. Legal relationships of this kind can continue even for several decades. Was the intention of the EU legislature really for legal relationships of such a kind to be governed by the conflict-of-law rules previously in force, even many years after the Rome I Regulation entered into force?

50. A conflict-of-law approach which excludes existing contracts from the scope of new provisions and makes them subject to the continued effect of old law is encountered relatively often in private law and is also analysed in legal literature, in particular from the point of view of the effects on long-term obligations. In Polish legal literature on intertemporal private law, developed in connection with the 1964 Polish Law introducing the Civil Code (*ustawa z 1964 r. — Przepisy wprowadzające kodeks cywilny*),<sup>15</sup> the opinion is expressed that such an approach cannot be applied in a mechanical manner and in particular should not cover long-term obligations.<sup>16</sup> According to the predominant view in contemporary Polish legal literature, in the case of long-term relationships of obligation, that is to say, where performance is continuous or periodic in nature, preference should be given to application of the new law. That approach makes it possible to avoid making a significant number of legal relationships subject to different systems of rules for an excessive period.<sup>17</sup>

51. It would appear that, in view of the clear wording of Article 28 of the Rome I Regulation, it is not possible to defend the argument that it is necessary to apply that regulation to long-term contractual relations if they were established prior to 17 December 2009. A finding that legal relations of this kind are governed by the Rome I Regulation would be possible only if amendments to the contract made after that date could be regarded — under the law applicable — as the conclusion of a new contract. It is for the referring court to rule whether or not such circumstances obtain in the present case.

52. In view of the above considerations, I consider that the time at which a contract is concluded for the purposes of Article 28 of the Rome I Regulation must be determined in accordance with the law which would be applicable to the contract concerned if that regulation applied.

14 — For example, the United Kingdom Government points out that English law lays down a statutory presumption of continuity of an employment contract, but case-law allows the novation of such a contract to be declared where an employer unilaterally imposes radically different terms.

15 — Dz. U. 1964, No 16, item 94.

16 — See Gwiazdomorski, J., 'Międzyczasowe prawo prywatne', *Nowe Prawo* 1962, Nos 6 and 7, p. 761.

17 — See Pietrzykowski, T., 'Obowiązki i stosowanie prawa cywilnego w czasie', *System prawa prywatnego*, vol. 1, *Prawo cywilne — część ogólna*, Safjan, M. (ed.), Warsaw, CH Beck, Instytut Nauk Prawnych PAN 2012, p. 769.

*Jurisdiction of the Court to interpret Articles 7(1) and 22(1)(a) of the Rome Convention*

53. If the referring court were to find that the contract in question does not fall within the scope of the Rome I Regulation, it would be governed by the system of conflict-of-law rules laid down in the Rome Convention.<sup>18</sup>

54. Therefore, it must be considered whether, in order to give a useful answer to the referring court, the Court should interpret Article 7(1) of the Rome Convention, which governed the question of the application of foreign overriding mandatory provisions before that convention was replaced by the Rome I Regulation.

55. Although the Rome Convention is not an act of EU law, under Articles 1 and 2(a) of the First Protocol to that convention the Court has jurisdiction to interpret it, inter alia on the basis of a request from one of Germany's highest federal courts.

56. Since, in the light of the abovementioned protocol, the Court has jurisdiction to interpret the Rome Convention at the request of the Bundesarbeitsgericht (Federal Labour Court), I consider that it also has jurisdiction to interpret that convention on the basis of the present request for a preliminary ruling concerning the Rome I Regulation. In its case-law the Court expressly reserves the right to expand the scope of a question referred for a preliminary ruling in order to give a useful answer to the referring court, provided that the substance of the question is preserved.<sup>19</sup> In the present case, to have regard to the interpretation of Article 7(1) of the Rome Convention would not alter the substance of the second question concerning Article 9(3) of the Rome I Regulation since those provisions govern the same matter.

57. However, it should be noted first of all that the referring court — which is aware of the uncertainty as to the scope *ratione temporis* of the Rome I Regulation — does not refer a question on the interpretation of the Rome Convention. If the Rome I Regulation is not applicable, the issue of applying foreign overriding mandatory provisions to the present dispute must be resolved, as moreover the referring court itself points out, on the basis of national private international law.

58. The Republic of Germany has reserved the right, under Article 22(1)(a) of the Rome Convention, not to apply Article 7(1). As the German Government rightly notes in its written observations, on account of this reservation Article 7(1) of the Rome Convention cannot apply in the main proceedings before the German court.

59. It is true, as the Commission pointed out at the hearing, that the question could be asked whether the mere fact that Germany made a reservation under Article 22(1)(a) of the Rome Convention ruled out the possibility of further application of the practice of the German courts which allowed — on the basis of national private international law — indirect regard to be had to foreign overriding mandatory provisions.

60. However, in order to answer that question interpretation of Article 22(1)(a) of the Rome Convention would be required. It would thus be necessary to ascertain the scope of the reservation, declared pursuant to that provision, in relation to the non-application of Article 7(1). In my view, the Court should not consider this matter since extending the questions in respect of the interpretation of

18 — Under Article 17 of the Rome Convention, the latter is to apply to contracts made after the date on which it has entered into force with respect to the State concerned, and thus in the case of Germany after 1 April 1991. The order for reference shows that the legal relationship underlying the dispute was established in 1996.

19 — The Court's case-law concerning its jurisdiction to give preliminary rulings pursuant to both Article 267 TFEU and protocols to conventions between the Member States places certain limits on altering a request for a preliminary ruling. Altering of the question by the Court of its own motion cannot lead to an amendment of the substance of the question as that would undermine the right of interested parties to submit observations. See judgments in *Phytheron International* (C-352/95, EU:C:1997:170, paragraph 14) and *Leathertex* (C-420/97, EU:C:1999:483, paragraph 22).

Article 22(1)(a) of the Rome Convention would alter the substance of the request for a preliminary ruling. Nonetheless, I wish to point out — jumping a little ahead of my considerations below — that the answer which I am proposing to the second question may also help to clear up the uncertainty highlighted by the Commission.

61. For the above reasons I consider that in the present case the Court should not interpret Article 22(1)(a) of the Rome Convention in relation to ruling out the application of Article 7(1) thereof.

### *Interpretation of 9(3) of the Rome I Regulation (second question referred)*

#### Preliminary remarks

62. The second question referred to the Court in the present case concerns the interpretation of Article 9(3) of the Rome I Regulation. That provision governs the issue of the application of overriding mandatory provisions in the law of a third State. Therefore, this relates to provisions which are not provisions of either the law applicable to the contract (*lex causae*) or the law of the court seised (*lex fori*).

63. It can be concluded from the order for reference that the answer to this question will be of relevance to the referring court only if — on the basis of the criteria set out in the answer to the first question — that court finds that the Rome I Regulation applies *ratione temporis* in the main proceedings.

64. However, it would appear that the issue raised in this question has a broader context and it is useful, for the purpose of resolving the case before the referring court, to consider that issue also against the background of the law in force before the Rome I Regulation entered into force.

#### Concept of overriding mandatory provisions

65. The concept of overriding mandatory provisions operates in the legal literature on private international law and in the case-law of many States.<sup>20</sup> They are provisions which serve to attain the special interests of the State concerned and which, on account of their objective, apply regardless of the law governing the legal relationship under examination. In other words, those provisions themselves determine their scope, which cannot be restricted even where conflict-of-law rules designate other law as applicable to the assessment of the legal relationship concerned.

66. The existence of this kind of provision arose from growing State interference with private law relationships. Making certain legal relationships entirely subject to foreign law was becoming unacceptable from the point of view of a given State implementing its political, social and economic interests. States seek to satisfy, to the broadest extent possible, the interests which such provisions serve to safeguard, regardless of which law governs — under conflict-of-law rules — the legal relationship under examination. This phenomenon was identified and described by lawyers as early as the middle of the last century.<sup>21</sup>

20 — In this Opinion, which has been written in Polish, I generally use the term '*przepisy wymuszające swoje zastosowanie*' to denote this concept. That term is sometimes used interchangeably with the term '*przepisy imperatywne*'. However, the term '*przepisy imperatywne*' in this meaning is not to be confused with the concept of provisions which cannot be derogated from by agreement (for example, Article 3(3) of the Rome I Regulation).

21 — Particularly relevant in this regard is the contribution by Franceskakisa, P., who used the term '*lois d'application immédiate*' in '*Quelques précisions sur les lois d'application immédiate et leurs rapports avec les règles de conflits de lois*', *Revue critique de droit international privé*, 1966, p. 1 et seq.

67. The issue of overriding mandatory provisions was taken into account in Article 7 of the Rome Convention, which was concluded between the States of what was then European Economic Community. That provision — which at that time was very innovative — shaped the way in which legal literature and case-law perceived overriding mandatory provision, and not only in European States. The vast majority of contemporary codifications of the private international law of individual States deal, albeit it in different ways, with the issue of overriding mandatory provisions.<sup>22</sup>

#### Overriding mandatory provisions and public policy

68. A closer examination of the origin of overriding mandatory provisions shows a very strong link with the idea of protecting public policy. In that regard it is sufficient to refer to the finding by Friedrich Carl von Savigny that a State's public policy is protected — regardless of the general public policy proviso correcting the effects of the application of a particular law applicable — also by special rules 'of a strictly positive, imperative nature' ('Gesetze von streng positiver, zwingender Natur').<sup>23</sup> The link between overriding mandatory provisions and public policy is also indicated by recital 37 of the Rome I Regulation, which states that 'considerations of public interest justify giving the courts of the Member States the possibility, in exceptional circumstances, of applying exceptions based on *public policy* and *overriding mandatory provisions*' (emphasis added).

69. Although both kinds of legal instrument have their origin in the protection of public policy, their effect is not identical. Public policy — which is expressed, for instance, in Article 21 of the Rome I Regulation — is based on the idea of excluding the application of foreign law where it would result in a manifest breach of the public policy of the State of the forum. It therefore serves to eliminate certain effects — which are undesirable from the point of view of protecting public policy — of applying foreign law.

70. However, overriding mandatory provisions protect public policy in a different way. They directly affect the legal relationship concerned. They shape its content, irrespective of the rules of foreign law which govern that relationship.

#### Overriding mandatory provisions in EU law

71. In Article 9(1) of the Rome I Regulation the EU legislature defined overriding mandatory provisions as 'provisions the respect for which is regarded as crucial by a country for safeguarding its public interests, such as its political, social or economic organisation, to such an extent that they are applicable to any situation falling within their scope, irrespective of the law otherwise applicable to the contract under this Regulation'. That definition draws inspiration from the wording used by the Court in its judgment in *Arblade and Others* where the Court considered provisions of Belgian labour law that under Belgian law were regarded as '*lois de police et de sûreté*'.<sup>24</sup>

72. As stated above, overriding mandatory provisions determine their scope themselves, regardless of what law governs the legal relationship under examination. It should be noted that generally the scope of such provisions does not arise directly from their wording. The court deciding a particular case determines their application on a case-by-case basis. When ruling on their application the court must assess the *specific situation* and on that occasion evaluate the rationale and objectives which the

22 — For example, Article 8 of the 2011 Polish law on private international law; Article 1.11(2) of the 2000 Lithuanian Civil Code; Article 20 of the 2004 Belgian law on private international law; Article 17 of the 1995 Italian law on private international law; Article 7 of Book 10 of the 1992 Netherlands Civil Code; and Paragraphs 3 and 25 of the 2012 Czech law on private international law. Among the States outside the European Union, note should be made above all of Articles 18 and 19 of the 1987 Swiss law on private international law.

23 — See von Savigny, F.C., *System des heutigen Römischen Rechts. Achter Band*, Berlin 1849, 36 I 276.

24 — See judgment in *Arblade and Others* (C-369/96 and C-376/96, EU:C:1999:575, paragraph 30). Cf. Nuyts, A., 'Les lois de police et dispositions impératives dans le Règlement Rome I', *Revue de droit commercial belge*, No 6, 2009.

provision concerned expresses. The court must ask itself whether the intention of the legislature which laid down that provision was in fact to confer on it *overriding mandatory* character. Do the political, social or economic interests of the State which laid down that provision actually support the view that it affects the legal relationship under examination even though the conflict-of-law rules designate the law of another State as that applicable to that legal relationship?

73. For that reason too, a catalogue of a priori privileged provisions cannot be created. The EU legislature and legal literature can only describe the actual phenomenon of ‘overriding mandatory provisions’, whilst the decision on whether or not to confer ‘mandatory’ character on a given provision lies with the court hearing the case concerned.

74. In my view, the analysis made by the court is functional in nature. The court assesses whether, in a specific situation, regard must be had to the legitimate and justified interests of the State whose law is not applicable to the legal relationship concerned in order to give a fair decision. It can therefore be said that the very concept of overriding mandatory provisions *creates for the court the possibility* of giving a decision which is fair and at the same time has regard to the need to balance the competing interests of the States involved.

#### Origin of the overriding mandatory provisions

75. The majority of the conflict-of-law rules of individual States differentiate between the permissibility of, and conditions for, the application of overriding mandatory provisions according to the State which has laid them down.

76. Where those provisions have been laid down in the law of the State whose law governs the legal relationship concerned (*lex causae*), the issue of the permissibility of their application does not arise at all. In that regard it is irrelevant whether or not the *lex causae* is identical to the law of the court which is hearing the case (*lex fori*). Those provisions are in any event part of the legal system under which a decision must be given.

77. The issue of the permissibility of applying such provisions is less controversial where they have been laid down by the State whose courts hear a particular case (*lex fori*), but the legal relationship under consideration is governed by the law of a different State. That issue has been regulated for instance by Article 7(2) of the Rome Convention and Article 9(2) of the Rome I Regulation. Then it is rightly assumed that the court of the State concerned bears special responsibility for safeguarding the political, social or economic interests of that State. Moreover, it is easiest for those courts to determine the scope of protection of those interests and to evaluate the rationale and objectives which the provision concerned expresses.

78. The greatest controversy is clearly caused by the issue which forms the subject matter of the second question referred by the Bundesarbeitsgericht (Federal Labour Court) in this case, that is to say, the application of overriding mandatory provisions of a third State. That issue — in particular after the adoption of Article 7(1) of the Rome Convention — has been the subject of many analyses in legal literature in almost all Member States. I even get the impression that the interest of legal literature in the issue has been largely disproportionate to its rather limited practical importance.

79. Article 7(1) of the Rome Convention was a very innovative provision at the time when it was adopted.<sup>25</sup> On the one hand, it was an inspiration for many national legislatures, and not only in the Member States. On the other, however, it was a matter of controversy. It was argued *inter alia* that the application of overriding mandatory provisions of a third State results in excessive discretion being granted to the bodies applying the law. It was pointed out that balancing the interests arising from provisions originating in the *lex causae*, *lex fori* and law of a third country is a very complicated task, also because the conditions for applying overriding mandatory provisions pursuant to Article 7(1) of the Rome Convention are imprecise. As a result, legal certainty and the requirement that decisions be predictable are impaired. That is why Article 22(1)(a) of the Rome Convention provided for the possibility of the States party thereto declaring a reservation regarding the non-application of Article 7(1). Use was made of that reservation by Ireland, Germany, Lithuania, Luxembourg, Portugal, Slovenia and the United Kingdom.

80. Supporters of Article 7(1) argued primarily that giving effect to certain overriding mandatory provisions of a third State creates an opportunity to make a fair decision which has regard to the legitimate interests of the other State.<sup>26</sup> Any obstacles to the recognition or enforcement of judgments in the other State can thereby be removed. The possibility of having regard to the overriding mandatory provisions of a third State enhances the international harmony of decisions since, regardless of which State's courts are hearing the case, an instrument is created which makes it possible to give a uniform decision.<sup>27</sup> The phenomenon of forum shopping is thereby limited. Finally, the possibility of having regard to overriding mandatory provisions of a third State promotes international cooperation and solidarity, which would appear essential at a time of mutual dependence of States.<sup>28</sup>

## Overriding mandatory provisions of a third State in the Rome I Regulation

### – Preliminary remarks

81. The controversy over Article 7(1) of the Rome Convention was reflected in the *travaux préparatoires* for the Rome I Regulation.<sup>29</sup> A provision governing the extent to which it is permissible to give effect to foreign overriding mandatory provisions was the subject of discussion within the Council.<sup>30</sup> It was finally decided to adopt a version of that provision implying that the permissibility of giving effect to overriding mandatory provisions of a third State is restricted compared with Article 7(1) of the Rome Convention.

82. The fundamental restrictions relate to two areas. First, *effect may be given* to the provisions of the State where *the obligations arising out of the contract have to be or have been performed*. Secondly, that is permissible only in so far as *those provisions render the performance of the contract unlawful*.

25 — As regards the *travaux préparatoires* for the Rome Convention, see Popiołek, W., 'Konwencja EWG o prawie właściwym dla zobowiązań', *Państwo i Prawo*, 9/1982, pp. 105 to 115; Fuchs, B., *Statut kontraktowy a przepisy wymuszające swoje zastosowanie*, Wydawnictwo Uniwersytetu Śląskiego, Katowice, 2003, p. 126 et seq.

26 — Wojewoda, M., 'Mandatory Rules in Private International Law', *Maastricht Journal of European and Comparative Law* (7) 2000, No 2, p. 212.

27 — Bonomi, A., 'Le régime des règles impératives et des lois de police dans le règlement 'Rome I' sur la loi applicable aux contrats', *Le nouveau règlement européen 'Rome I' relatif à la loi applicable aux obligations contractuelles*, Bonomi, A., Cashin Ritaine, E., (ed.), Geneva 2008, p. 235.

28 — See Zachariasiewicz, M.A., 'Przepisy wymuszające swoje zastosowanie', *System prawa prywatnego*, vol. 20A, *Prawo prywatne międzynarodowe*, Pazdan, M. (ed.), Warsaw, C.H. Beck, Instytut Nauk Prawnych PAN, 2014, p. 455.

29 — Those controversies were in no way confirmed in the practice of applying Article 7(1) in States which did not declare a reservation pursuant to Article 22(1) of the Rome Convention — see Zachariasiewicz, M.A., 'Rozwój nauki prawa prywatnego międzynarodowego', *System prawa prywatnego*, vol. 20A, *Prawo prywatne międzynarodowe*, Pazdan, M. (ed.), Warsaw, C.H. Beck, Instytut Nauk Prawnych PAN, 2014, p. 81.

30 — See, in that regard, Hellner, M., 'Third Country Overriding Mandatory Rules in the Rome I Regulation: Old Wine in New Bottles?', *Journal of Private International Law*, 2009, No 5 (3), pp. 451 to 454; McParland, M., *The Rome I Regulation on the Law Applicable to Contractual Obligations*, Oxford University Press 2015, pp. 697 to 705.

83. Article 9(3) of the Rome I Regulation may give rise to yet other uncertainties as to interpretation. They concern, for instance, the extent to which EU law can prohibit, restrict or require the application of specific overriding mandatory provisions, for it should be remembered that, unlike Article 7 of the Rome Convention, Article 9(1) contains a definition of overriding mandatory provisions, which is bound to have an effect on the jurisdiction of the Court of Justice. Nor is it clear what consequences are attached to the fact that, in relation to the overriding mandatory provisions of the State of the forum, Article 9(2) provides for their *application*, whilst, in relation to such provisions of a third State, Article 9(3) provides for giving them *effect*. However, those matters do not form the subject matter of this case and I shall not address them.

84. The uncertainty of the referring court expressed in the second question by and large concerns one issue, that is to say, clarification of whether, if the conditions laid down in Article 9(3) are not satisfied, the court can have indirect regard to the provisions of a third State, that is to say, in this specific situation, the provisions of Greek law. The referring court explains that, in its view, the contractual obligation at issue in the main proceedings is not performed in Greece but in Germany.

85. I could go straight to considering that matter, were it not for the fact that the answer to the question referred by the national court needs to be considered in a broader context.

– Restriction of the permissibility of applying overriding mandatory provisions of a third State in the light of Article 9(3) of the Rome I Regulation

86. In the observations which they submitted in this case, the German and United Kingdom Governments and the Commission propose a strict interpretation of the conditions for reliance on Article 9(3) of the Rome I Regulation. In their view, the permissibility of having regard to provisions of this kind of a third State is currently restricted significantly in comparison with Article 7(1) of the Rome Convention. This relates primarily to the restrictions referred to in point 82 of this Opinion. Accepting this position means that, on the one hand, the permissibility of applying the overriding mandatory provisions of the State of the forum is almost unrestricted and, on the other, having regard to such provisions of a third State would be possible only in strictly defined situations.

87. In my view, that approach is not consistent with either the objective of the Rome I Regulation or the function to be fulfilled by the possibility of having regard to overriding mandatory provisions.

88. First, as I pointed out above,<sup>31</sup> the analysis preceding the decision whether, in a specific case, regard must be had to a particular overriding mandatory provision is functional in nature. The court taking that decision evaluates the rationale and objectives which the provision concerned expresses and also considers the consequences which that provision might have for the legal relationship under examination. That is to help ensure that a fair decision is given which has regard to the legitimate interest of the other State. In many cases that may also be the interest of another Member State. It is difficult not to note the fact that such a possibility promotes — in broad terms — mutual trust between the Member States.<sup>32</sup> Nor can it be excluded that in some situations having regard to an overriding mandatory provision of a third State will be in the interest of the court hearing the case.<sup>33</sup> That State may have a legitimate interest in the courts of other States also having regard to its overriding mandatory provisions.

31 — See point 74 of this Opinion.

32 — See Bonomi, A., Cashin Ritaine, E., *op. cit.* (footnote 27), p. 235.

33 — In this context it is worth pointing to the case-law of the English courts (for example the judgment in *Foster v Driscoll* [1929] 1 KB 470) which is based on the assumption that not having regard to foreign overriding mandatory provisions can sometimes result in a breach of the public policy of the State of the forum based on 'comity of nations'. See McParland, M., *op. cit.* (footnote 30), pp. 711, 715 and 716; Harris, J., 'Mandatory Rules and Public Policy under the Rome I Regulation', *Rome I Regulation, The Law Applicable to Contractual Obligations in Europe*, Ferrari, F., Leible, S. (ed.), Sellier, Munich 2009, p. 298 et seq.

89. Secondly, establishing such different treatment of the overriding mandatory provisions of the State of the forum and of a third State promotes the phenomenon of forum shopping. Where the applicant has a choice as regards initiating proceedings before the courts of different States, he can thus decide whether or not regard will be had to specific overriding mandatory provisions. Even in the case of the main proceedings in this case, it is possible to imagine that, if proceedings relating to the same matter of dispute were under way before a Greek court, it would undoubtedly apply its own overriding mandatory provisions pursuant to Article 9(2) of the Rome I Regulation.

90. Thirdly, and finally, I am unconvinced by the arguments that having regard to overriding mandatory provisions of a third State prejudices legal certainty and renders decisions unpredictable. The same claim could just as easily be made in relation to application of the public policy proviso (Article 21 of the Rome I Regulation) or overriding mandatory provisions of the State of the forum (Article 9(2) of the Rome I Regulation). Those cases also involve a form of interference with the scope of the law applicable. That interference is justified by the need to respect the fundamental values of a particular legal order or by protection of the key interests of a particular State. In any event and regardless of whether the application of Article 21, Article 9(2) or Article 9(3) of the Rome I Regulation is concerned, interference of that kind must be exceptional and based on particularly vital grounds of public interest.

91. For those reasons, I consider that in construing Article 9(3) of the Rome I Regulation an excessively strict interpretation cannot be placed on the concept of ‘country where the obligations are to be or have been performed’.<sup>34</sup> Above all, it is not possible to apply an interpretation similar to that applied in the case of Article 5(1) of the Brussels I Regulation, which also uses the term ‘place of performance of the obligation’ as a basis for the jurisdiction of courts in civil and commercial matters.<sup>35</sup> The objectives of the two provisions are entirely different. The Brussels I Regulation concerns the establishment of a specific place in the Member State whose court will have territorial jurisdiction. That place must display a strong enough link with the performance of the contract to establish, having regard to the proper organisation of judicial proceedings, the territorial jurisdiction of the courts, which also constitutes a derogation from the general jurisdiction arising from Article 2 of the Brussels I Regulation. The concept of place of performance of the obligation under the Brussels I Regulation must therefore be interpreted strictly.

92. The situation is different as regards interpretation of the term ‘country where the obligations are to be or have been performed’ under Article 9(3) of the Rome I Regulation. In interpreting that provision<sup>36</sup> the intention is not to establish a specific place indicating territorial jurisdiction, but to determine the *State* in whose territory the contractual obligation is performed or is to be performed. Therefore, it is a question not only of the material (factual) performance of acts by a party to the contract at a specific geographical location but also of the link with the area of authority of the State concerned and with its legal system.

93. Furthermore, it is not a question here solely of performance of the obligation consisting in ‘characteristic performance’<sup>37</sup> of the contractual relationship concerned. For the purpose of defining the conditions for the application of Article 9(3) of the Rome I Regulation account may be taken of the performance of any obligation arising from the contract.

34 — See, to that effect, Schmidt-Kessel, M., ‘Article 9’, *Rome I Regulation*, Ferrari, F. (ed.), Sellier, Munich 2015, p. 350. I also consider that a similarly broad interpretation should be applied to the other condition arising from Article 9(3), that is to say, that such provisions apply in so far as they render ‘the performance of the contract unlawful’. See Schmidt-Kessel, M., loc. cit.; Harris, J., op. cit. (footnote 33), p. 322; Hellner, M., op. cit. (footnote 30), p. 461.

35 — See Nuyts, A., op. cit. (footnote 24), pp. 563 and 564.

36 — I have no doubt that the interpretation of that expression must be autonomous in nature — see Harris, J., op. cit. (footnote 33), p. 315; Marazopoulou, V., ‘Overriding Mandatory Provisions of Article 9 § 3 of the Rome I Regulation’, *Revue Hellénique de Droit International* 2/2011, p. 787.

37 — For instance, Article 4 of the Rome I Regulation, which serves to determine the law applicable to a contract where the parties have not chosen the law pursuant to Article 3 of that regulation, is based on the concept of characteristic performance.

94. Nor must it be a question exclusively of an *obligation* which was directly defined by the parties in the contract.<sup>38</sup> The law which governs the contract concerned can shape differently or supplement the obligations of the parties in relation to what they agreed directly in the contract.

95. Consequently, in my view there is no outright presumption that Germany alone is the place where the obligation is performed in the main proceedings in this case. If there is an employment relationship to which the Greek State, performing, as part of its public duties, an obligation to provide educational services funded from the budget of that State, is a party, a finding that Greece is also the place where the obligation is performed cannot be rejected out of hand. There is nothing to prevent, in relation to certain contractual relationships, more than one State from being the place where the obligations arising from those relationships — under Article 9(3) of the Rome I Regulation — are performed.<sup>39</sup>

96. However, since the referring court found that Germany alone is the place where the contract in question is performed and has not directly requested an interpretation of Article 9(3) of the Rome I Regulation in that respect, I propose that the Court address only the issue which forms the subject matter of the second question.

– Application of, and substantive regard to, foreign overriding mandatory provisions

97. This question is based on the assumption that *application* of overriding mandatory provisions is one thing, and *substantive regard* to foreign overriding mandatory provisions (‘materiell-rechtliche Berücksichtigung ausländischer Eingriffsnormen’) is another. In that respect the referring court points to the German case-law and legal literature which allow regard to be had to foreign overriding mandatory provisions — in the context of applying German law as the *lex causae* — as matters of fact.<sup>40</sup> The referring court states that in the main proceedings it might have regard to provisions of Greek law pursuant to Paragraph 241(2) of the German Civil Code (paragraph 13).<sup>41</sup>

98. There is no need in this case to consider the various justifications in legal literature of the permissibility of having *substantive regard* to foreign overriding mandatory provisions. All that matters is the issue the resolution of which may be relevant to the referring court.

99. The Commission argues in its observations that Article 9(3) of the Rome I Regulation rules out completely the possibility of having regard to foreign overriding mandatory provision by using instruments other than that provision. Also, in relation to Article 7(1) of the Rome Convention the Commission takes the view that a State which has made a reservation pursuant to Article 22(1)(a) of the Rome Convention deprives itself of the legal basis for having regard to foreign overriding mandatory provisions.

100. As, moreover, the Commission confirmed at the hearing, accepting that view means that, even if the referring court were to find that the Rome Convention applies *ratione temporis* in this case, it still could not rely on the previous practice of the German courts consisting in having substantive regard to foreign overriding mandatory provisions.

38 — McParland, M., op. cit. (footnote 30), p. 706; Hellner, M., op. cit. (footnote 30), p. 466.

39 — See, to that effect, Renner, M., ‘Rome I Article 9, Overriding Mandatory Provisions’, *Rome Regulations*, op. cit. (footnote 11), p. 258; Zachariasiewicz, M.A., op. cit. (footnote 28), p. 459; Nuyts, A., op. cit. (footnote 24), p. 564.

40 — The possibility of having regard to foreign overriding mandatory provisions in applying the *lex causae* is also mentioned in Polish legal literature — see Popiołek, W., *Wykonanie zobowiązania umownego a prawo miejsca wykonania: zagadnienia kolizyjnoprawne*, Katowice 1989, p. 163 et seq.; Mataczyński, M., *Przepisy wymuszające swoje zastosowanie w prawie prywatnym międzynarodowym*, Zakamycze, 2005, p. 181 et seq.

41 — On the basis of *Schuldstatuttheorie*. See, to that effect, Harris, J., op. cit. (footnote 33), p. 302.

101. It is true that the practical difference between the *application of*, and *substantive regard to*, an overriding mandatory provision is almost imperceptible. The difference is apparent only in relation to the justification for that differentiation in legal literature. In that sense I can understand the Commission's fear that the permissibility of substantive regard to a foreign overriding mandatory provision could lead to circumvention of the restrictions laid down in Article 9(3) of the Rome I Regulation and of a reservation declared pursuant to Article 22(1)(a) of the Rome Convention. Nevertheless, in my view the interpretation of Article 9(3) proposed by the Commission — according to which any other possibility of having regard to overriding mandatory provisions of a third State is ruled out — is excessively strict.

102. First, I consider that the Rome I Regulation — as a conflict-of-law rule — serves to designate the law applicable to a particular legal relationship (*lex causae*). Where, in applying the law designated and pursuant to that law, regard is had to a foreign overriding mandatory provision, there is application only of the *lex causae*. Such regard to an overriding mandatory provision therefore falls outside the scope of the Rome I Regulation.<sup>42</sup>

103. The Rome I Regulation serves to designate the law applicable to a contractual relationship and, where appropriate, forms the basis for 'correcting' that designation, for example on the basis of the public policy proviso or the instrument of overriding mandatory provisions. Article 9(3) of the Rome I Regulation operates where the court wishes to have regard to foreign overriding mandatory provisions regardless of the substance of the *lex causae*. In other words, there is a certain *interference* with the scope of the *lex causae* by having regard to a provision originating in a different legal order.

104. Such a situation does not exist where regard to a foreign overriding mandatory provision is had in the context of applying the *lex causae*.<sup>43</sup>

105. Secondly, accepting the Commission's view would mean that the Rome I Regulation serves not only to designate the law applicable to a contractual relationship, but can also interfere with the actual application of the law designated. How else would it be possible to interpret the fact that — in the Commission's view — the previous practice of the German courts, consisting in having substantive regard to a foreign overriding mandatory provision in the context of applying the provisions of German law, would have to be inconsistent with Article 9(3) of the Rome I Regulation?

106. In every legal system there are provisions which contain undefined terms. That could be, for example, 'morality', 'good faith', 'legitimate interest of the party' or 'good behaviour'. They serve to provide the courts with the appropriate discretion. I have no doubt that in the context of applying such provisions account can be taken — *as matters of fact* — of the legal rules in force in other States. This concerns primarily those legal rules which arise from the need to safeguard objectively justified interests and which are appropriately linked to the contractual relationship under examination. I have no doubt that in such situations there is application of the applicable law which governs the contract concerned. In other words, it is not a derogation from the application of the *lex causae*.

42 — See, similarly, Martiny, D., 'Art. 9 ROM I-VO', *Münchener Kommentar zum BGB*, C.H. Beck, 6th ed., Munich 2015, paragraphs 114 to 114b; Remien, O., 'Art. 9 ROM I-VO', *BGB Kommentar*, Prütting, H., Wegen, G., Weinreich, G. (ed.), 2015, paragraph 45. However, the authors of those commentaries highlight the existence of a different opinion in German legal literature according to which substantive regard to foreign overriding mandatory provisions falls within the concept of 'giving effect' within the meaning of Article 9(3) of the Rome I Regulation and is therefore also covered by the restrictions arising from that provision.

43 — See, to that effect, Renner, M., op. cit. (footnote 39), p. 261; Schmidt-Kessel, M., op. cit. (footnote 34), p. 353; Marazopoulou, M., op. cit. (footnote 36), p. 792.

107. For the above reasons, accepting the Commission's view would create problems of a jurisdictional nature. The Rome I Regulation was adopted on the basis of Treaty provisions serving to promote 'the compatibility of the rules ... concerning the conflict of laws' (former Article 65 EC in conjunction with Article 61(c) thereof). Therefore, that regulation should not interfere with the practice of applying the provisions of the law which is designated as applicable, above all where they are provisions of law — principally private law — which leave the courts a certain discretion.

108. Thirdly, and finally, excluding the possibility of having regard to foreign overriding mandatory provisions in the context of applying the *lex causae* would help to promote the phenomenon of forum shopping.<sup>44</sup>

109. In summing up this part of the Opinion, I wish to point out that the permissibility of having regard to foreign overriding mandatory provisions — regardless of whether that concerns the *application* thereof or *substantive regard* thereto — is not automatic. The court hearing the case has a large degree of discretion which is intended to enable it to give a fair decision that has regard to the legitimate interests of the parties and also the interests of the States whose law affects the legal relationship concerned.

110. The possibility cannot be ruled out that in the present case the referring court will not have regard to the provisions of Greek law in their entirety and will consider only a partial reduction in Mr Nikiforidis's pay to be legitimate. That court may also rule — as did the court of second instance in this case (the Landesarbeitsgericht (Higher Labour Court)) — that having regard to the provisions of Greek law is contrary to the fundamental principles of German labour law.

111. In any event, Article 9(3) of the Rome I Regulation does not restrict the scope *ratione materiae* and the manner of application of German law as the law applicable to the employment contract.

#### Conclusion as regards the second question referred

112. In the light of the foregoing, I propose that the Court's answer to the national court's second question should be that Article 9(3) of the Rome I Regulation does not preclude indirect substantive regard to foreign overriding mandatory provisions where that is permitted under the law of the State whose law governs the contract.

#### *Relevance of the principle of sincere cooperation (Article 4(3) TEU) when having regard to overriding mandatory provisions of another Member State (third question referred)*

113. In the reference for a preliminary ruling, the German court points out that Laws No 3833/2010 and No 3845/2010 serve to perform the obligations of the Hellenic Republic arising from provisions of the EU Treaty concerning economic policy, in particular the obligation to avoid an excessive government deficit laid down in Article 126(1) TFEU. On account of the financial crisis in Greece and the aid granted by the euro area Member States, that obligation was given concrete expression by the Council of the European Union in Decision 2010/320/EU.<sup>45</sup> That decision provides that Greece is to take a number of measures to remedy the situation of excessive deficit.

114. Consequently, it must be considered whether the principle of sincere cooperation between Member States laid down in Article 4(3) TEU requires that effect be given to the Greek laws referred to above.

<sup>44</sup> — See point 89 of this Opinion.

<sup>45</sup> — Council Decision of 10 May 2010 addressed to Greece with a view to reinforcing and deepening fiscal surveillance and giving notice to Greece to take measures for the deficit reduction judged necessary to remedy the situation of excessive deficit (OJ 2010 L 145, p. 6).

115. I wish to point out that the obligation of sincere cooperation between the Member States laid down in Article 4(3) TEU is certainly one of the fundamental institutional principles of EU law.

116. However, when applying that principle regard must be had to its scope. That principle is binding on the bodies — including courts — of a Member State only in so far as they apply EU law.

117. I wish to note that the application of the Rome I Regulation is limited to designating the law applicable to the contract concerned. The substantive dispute is not resolved on the basis of the Rome I Regulation but on the basis of the applicable law (*lex causae*).

118. In the context under discussion, it is, in my view, irrelevant whether or not the law applicable to the employment contract was designated by EU conflict-of-law rules. In other words, in answering the third question it is essentially irrelevant whether the applicability of German law to that contract arises from the Rome I Regulation or German conflict-of-law rules implementing the Rome Convention.

119. The referring court is resolving a dispute in relation to an employment contract to which German law is applicable.

120. At this juncture, it is worth recalling that EU law is part of the legal orders of the Member States. Therefore, if a court of a Member State is resolving a dispute, overriding mandatory provisions which have their origins in EU law will be applied pursuant to Article 9(2) of the Rome I Regulation.<sup>46</sup> Those provisions belong to the legal system in force at the seat of the court seized (*lex fori*).<sup>47</sup>

121. The issue of having regard to Greek Laws No 3833/2010 and No 3845/2010 is an essential element indicating a possible link between the main proceedings and the application of EU law.

122. First, I would like to point out that Decision 2010/320 — pursuant to which the two Greek laws were adopted — is addressed to Greece and not Germany. Therefore, it cannot — even in the light of Article 4(3) TEU — require that the German court does not apply the provisions of German law, which is applicable to the employment relationship at issue.

123. Secondly, as the Commission correctly points out, the obligation to reduce the pay of persons employed in the public sector does not, with the exception of certain bonuses and allowances,<sup>48</sup> arise directly from Decision 2010/320.

124. Thirdly, as the order for reference shows, the provisions of German employment law do not preclude a reduction in the pay of workers employed in Greek public institutions in Germany but merely require that the employer fulfils certain conditions applicable to a rider to an employment contract or to termination with reengagement on amended terms.

125. In the light of the foregoing, I consider that it is not possible to derive from the principle of sincere cooperation — laid down in Article 4(3) TEU — an obligation to give effect to the provisions of another Member State even where they serve to ensure that that State satisfies its obligations towards the European Union. This applies both to a situation where a court considers having regard to such provisions as matters of fact in the context of applying the *lex causae* and to a situation where the court applies Article 9(3) of the Rome I Regulation.

46 — Schmidt-Kessel, M., *op. cit.* (footnote 34), p. 329; Sánchez Lorenzo, S., 'Choice of Law and Overriding Mandatory Rules in International Contracts after Rome I', *Yearbook of Private International Law*, vol. 12, 2010, p. 78.

47 — Furthermore, the Rome I Regulation contains a provision which serves to ensure that EU law is applied where the law of a third State is chosen (Article 3(4)).

48 — Article 2(f) provides that Greece is to reduce before the end of June 2010 Easter, summer and Christmas bonuses and allowances paid to civil servants.

126. However, it should be noted that Article 9(3) *in fine* of the Rome I Regulation expressly provides that, in considering whether to give effect to those provisions, regard is to be had to their nature and purpose and to the consequences of their application or non-application. In my view, that means that, in taking a decision on whether to give effect to those provisions pursuant to Article 9(3), the court must have regard to the fact that they were adopted by another Member State to fulfil obligations arising from its membership of the European Union. However, that does not determine the final decision which the court seised will take in that respect.

## Conclusion

127. In the light of the foregoing considerations, I propose that the Court should answer the questions referred by the Bundesarbeitsgericht (Federal Labour Court) as follows:

- (1) The time at which a contract is concluded for the purposes of Article 28 of 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) must be determined in accordance with the law which would be applicable to the contract concerned if that regulation applied.
- (2) Article 9(3) of the Rome I Regulation does not preclude indirect substantive regard to overriding mandatory provisions of a third State where that is permitted under the law of the State whose law governs the contract.
- (3) In the light of the obligation of sincere cooperation laid down in Article 4(3) TEU, the court of a Member State, when taking a decision on whether or not to give effect to foreign overriding mandatory provisions pursuant to Article 9(3) of the Rome I Regulation, must have regard to the fact that those provisions were adopted by another Member State to fulfil obligations arising from its membership of the European Union. However, that does not determine the final decision which the court seised will take in that respect.