



Reports of Cases

OPINION OF ADVOCATE GENERAL
CAMPOS SÁNCHEZ-BORDONA
delivered on 22 April 2021¹

Joined Cases C-152/20 and C-218/20

**DG,
EH**

v

SC Gruber Logistics SRL (C-152/20)

and

Sindicatul Lucrătorilor din Transporturi, TD

v

SC Samidani Trans SRL (C-218/20)

(Request for a preliminary ruling
from the Tribunalul Mureș (Regional Court, Mureș, Romania))

(Preliminary-ruling proceedings – Judicial cooperation in civil matters – Law applicable to contractual obligations – Regulation (EC) No 593/2008 – Choice of law by the parties – Individual employment contracts – Employee who performs work in more than one Member State – Habitual place of performance of work – Provisions which cannot be derogated from by agreement – Definition – Minimum wage)

1. In these two references for a preliminary ruling, a Romanian court asks the Court of Justice for an interpretation of Articles 3 and 8 of Regulation (EC) No 593/2008.² The Romanian court considers that interpretation to be necessary in order to enable it to decide on two disputes concerning the salary claims of a number of lorry drivers against the undertaking by which they are employed, which is established in Romania and which sends them to transport goods to other Member States.

2. The orders for reference omit from the description of the facts a number of details which could be relevant. The most notable is a detail which makes it possible to distinguish between posted workers, on the one hand, and workers who, while not having the status of posted workers, habitually carry out their work in a different country from that in which the employer has its headquarters and from the place where the contract was concluded, on the other.

¹ Original language: Spanish.

² Regulation of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I) (OJ 2008 L 177, p. 6; 'the Rome I Regulation').

3. Since the information supplied to the Court is imprecise, it cannot be stated categorically that the situation of the applicant employees in these proceedings comes within one or other of those categories. Theoretically, it is not possible to rule out the existence of a cross-border posting of workers within the meaning of Directive 96/71/EC,³ but the referring court does not appear to see it that way as it frames its questions solely by reference to the Rome I Regulation.

I. Legal framework

A. European Union law. The Rome I Regulation

4. The Rome I Regulation replaced the Rome Convention on the law applicable to contractual obligations.⁴ It is, in large part, a continuation of that convention, even though it does not include a general statement to that effect. In so far as is relevant here, Articles 3 and 8 of the Rome I Regulation correspond to Articles 3 and 6 of the 1980 Convention, such that the Court's rulings on the latter apply to the former.⁵

5. In accordance with recital 11 of the regulation:

'The parties' freedom to choose the applicable law should be one of the cornerstones of the system of conflict-of-law rules in matters of contractual obligations.'

6. Recital 23 stipulates:

'As regards contracts concluded with parties regarded as being weaker, those parties should be protected by conflict-of-law rules that are more favourable to their interests than the general rules.'

7. According to recital 35:

'Employees should not be deprived of the protection afforded to them by provisions which cannot be derogated from by agreement or which can only be derogated from to their benefit.'

8. In accordance with recital 36:

'As regards individual employment contracts, work carried out in another country should be regarded as temporary if the employee is expected to resume working in the country of origin after carrying out his tasks abroad ...'

³ Directive of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services (OJ 1997 L 18, p. 1).

⁴ Convention on the law applicable to contractual obligations opened for signature in Rome on 19 June 1980 (OJ 1980 L 266, p. 1; 'the 1980 Convention').

⁵ In the judgment of 12 September 2013, *Schlecker* (C-64/12, EU:C:2013:551; 'judgment in *Schlecker*'; paragraph 38), the Court stated that the connecting factors laid down in the 1980 Convention were consistent with the new provision on the conflict rules relating to employment contracts in the Rome I Regulation, even though that regulation was not applicable *ratione temporis* to that case.

9. Recital 37 is worded as follows:

‘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. The concept of “overriding mandatory provisions” should be distinguished from the expression “provisions which cannot be derogated from by agreement” and should be construed more restrictively.’

10. Article 3 (‘Freedom of choice’) reads:

‘1. A contract shall be governed by the law chosen by the parties. The choice shall be made expressly or clearly demonstrated 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.

...’

11. Article 8 (‘Individual employment contracts’) provides:

‘1. An individual employment contract shall be governed by the law chosen by the parties in accordance with Article 3. Such a choice of law may not, however, have the result of depriving the employee of the protection afforded to him by provisions that cannot be derogated from by agreement under the law that, in the absence of choice, would have been applicable pursuant to paragraphs 2, 3 and 4 of this Article.

2. To the extent that the law applicable to the individual employment contract has not been chosen by the parties, the contract shall be governed by the law of the country in which or, failing that, from which the employee habitually carries out his work in performance of the contract. The country where the work is habitually carried out shall not be deemed to have changed if he is temporarily employed in another country.

3. Where the law applicable cannot be determined pursuant to paragraph 2, the contract shall be governed by the law of the country where the place of business through which the employee was engaged is situated.

4. Where it appears from the circumstances as a whole that the contract is more closely connected with a country other than that indicated in paragraphs 2 or 3, the law of that other country shall apply.’

B. National law. Romanian law

12. The Ordinul ministrului muncii și protecției sociale nr. 64/2003 pentru aprobarea modelului-cadru al contractului individual de muncă⁶ stipulates, under Section N of Annex I, that individual employment contracts concluded in Romania must necessarily include this clause: ‘The provisions of this individual employment contract are supplemented by the provisions of Law No 53/2003 establishing the Labour Code’.⁷

⁶ Order No 64/2003 of the Minister for Employment and Social Affairs approving the standard-form individual employment contract; ‘Order No 64/2003’.

⁷ Legea nr. 53/2003 privind Codul muncii.

II. Facts, disputes and questions referred for a preliminary ruling

A. Case C-152/20

13. DG and EH, lorry drivers resident in Romania, both concluded individual employment contracts with the undertaking SC Gruber Logistics SRL, also established in Romania.

14. The contracts, drafted in both Romanian and Italian, stipulated that their clauses were supplemented by the provisions of the Romanian Labour Code.

15. As regards the place of work, the contracts stipulated that work would be carried out in the place of business in Oradea (Romania) or at any location in the country and abroad where their services may be requested.

16. DG and EH maintain that, although their contracts were concluded in Romania, they habitually performed their duties in Italy, from where they carried out their assignments. They returned to Italy at the end of their assignments and received their instructions and carried out most of their transport tasks in that country.

17. They submit, therefore, that the Italian legislation on the minimum wage should apply to them, in accordance with Article 8 of the Rome I Regulation.

18. The employer undertaking contests those claims, arguing that the two drivers worked for it in lorries registered in Romania and under transport licences issued in accordance with Romanian legislation. The employer adds that it issued all the instructions and that the applicants' work was organised in Romania. Therefore, the employment contracts at issue should be subject to Romanian law.

19. Against that background, the Tribunalul Mureş (Regional Court, Mureş, Romania) referred the following questions to the Court of Justice for a preliminary ruling:

- '(1) Is Article 8 of [the Rome I] Regulation ... to be interpreted as meaning that the choice of law applicable to an individual employment contract excludes the application of the law of the country in which the employee has habitually carried out his or her work or as meaning that the fact that a choice of law has been made excludes the application of the second sentence of Article 8(1) of that regulation?
- (2) Is Article 8 of [the Rome I] Regulation ... to be interpreted as meaning that the minimum wage applicable in the country in which the employee has habitually carried out his or her work is a right that falls within the scope of "provisions that cannot be derogated from by agreement under the law that, in the absence of choice, would have been applicable", within the meaning of the second sentence of Article 8(1) of the regulation?
- (3) Is Article 3 of [the Rome I] Regulation ... to be interpreted as meaning that the specification, in an individual employment contract, of the provisions of the Romanian Labour Code does not equate to a choice of Romanian law, in so far as, in Romania, it is well-known that there is a legal *obligation* to include such a choice-of-law clause in individual employment contracts? In other words, is Article 3 of [the Rome I] Regulation ... to be interpreted as precluding national rules and practices pursuant to which a clause specifying the choice of Romanian law must *necessarily* be included in individual employment contracts?'

B. Sindicatul Lucrătorilor din Transporturi, Case C-218/20

20. TD, a member of the trade union Sindicatul Lucrătorilor din Transporturi, was hired by the company SC Samidani Trans SRL as a lorry driver to work in the territory of the European Union.

21. The individual employment contract, concluded in Romania, did not expressly mention the place where the employee would carry out his work.

22. Pursuant to that contract, ‘the provisions of this individual employment contract are supplemented by the provisions of Law No 53/2003 establishing the Labour Code and of the collective labour agreement applicable at unit/sectoral level [and] disputes relating to the conclusion, performance, amendment, suspension or termination of this individual employment contract shall be resolved by the court having jurisdiction *ratione materiae* and *ratione loci*, in accordance with the law’.

23. The trade union claims that the employer undertaking should be ordered to pay DT the difference between the wages he actually received and the minimum wage to which he would have been entitled under German law. It further contends that DT is entitled to payment of wages in respect of the ‘thirteenth’ and ‘fourteenth’ months provided for in German law.

24. It is argued in the application that the German provisions on those matters are applicable to DT’s employment contract in accordance with Article 8 of the Rome I Regulation. Although the individual employment contract was concluded in Romania, the employee usually performed his duties and received instructions in Germany. Moreover, the lorries used by the employee would be parked in Germany and transport tasks were carried out within German borders.

25. The defendant undertaking submits that the parties specifically stipulated that the law applicable to the individual employment contract was Romanian law.

26. Against that background, the Tribunalul Mureş (Regional Court, Mureş) referred the following questions to the Court of Justice for a preliminary ruling:

- ‘(1) Does the choice of law applicable to an individual employment contract exclude the application of the law of the country in which the employee has habitually carried out his or her work or does the fact that a choice of law has been made exclude the application of the second sentence of Article 8(1) of [the Rome I Regulation]?
- (2) Is the minimum wage applicable in the country in which the employee has habitually carried out his or her work a right that falls within the scope of “provisions that cannot be derogated from by agreement under the law that, in the absence of choice, would have been applicable”, within the meaning of the second sentence of Article 8(1) of the [Rome I Regulation]?
- (3) Does the specification, in an individual employment contract, of the provisions of the Romanian Labour Code equate to a choice of Romanian law, in so far as, in Romania, it is well-known that the employer predetermines the content of the individual employment contract?’

III. Procedure

27. The requests for a preliminary ruling were received at the Registry of the Court of Justice on 30 March 2020 (C-152/20) and 27 May 2020 (C-218/20), and the decision was taken to join the two cases.

28. Written observations were lodged by the Finnish and Romanian Governments and the European Commission. It was not considered necessary to hold a hearing.

IV. Analysis

A. *Preliminary observations*

29. The dispute essentially concerns the law applicable to the wages (in particular, the minimum wage) payable to employed lorry drivers when the following circumstances pertain:

- The drivers each concluded individual employment contracts in Romania with an undertaking established in that country but they carried out their work in another Member State⁸ at the material time;
- The contracts, concluded in line with a standard-form contract pre-formulated pursuant to Order No 64/2003, included a clause which stipulates that the Romanian Labour Code is applicable for the purpose of supplementing the contractual provisions; and
- In accordance with that order, individual employment contracts concluded in Romania must include that clause. However, the interpretation of that clause is in dispute.

30. Before I deal with the questions referred for a preliminary ruling, and as I have already pointed out, I concur with the Finnish and Romanian Governments⁹ that the application, to all or some of the workers involved, of Directive 96/71, which governs the cross-border posting of workers,¹⁰ cannot be ruled out.

31. That point is not immaterial because, pursuant to Directive 96/71, the provisions governing the minimum wage in force in the country to which a worker is posted are applicable regardless of the body of legal rules to which the individual employment contract is subject.¹¹

⁸ Italy (Case C-152/20) and Germany (Case C-218/20). In the former case, EH's action also relates to the minimum wage applicable in Germany during the period when he worked there. However, the referring court confines its questions to the applicants' situation in Italy.

⁹ Written observations, points 7 and 5, respectively.

¹⁰ The judgment of 1 December 2020, *Federatie Nederlandse Vakbeweging* (C-815/18, EU:C:2020:976), confirmed that Directive 96/71 is applicable to the cross-border provision of services in the road transport sector, after examining the circumstances in which workers in that sector are 'posted' for the purposes of the directive. Directive (EU) 2018/957 of the European Parliament and of the Council of 28 June 2018 amending Directive 96/71/EC concerning the posting of workers in the framework of the provision of services (OJ 2018 L 173, p. 16) will apply to the road transport sector from 2 February 2022, in accordance with Article 3(3) thereof.

¹¹ Article 3(1)(c) of Directive 96/71, without prejudice to the application of more favourable terms and conditions of employment (see paragraph 7). Derogations from that provision are possible.

32. Directive 96/71 does not supplant the Rome I Regulation but rather requires that the two texts should be coordinated.¹² In a situation involving a conflict of laws, the law applicable to an employment contract must be determined in accordance with Article 8 of the Rome I Regulation. However, the scope of such applicable law will be limited, for Article 3(1) of Directive 96/71 lays down the obligation to guarantee certain terms and conditions of employment governed by the provisions of the host State, whatever the law applicable to the employment relationship may be.

33. The referring court, which does not classify the situations at issue as ‘postings’, frames its questions by reference to the Rome I Regulation, thus implying that those situations do not fall within the scope of Directive 96/71.¹³

34. Accordingly, in the absence of other information, it will be necessary to proceed on the same basis as the national court and I shall therefore focus my analysis on the effects of the Rome I Regulation on the disputes.¹⁴

B. The first question

35. By its first question, the referring court asks the Court of Justice to rule on the interpretation of the second sentence of Article 8(1) of the Rome I Regulation.

36. To be specific, the question it asks comes down to determining whether, where ‘a worker habitually carries out the work which is the subject of his or her employment contract in a country other than the country whose laws have been expressly chosen by the parties, a national court may ... override the parties’ choice of law where it appears from all the circumstances that the contract is more closely connected with a different country.’¹⁵

37. The referring court presumes that the parties have chosen Romanian law to govern their contractual relationship. Against that background, it asks whether it is possible to *counteract* the effects of that choice by means of the provisions of other countries in which the worker has carried out his work.

38. Article 8 of the Rome I Regulation is intended to protect the employee, who is the ‘structurally weak’ party in the contractual relationship,¹⁶ through a mechanism of conflict rules.¹⁷ Those rules apply if, pursuant to an individual contract, work is carried out in a State (or States) other than that in which the law chosen applies.

¹² I refer to my Opinion in *Hungary v Parliament and Council* (C-620/18, EU:C:2020:392, point 191 et seq.). On the relationship between the Rome I Regulation and Directive 96/71, see recital 34 and Article 23 of the former and recitals 7 to 11 of the latter.

¹³ It is true that the referring court sets out, in the description of the national legal framework, provisions which implement that directive, such as Article 4 of *Legea nr. 344/2006 privind detaşarea salariaţilor în cadrul prestării de servicii transnaţionale* (Law No 344/2006 concerning the posting of workers in the framework of transnational service provision). However, the referring court does not expressly maintain that those provisions are applicable and it is possible that their citation is merely instrumental to the citation of Article 7a of that law, which is applicable to international transport situations covered by rules other than those applicable to posting.

¹⁴ The brief descriptions of the facts in the orders for reference reveal that the provision of services by the workers did not occur merely on an occasional journey to a foreign country. I believe, therefore, that the situations examined are such that they are liable to involve a conflict of laws within the meaning of Article 1(1) of the Rome I Regulation.

¹⁵ Order for reference, Case C-152/20, paragraph 10.

¹⁶ The *weakness* is reflected, in particular, in terms of negotiating power.

¹⁷ The protection of workers may also be derived from other provisions, such as ‘overriding mandatory provisions’, with which I shall deal below, or the exception relating to the public policy of the forum (Articles 9 and 21, respectively, of the Rome I Regulation).

39. The Court has referred to that mechanism in the context of Article 6 of the 1980 Convention, the immediate predecessor of the Rome I Regulation, using statements that are applicable to the current article.¹⁸

40. The conflict rules in Article 8 of the Rome I Regulation constitute *lex specialis* with respect to Articles 3 and 4 thereof.¹⁹ Their aim is to balance the interests of employees and employers,²⁰ by characterising the law chosen by the parties as the preferential connecting factor (paragraph 1). The law thus chosen also applies where employees perform their work in another Member State, with the caveat I shall describe next.

41. However, the agreement on the law applicable as a result of that choice must not be detrimental to the employee. To that end, even though the Rome I Regulation does not restrict the range of laws that *may be chosen*,²¹ it guarantees, in the second sentence of Article 8(1), that an employee will not lose the protection afforded to him by mandatory provisions (more specifically, ‘provisions that cannot be derogated from by agreement’) of the law which would have been applicable in the absence of a choice.²²

42. Accordingly, the *minimum* protection ensured is that established by the law which would have governed the contract in the absence of a choice by the parties. That law will be applicable:

- as the law of the country in which (or, failing that, from which) the employee habitually carries out his work in execution of the contract; or
- as the law of the country of the establishment through which the employee was recruited, if the applicable law cannot be determined in accordance with the previous rule;²³ or
- as the law of a country which, in the light of the circumstances, has closer links to the contract than those indicated by the above rules.²⁴

¹⁸ Although there are disparities between the wording of the 1980 Convention and the regulation in force, these do not substantially alter the provision or affect what I am addressing here.

¹⁹ Judgments of 15 March 2011, *Koelzsch* (C-29/10, EU:C:2011:151, paragraph 34); of 15 December 2011, *Voogsgeerd* (C-384/10, EU:C:2011:842; ‘judgment in *Voogsgeerd*’; paragraph 24); and in *Schlecker* (paragraph 22).

²⁰ The article does not merely reflect the aim of favouring the worker. It lays down a sophisticated mechanism which prioritises, as a connecting factor, agreement between the parties and corrects the outcome of that choice, where it is necessary to protect one party, in the light of the law most closely connected to the contract.

²¹ Nor does it do so in relation to consumer contracts, as referred to in Article 6(1). The method of protecting consumers, who are the ‘weak party’ for the purposes of the regulation, is the same as that provided for in respect of employees in Article 8. Both demonstrate similar difficulties when it comes to their implementation. See the Opinion of Advocate General Trstenjak in *Voogsgeerd* (C-384/10, EU:C:2011:564, point 49), in relation to employment contracts, and the proposal for a different application, in respect of consumer contracts, put forward by Advocate General Saugmandsgaard Øe in the Opinion in *Verein für Konsumenteninformation* (C-191/15, EU:C:2016:388, point 100).

²² Judgment in *Voogsgeerd* (paragraph 25).

²³ On the relationship of subsidiarity between that rule and the previous one, derived from the legislature’s intention to guarantee employees *adequate* protection, see the judgment in *Voogsgeerd* (paragraphs 32, 34 and 35).

²⁴ Article 8(4) is not of subsidiary application: it can supplant either of the two previous connecting factors, provided that it is established that there is really a country more closely connected to the contract than that designated using those factors.

43. If the mandatory provisions (in the sense already described) of the legal system which would be applicable in the absence of a choice offer the employee greater protection than those of the legal system chosen, the former provisions will override the latter. The law chosen will continue to be applicable to the rest of the contractual relationship.²⁵

44. Consequently, the operation of the mechanism described involves a three-step approach: (a) identification of the law which would have applied in the absence of a choice; (b) determination, in accordance with that law, of the rules which cannot be derogated from by agreement; and (c) comparison of the level of protection which they afford to the employee with that afforded by the law chosen by the parties.²⁶

45. To judge by the way in which the referring court explains its question, it appears that, in its view, Italian law (in Case C-152/20) and German law (in Case C-218/20) may be the reference points for the comparison with Romanian law which was chosen by the parties.

46. That would be the case because both Italy and Germany are either the place where the work is habitually carried out (Article 8(2) of the Rome I Regulation)²⁷ or the place which is more closely connected with the individual employment contracts (Article 8(4) of the Rome I Regulation).

47. Paragraphs 2 and 4 of Article 8 of the Rome I Regulation are not interchangeable. That was the view taken by the Court of Justice in the judgment in *Schlecker* when it interpreted Article 6 of the 1980 Convention, pointing out that ‘that interpretation is consistent also with the wording of the new provision on the conflict rules relating to contracts of employment, introduced by the Rome I Regulation’.²⁸

48. According to that judgment:

- In the light of the wording and the objective of the provision, first, the court must ‘determine the applicable law by reference to the specific connecting factors under Article 6(2)(a) and (b) respectively, which satisfy the general requirement of predictability of the law and accordingly of legal certainty in contractual relationships’.²⁹
- Second, where it is apparent from the circumstances as a whole that the employment contract is more closely connected with another country, the national court must disregard those factors and apply the law of that other country.³⁰

²⁵ A situation thus arises which is known as ‘dépeçage’, or the application of a number of legal systems to different aspects of the same contractual relationship. The difficulties of adaptation which that situation entails in practice have not deterred the EU legislature: on the contrary, Article 3(1) of the Rome I Regulation provides that *contracting parties themselves* may choose more than one legal system to apply to different parts of the contract.

²⁶ That is how Advocate General Wahl explained it in his Opinion in *Schlecker* (C-64/12, EU:C:2013:241, point 24).

²⁷ On how to identify the country where the work is habitually carried out, within the meaning of Article 8(2), see the judgment of 15 March 2011, *Koelzsch* (C-29/10, EU:C:2011:151, paragraphs 45, 48 and 49), and the judgment in *Voogsgeerd*, (paragraphs 37 to 40).

²⁸ Judgment in *Schlecker* (paragraph 38). The Court dismissed the view that the words ‘more closely connected’ in the regulation have a different force compared with the 1980 Convention, as shown by their inclusion in a separate, independent paragraph of Article 8. That interpretation underpinned the Commission’s proposal which, in addition to separating the text, replaced the *obligation* to derogate from certain laws with *permission* to do so, through use of the verb ‘may’: Proposal for a Regulation of the European Parliament and the Council on the law applicable to contractual obligations (Rome I), COM(2005) 650 final, Article 6(3).

²⁹ Judgment in *Schlecker* (paragraph 35).

³⁰ *Ibid.* (paragraph 36 et seq.).

49. It is not possible, based on the factual details set out in the orders for reference, to give a definite answer on those points. I must therefore confine myself to providing an abstract interpretation of Article 8 of the Rome I Regulation, in the terms I have set out above.

C. The second question

50. This question also concerns the interpretation of the second sentence of Article 8(1) of the Rome I Regulation. The national court asks, in particular, whether the provisions on the minimum wage can be classified as ‘provisions that cannot be derogated from by agreement’.

51. The answer requires an interpretation of the expression cited and a determination of its scope.³¹ Based on that, as some of the parties have pointed out,³² it will fall to the referring court to determine whether, in particular, a specific rule of its own legal system (or, as the case may be, of the legal system of another Member State) is caught by that definition.

1. Wording and objective of the provision

52. The wording of the second sentence of Article 8(1) of the Rome I Regulation is clear: it encompasses provisions which are mandatory for the parties (in other words, not provisions which apply in the absence of other arrangements established by the parties), and from which they cannot derogate.

53. Such provisions do not have to be the same as those which apply ‘by default’, where the parties are unable to reach agreement.³³ The objective of the provision confirms that interpretation: it aims to guarantee a certain level of protection for employees, and not to provide for a system of supplementary law in respect of areas not governed by the individual employment contract.

54. It is possible to state, therefore, that the category of provisions from which the parties cannot derogate includes only those provisions which are capable of being classified as such in a particular legal system and provide specific protection for workers.³⁴

³¹ That wording is also used in Article 3(3) and (4), Article 6(2) and Article 11(5)(b) of the Rome I Regulation. While its meaning is the same in all those provisions, the same cannot necessarily be said of the provisions involved as a whole, since Articles 6(2) and 8(1), in addition to being provisions that may not be derogated from, provide that their aim is the ‘protection’ of consumers and employees respectively. For its part, Article 11 refers exclusively to provisions governing the form of contracts concerning rights in rem or tenancies of immovable property, in force in the law of the place where the property is situated.

³² Observations of the Commission, paragraphs 35 to 37, and of the Finnish Government, paragraphs 21 and 22.

³³ The concept is different, therefore, from that of ‘mandatory statutory or regulatory provisions’ used in other spheres, such as Article 1(2) of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts (OJ 1993 L 95, p. 29) (see, in that connection, judgment of 9 July 2020, *Banca Transilvania*, C-81/19, EU:C:2020:532).

³⁴ The Report on the Convention on the law applicable to contractual obligations, by M. Giuliano and P. Lagarde (OJ 1992 C 327, p. 1; ‘the Giuliano-Lagarde Report’), p. 23, suggested as examples the rules on notice or health and safety at work. In his Opinion in *Schlecker* (C-64/12, EU:C:2013:241, point 34), Advocate General Wahl added the rules relating to the payment of compensation in the case of dismissal. According to Advocate General Trstenjak, in her Opinion in *Voogsgeerd* (C-384/10, EU:C:2011:564, point 50), a provision governing the limitation period for bringing an action for damages for wrongful termination of the contract could also be a provision of that nature.

2. *Origins of the provision*

55. The immediate precursor of the expression ‘provisions that cannot be derogated from by agreement’ can be found in the words ‘rules of the law [of that country]³⁵ which cannot be derogated from by contract’, in Article 3(3) of the 1980 Convention, which also referred to such rules as ‘mandatory rules’.

56. The application of those rules operates as a compromise where the parties choose the law of another country to govern a contract which, at the time of the choice, objectively lacks a connection (or a relevant connection) with more than one legal system. It is, in fact, a purely domestic contract.

57. In those circumstances, which, a priori do not appear to involve ‘a choice between the laws of different countries’, within the meaning of Article 1(1) of the 1980 Convention,³⁶ the conflict is derived from the choice of a foreign law to apply to the contract.

58. Like any choice, one taken in the circumstances described would enable the contracting parties to circumvent completely the law which would otherwise have been applicable. That possibility of circumvention gave rise to some discussion during the negotiations for the Convention: the arguments in favour of permitting a choice of law in purely domestic contracts were countered by the equally reasonable fear of abuse and fraud.³⁷

59. The final text opted for the compromise that I have already described: (a) on the one hand, it permits an agreement on the applicable law; and (b) on the other hand, it retains the application of provisions in force in the country with which all the elements of the contract are connected at the time of the choice, which the parties could not have derogated from by agreement because of their mandatory nature.

60. In the case of consumer contracts and individual employment contracts, governed, respectively by Articles 5 and 6 of the 1980 Convention, the presence of a ‘weak’ contracting party made it necessary for those who negotiated the Convention to modify the freedom of choice enshrined in Article 3.

61. The option included in Article 6 of the Convention permitted a choice while also limiting it, by incorporating the method introduced by Article 3(3). Moreover, the solution is adapted to the context:

- as regards the law whose mandatory provisions must be complied with in any event;³⁸
- and as regards the limits of the involvement of that law, which does not encompass all the mandatory rules but rather only those for the protection of the weak party.

62. The use in Article 6(1) of the 1980 Convention of the words ‘mandatory rules’ should not have created any uncertainty because, pursuant to Article 3(3), the term is equivalent to ‘rules of the law of that country which cannot be derogated from by contract’.

³⁵ The country in which all the other elements of the situation are located at the time of the choice.

³⁶ Identical to Article 1(1) of the Rome I Regulation.

³⁷ The Giuliano-Lagarde Report, p. 17.

³⁸ Those indicated in Article 6(2).

63. However, using that method, absolutely mandatory rules, or ‘overriding mandatory provisions’, governed by Article 7 of the Convention, would not be applicable.

3. *‘Provisions that cannot be derogated from by agreement’ and ‘overriding mandatory provisions’*

64. A systematic analysis is useful for defining the category of ‘provisions that cannot be derogated from by agreement’. It requires a distinction to be drawn between these and ‘overriding mandatory provisions’, to which Article 9 of the Rome I Regulation refers by reproducing (with certain modifications) Article 7 of the 1980 Convention.³⁹

65. Overriding mandatory provisions, in so far as they cannot be circumvented ‘irrespective of the law otherwise applicable to the contract under this Regulation’,⁴⁰ render inoperative (within their own sphere of application) the option chosen by the parties in their contract when designating a foreign law.

66. The seriousness of that consequence explains the restrictions which the Rome I Regulation imposes on the category of overriding mandatory provisions:⁴¹

- Only the overriding mandatory provisions of the forum can be fully applicable;⁴²
- Effect may be given to the overriding mandatory provisions of the State of performance of the contract but only in so far as those overriding mandatory provisions render the performance of the contract unlawful.⁴³

67. By contrast, rules ‘which cannot be derogated from by agreement’, as referred to in Article 3(3) and (4), Article 6(2), Article 8(1) and Article 11(5)(b) of the Rome I Regulation, are those which it is not possible to circumvent in a domestic contract; those rules may, however, be circumvented in an international contract, through the choice of the law which is to govern the contract.

68. In such a case, the non-mandatory provisions of the law chosen and the provisions of that law that cannot be derogated from are applicable, unless (and to the extent that) the Rome I Regulation indicates otherwise, which occurs by way of exception.⁴⁴

³⁹ In connection with the 1980 Convention, the judgment of 17 October 2013, *Unamar* (C-184/12, EU:C:2013:663, paragraph 47), defined overriding mandatory provisions (public order legislation) as ‘national provisions compliance with which has been deemed to be so crucial for the protection of the political, social or economic order in the Member State concerned as to require compliance therewith by all persons present on the national territory of that Member State and all legal relationships within that State ...’. Article 9 of the Rome I Regulation codifies that definition.

⁴⁰ Article 9(1), *in fine*.

⁴¹ Judgment of 18 October 2016, *Nikiforidis* (C-135/15, EU:C:2016:774, paragraph 42 et seq. and the operative part): ‘Article 9(3) of the ... Regulation ... [precludes] overriding mandatory provisions other than those of the State of the forum or of the State where the obligations arising out of the contract have to be or have been performed from being applied, as legal rules, by the court of the forum, but [does not preclude] it from taking such other overriding mandatory provisions into account as matters of fact in so far as this is provided for by the national law that is applicable to the contract pursuant to the regulation.’

⁴² Pursuant to Article 9(2) of the Rome I Regulation, that regulation does not restrict the application of such provisions of the law of the forum but nor does it require their application.

⁴³ Article 9(3) of the Rome I Regulation.

⁴⁴ As in the articles cited in point 67 of this Opinion.

4. *Identification of the provisions from which the parties cannot derogate by agreement*

69. In accordance with EU law, national authorities decide in which areas, and on what grounds, a provision is to be rendered mandatory and impossible to derogate from by agreement between the parties.

70. In order to identify whether or not a national provision is mandatory, it is necessary to interpret that provision, a task in respect of which the Rome I Regulation does not provide precise rules, apart from stating that ‘overriding mandatory provisions’ should be construed more restrictively than ‘provisions which cannot be derogated from by agreement’.⁴⁵

71. The referring court will therefore have to identify whether a provision is mandatory or non-mandatory in accordance with the usual criteria for interpretation, albeit by projecting its analysis from the perspective of the law from which the provision examined originates, which may be a foreign law.

72. Without seeking to supplant the referring court for the purposes of that assessment, in view of the circumstances pertaining in these cases, I believe that it is necessary to point out that:

- In relation to individual employment contracts, the origin or source of a rule does not necessarily reveal whether that rule is mandatory or non-mandatory. It is possible that, in addition to being found in the law in the strict sense, mandatory rules may also be found in other texts that are stated to be of general application and which are recognised as having equivalent force.⁴⁶
- Rules concerning a minimum wage serve, in States which have such rules, to protect workers and, by their very nature, it should not be possible to derogate from them by agreement between the parties, to the detriment of workers.
- As regards Member States which have adopted rules on a minimum wage, the mandatory nature of those rules is apparent, indirectly, from the case-law of the Court on the subject of Article 3 of Directive 96/71, the aim of which is to ensure for posted workers ‘that a nucleus of mandatory rules for minimum protection [of the host Member State] are observed’.⁴⁷
- Those mandatory rules applicable to certain terms and conditions of work and employment specifically include references to minimum rates of pay.

73. It should be recalled, however, that the Rome I Regulation is of ‘universal application’, pursuant to Article 2 thereof,⁴⁸ from which it follows that the provisions that cannot be derogated from for the purposes of the second sentence of Article 8(1) may be those of a third country.

⁴⁵ Recital 37 of the Rome I Regulation.

⁴⁶ In Case C-152/20, the parties argued that the Italian provisions contained in a collective agreement were applicable.

⁴⁷ Judgment of 12 February 2015, *Sähköalojen ammattiliitto*, C-396/13, EU:C:2015:86, paragraph 29. Legal literature discusses whether national provisions implementing that ‘nucleus of protection’, intended for posted national and foreign workers, should be framed not only as mandatory within the meaning of Article 8 of the Rome I Regulation but also as ‘overriding mandatory provisions’ within the meaning of Article 9(1). See Piir, R., ‘Safeguarding the posted worker. A private international law perspective’, *European Labour Law Journal*, 2019, pp. 101-115, in particular pp. 111 and 112.

⁴⁸ ‘Any law specified by this Regulation shall be applied whether or not it is the law of a Member State.’

74. In any event, no single definition of ‘minimum wage’ exists at EU level, nor is there any obligation to establish one.⁴⁹ In the context of Directive 96/71, the lack of a uniform definition led to the replacement of the term ‘minimum rates of pay’ by the term ‘remuneration’ in Article 3(1), first subparagraph, point (c) of that directive, as amended by Directive (EU) 2018/957.⁵⁰

75. Therefore, it cannot be ruled out that items or concepts from which, in one Member State, it is not possible to derogate by agreement between the parties, because they come within that definition, may be derogated from in another Member State.⁵¹

76. However, I must stress that, even if it is confirmed that a Member State’s rules on the minimum wage cannot be derogated from, the application of those rules is not automatic, for there must be a comparison between the level of protection afforded to workers by those rules and the level of protection afforded by the equivalent rules of the law chosen.

D. The third question

77. The third question is not exactly the same in the two references for a preliminary ruling:

- In Case C-152/20, the national court takes the view that the reference to the Romanian Labour Code in the contracts at issue equates to the choice of Romanian law by the parties. It asks whether Article 3 of the Rome I Regulation precludes the domestic legislation which lays down an *obligation* to include such a choice-of-law clause in individual employment contracts.
- In Case C-218/20, which is based on the same premiss, the question concerns the choice of law by the parties when it is *well known* that the employer determines unilaterally the content of individual employment contracts.

78. Notwithstanding the different formulation, the argument underlying both questions is the same: whether a choice, in the terms described, can be deemed to be free, for the purposes of Article 3 of the Rome I Regulation (and also, by extension, of Article 8 thereof).

79. In order to address this matter, I shall examine: (a) the viability in general of the implicit choice of law in the Rome I Regulation; and (b) whether, in the circumstances at issue, it is possible to find that that method of choice of law has occurred.

80. First, I must point out that the documents submitted to the Court do not appear to suggest that the applicant workers actually questioned the application of Romanian law as the law chosen.

81. As I have already observed, the national court acknowledges (in the first and second questions) that the parties chose Romanian law as the law applicable to their contracts. Having accepted that proposition, the dispute is solely concerned with the limits of that choice as regards the remuneration of employees whose work is carried out in Italy and Germany.

⁴⁹ As regards the minimum wage in ‘social Europe’, see the Proposal for a Directive of the European Parliament and of the Council on adequate minimum wages in the European Union, COM(2020) 682 final, of 28 October 2020.

⁵⁰ Directive of the European Parliament and of the Council of 28 June 2018 amending Directive 96/71/EC concerning the posting of workers in the framework of the provision of services (OJ 2018 L 173, p. 16). I refer to my Opinion in *Hungary v Parliament and Council* (C-620/18, EU:C:2020:392, and to the judgment of 8 December 2020 in that case (EU:C:2020:1001).

⁵¹ The referring court does not specify which elements make up the ‘minimum wage’ in Romanian law, or what, in its view, the point of comparison is in the Italian and German systems.

82. It can be inferred from the orders for reference that it is the national court itself which calls into question the choice of Romanian law. Further, it does so not because of the uncertainty generated by the wording included in the contract but because of doubts regarding whether it is a *genuine* choice as opposed to an *imposed* choice.

1. *Implicit choice of law in the Rome I Regulation*

83. In line with the 1980 Convention, the Rome I Regulation unifies the rules (conflict-of-law provisions) which are used to determine, before the courts of any Member State,⁵² the national law applicable to a contract in the event of a conflict of laws.

84. The Rome I Regulation thus establishes a system which offers predictability as regards the outcome of litigation and legal certainty as to the law applicable. Furthermore, it ultimately facilitates the movement of judgments between Member States in the interests of the proper functioning of the internal market.⁵³

85. The cornerstone of that system is that the parties who conclude a contract may designate (choose) the law applicable.⁵⁴ Article 3 of the Rome I Regulation enshrines freedom of choice in circumstances involving a conflict of laws as a rule of principle for all contracts. It also lays down the body of legal rules applicable to that choice,⁵⁵ which are both general in nature and specific to certain contractual relationships.⁵⁶

86. The article is generous when it comes to the form of the choice of law: it can be both explicit and implicit. An implicit choice must be ‘clearly demonstrated by the terms of the contract or the circumstances of the case.’⁵⁷

87. No list of criteria exists for ‘determining whether a choice of law has been clearly demonstrated.’⁵⁸ Apart from a reference to the choice of forum as an indication of the choice of law,⁵⁹ the Rome I Regulation does not give examples of other evidence that the parties intended to choose implicitly the law applicable to their contract.

⁵² With the exception of Denmark.

⁵³ Recital 6 of the Rome I Regulation.

⁵⁴ Judgment of 17 October 2013, *Unamar* (C-184/12, EU:C:2013:663, paragraph 49).

⁵⁵ The choice is governed *directly* by substantive provisions, as occurs, in relation to its form, scope and the time when it is made, in Article 3(1) and (2), or *indirectly*, by stating, in Article 3(5), how to identify the national law to be used to assess the existence and validity of the consent as to the choice, if these are disputed.

⁵⁶ The rules are modified to reflect special features of the contractual relationship in Article 5(2) (contract for the carriage of passengers), Article 6(2) (certain contracts concluded by consumers under certain conditions), Article 7(3) (certain insurance contracts), and Article 8(1) (individual employment contracts).

⁵⁷ See, however, the requirements as to the form of the choice-of-law clause in other instruments: for example, Article 7 of Council Regulation (EU) No 1259/2010 of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation (OJ 2010 L 343, p. 10), and Article 23 of Council Regulation (EU) 2016/1103 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes (OJ 2016 L 183, p. 1).

⁵⁸ Recital 12 of the Rome I Regulation.

⁵⁹ *Ibid.*

2. Choice of law in these two disputes

88. A clause in an individual employment contract stipulating that that contract is to be *supplemented* by the terms of a national provision⁶⁰ could, in principle, be evidence of a choice of law.

89. However, as the Commission points out,⁶¹ that clause could also be interpreted as merely an expression of the intention to incorporate into the contract a number of substantive provisions of law having identical force to that of any other contractual clause ('incorporation by reference').⁶²

90. It is for the national court to determine what the parties' real intention was in each case. In the context of that task, I believe that a clause like that included in the contracts at issue is not sufficient to infer that an *unequivocal* choice of law was made.⁶³

91. For that clause to be construed as an implicit expression of the parties' intention to choose the law governing their relationship, it must be supported by other information,⁶⁴ particularly where certain important elements of the contract, such as the place of performance of the main services, appear to point to a different law.

92. The individual employment contracts with which these disputes are concerned are in a pre-formulated standard form, the use of which is required by Order No 64/2003. The (alleged) choice-of-law clause is one of the pre-formulated terms in that standard-form contract.

93. Nothing in the Rome I Regulation precludes the choice of law from being set out in a contract as a term that has not been individually negotiated but rather included, by default, in a standard-form contract common in the sector concerned.⁶⁵

94. Any uncertainties which may arise concerning the existence and validity of consent to a clause of that kind must be resolved in accordance with the law that is hypothetically applicable, that is, the law which would apply if the choice were valid: the same law, therefore, as that which appears to have been chosen.⁶⁶

95. A different, and naturally preliminary, question is whether a choice-of-law clause which is included in a contract as a result of a mandatory legal provision or as a result of a unilateral decision by one party to the contract is valid.

96. The Rome I Regulation's answer to that question requires a distinction to be drawn between the two scenarios.

⁶⁰ In these cases, the contracts are supplemented by the Romanian Labour Code.

⁶¹ Paragraph 20 et seq. of its written observations.

⁶² The technique of 'incorporation by reference' constitutes an exercise of *material* freedom of choice (and not freedom of choice in circumstances involving a *conflict* of laws). The Rome I Regulation refers to it in recital 13: the parties may '[incorporate] by reference into their contract a non-State body of law or an international convention'.

⁶³ The fact that reference is made generally to a 'code' and not to a number of individual provisions does not alter my view; what matters is the weight or significance that the provisions expressly cited in the contract possess in a legal system as a whole.

⁶⁴ As I have observed, there is no closed list of factors indicative of a choice. Naturally, such factors should be related to the contract and to the circumstances in which it is concluded and performed. In addition to the choice of forum, referred to above, examples are the language of the contract (in particular, the use of legal terminology specific to a particular legal system); the places of conclusion of the contract and performance of the contractual obligations; the existence of previous contracts between the parties, to which a specific law was applied; and (as occurs in these cases) the use of a standard form associated with a particular legal system.

⁶⁵ See points 103 to 106 of this Opinion.

⁶⁶ Article 3(5), which refers to Article 10(1) of the Rome I Regulation.

(a) *Clause imposed ex lege*

97. The referring court describes the reference to the Romanian Labour Code in the contracts at issue as the result of national legislation which provides that it ‘must *necessarily* be included in individual employment contracts’ (Case C-152/20).

98. That being so, there has not been a *free choice* of law by the parties to the contract, for the purposes of Article 3 of the Rome I Regulation. A clause of that kind, which is *imposed* by law, is incompatible with the notion of *freedom of choice*.

99. That does not appear to be the only interpretation of the domestic provision. In its observations, the Romanian Government states that the parties to an individual employment contract do not have an *obligation* to choose Romanian law as the applicable law. It is only if the parties make that freely agreed choice of law that they are required to comply with Order No 64/2003 and to conclude their contract in line with the standard-form contract annexed thereto.

100. In accordance with that interpretation, the inclusion in the contract (using the standard form) of the clause stipulating the supplementary application of the Labour Code is the result of the prior, free choice made by the parties, who have designated Romanian law to govern their contractual relationship. The inclusion of the clause also provides evidence of that choice.

101. It is for the referring court and not the Court of Justice to interpret domestic law. Only if the second of the two interpretations set out applies will it be possible to construe the clause as an exercise of freedom of choice by the parties, for the purposes of Article 3 of the Rome I Regulation.

(b) *Clause pre-formulated by the employer*

102. There are other aspects to the question if the clause is inserted in the contract not pursuant to a statutory requirement but rather as the result of a decision of the employer, to which the third question in Case C-218/20 specifically refers.

103. Employment contracts tend to be pre-formulated by employers in a standard form. The inclusion in such contracts of a clause choosing the law of the State (and of the forum) where the contract is concluded facilitates the administration of employment relationships and reduces the costs of legal information.

104. Freedom of choice – which, in principle, applies to both parties – is, in the case of a pre-formulated clause in an individual employment contract (which, for its part, may include the stipulations of a collective agreement), liable to be exercised by the provision of consent, even where there has not genuinely been a prior *negotiation* of the content of the contract.⁶⁷

⁶⁷ I concur, therefore, with the Commission’s position when it points out (paragraph 19 of its written observations) that the insertion of a pre-formulated choice-of-law clause by the employer in a standard-form employment contract is permissible and does not conflict with the requirement of genuine consent in accordance with Article 3 of the Rome I Regulation.

105. The application of Article 3 of the Rome I Regulation to individual employment contracts cannot disregard that fact. Save in exceptional cases, most employees lack de facto the power to compel the employer to choose the law applicable to their individual contracts. The *choice* of law by those employees therefore becomes the *acceptance*, through their consent, of the law predetermined by the employer.

106. That occurs also in the relatively parallel area of consumer contracts, to which Article 6 of the Rome I Regulation applies. As far as those contracts are concerned, the Court has not objected to ‘a pre-formulated term on the choice of the applicable law designating the law of the Member State in which the seller or supplier is established’, provided that it is not unfair.⁶⁸

V. Conclusion

107. In the light of the foregoing considerations, I propose that the following replies be given to the Tribunalul Mureş (Regional Court, Mureş, Romania):

- (1) Article 8 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 interpreted as meaning that, once the law governing the individual employment contract has been chosen, any other laws which, in the absence of a choice, would have been applicable in accordance with Article 8(2), (3) or (4) are excluded, provided that the law chosen offers the worker a level of protection equal to or higher than that offered by the provisions that cannot be derogated from by agreement of the law which would have applied in the absence of a choice.
- (2) The rules on the minimum wage of the country where the employee has habitually carried out his work can, in principle, be classified as ‘provisions that cannot be derogated from by agreement under the law that, in the absence of choice, would have been applicable’, within the meaning of the second sentence of Article 8(1) of Regulation No 593/2008. Whether those rules take precedence will depend on how they are formulated in the law concerned, which is a matter for the referring court to examine.
- (3) Articles 3 and 8 of Regulation No 593/2008 must be interpreted as meaning that the explicit or implicit choice of the law applicable to an individual employment contract must be free for both parties, which will not occur if a national provision requires the inclusion in that contract of a choice-of-law clause. However, those articles do not preclude such a clause from being pre-formulated in the contract, as a result of a decision of the employer, to which the employee consents.

⁶⁸ The judgment of 28 July 2016, *Verein für Konsumenteninformation* (C-191/15, EU:C:2016:612), echoes, in paragraph 67, the Opinion of Advocate General Saugmandsgaard Øe in that case (C-191/15, EU:C:2016:388). A pre-formulated term will be unfair ‘in so far as it displays certain specific characteristics inherent in its wording or context which cause a significant imbalance in the rights and obligations of the parties’.