

The London School of Economics and Political Science

The International Employment Contract:

Ideal, Reality and Regulatory Function of European Private

International Law of Employment

Uglješa Grušić

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DECLARATION

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ABSTRACT

Private international law has traditionally been perceived as a field of law concerned with resolving individual private disputes and achieving private justice and fairness in individual cases. This dissertation challenges this view by examining the systemic function of European private international law of employment, one of allocating and protecting regulatory (i.e. legislative and adjudicatory) authority of states in the field of labour law, thus maintaining and managing the diversity of European national labour law systems and safeguarding the objectives of uniform and harmonised EU employment legislation. This dissertation also explores the changes that the ‘Europeanization’ of private international law of employment has brought about in the traditional rules and perception in this field of law in England. In addition to introducing special rules of jurisdiction in employment matters that had not existed before, the European private international law instruments have largely merged the traditionally perceived contractual, statutory and tortious claims into one type of claim for choice-of-law purposes, thereby also abolishing concurrent causes of action. The conceptualisation of this field of law in terms of its regulatory function reveals something about the nature of private international law as a whole. The fact that European private international law of employment performs a regulatory function is a piece of evidence for the proposition that the division between the ‘private’ and the ‘public’, traditionally perceived as embedded in the foundations of the discipline and even expressed in its very name, has faded away.

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LIST OF ABBREVIATIONS

1988 Lugano Convention	Convention on jurisdiction and the enforcement of judgments in civil and commercial matters done at Lugano on 16 September 1988 [1988] OJ L319/9
2007 Lugano Convention	Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters done at Lugano on 30 October 2007 [2009] OJ L147/1
Brussels I	Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2001] OJ L12/1
Brussels Convention	Convention on jurisdiction and the enforcement of judgments in civil and commercial matters done at Brussels on 27 September 1968 [1972] OJ L299/32
CA	Court of Appeal
CJJA 1982	Civil Jurisdiction and Judgments Act 1982
CJEU	Court of Justice of the European Union
EAT	Employment Appeal Tribunal
EC	European Community
EEC	European Economic Community
ERA 1996	Employment Rights Act 1996
EReLA 1999	Employment Relations Act 1999
EFTA	European Free Trade Area
ET	Employment Tribunal
EU	European Union

EqA 2010	Equality Act 2010
ILO	International Labour Organisation
ITF	International Transport Workers' Federation
HL	House of Lords
HSWA 1974	Health and Safety at Work Act 1974
NMWA 1998	National Minimum Wage Act 1998
PIL	Private international law
PTWR 2000	Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000
PWD	Directive 96/71/EC 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 [1997] OJ L18/1
Rome I	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) [2008] OJ L177/6
Rome II	Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II) [2007] OJ L199/40
Rome Convention	Convention on the law applicable to contractual obligations opened for signature in Rome on 19 June 1980 [1980] L266/1
RRA 1976	Race Relations Act 1976
SDA 1975	Sex Discrimination Act 1975
TEC	Treaty Establishing the European Community (consolidated version) [2006] OJ C321E/1

TFEU	Treaty on European Union and Treaty on the functioning of the European Union (consolidated version) [2010] OJ C83/49
TULR(C)A 1992	Trade Union and Labour Relations (Consolidation) Act 1992
UK	United Kingdom
US	United States of America
WTR 1998	Working Time Regulations 1998

I INTRODUCTION

International employment contracts, i.e. individual employment contracts that are connected to more than one country, are a common occurrence. People migrate from one country to another in search of employment. Workers commute to a place of work in a neighbouring country. Employers send their employees, either temporarily or permanently, to a foreign branch, subsidiary, affiliate or place of work. Companies seek out workers across borders. Employees are ‘hired out’ to foreign companies. There are workers whose occupations are ‘international’ by their very nature: commercial representatives covering territories of several countries, international transport workers, workers on offshore installations etc.

The diversity of factual patterns under which international employment relations arise suggests how widespread a social phenomenon they are, constantly growing in number and significance. This is a consequence of globalisation and the resulting internationalisation of the production of goods and supply of services, rise of transnational corporations, and increased international mobility of workers. Looking particularly at the European Union (‘EU’), the freedom of movement of workers, freedom of establishment and freedom to provide services¹ ensure there are no legal obstacles within the EU to the creation of factual patterns referred to above. Indeed, the growing number and significance of international employment relations is reflected in the recent surge in the number of judgments concerning such relations rendered by the Court of Justice of the EU (‘CJEU’) and the courts of the United Kingdom.

¹ Arts.45, 49 and 56, respectively, of the Treaty on the Functioning of the EU (consolidated version) [2010] OJ C83/47 (‘TFEU’) (ex Arts.39, 43, 49, respectively, of the Treaty Establishing the European Community (consolidated version) [2006] OJ C321E/1 (‘TEC’)).

A truly international legal regulation of international employment relations does not exist. International organisations such as the United Nations, International Labour Organisation ('ILO') and Council of Europe have not achieved and cannot be expected to achieve in the foreseeable future a worldwide unification of labour laws. The EU has some competence in the social sphere.² But apart from the areas of free movement of workers and equality, EU employment legislation is contained in directives which do not lead to real uniformity of the Member States' labour laws, since national implementations of those directives often differ. National regulation of international employment relations therefore remains of primary importance both at the international and EU level. National labour law systems remain widely divergent in their respective regulatory objectives, regulatory techniques and content. These typically reflect the unique social, political and economic textures of a particular country.

Owing to the lack of uniformity, private international law ('PIL') assumes a central role. It goes without saying that the outcome of a particular employment dispute may depend on the applicable law, competent court, and the possibility of recognition and enforcement of judgments abroad. Legal uncertainty arising from divergent national regulation of those matters could create obstacles to the fundamental economic Treaty freedoms. PIL rules concerning employment have therefore been unified in the EU and are contained in the following instruments:

- Regulation 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters ('Brussels I'),³ superseding the 1968 Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters ('Brussels Convention');⁴ closely related

² Title X TFEU, in particular Art.153 (ex Art.137 TEC).

³ [2001] OJ L12/1.

⁴ [1972] OJ L299/32, implemented in the UK by the Civil Jurisdiction and Judgments Act 1982 ('CJJA 1982').

are the 2007 Lugano Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters ('2007 Lugano Convention'),⁵ superseding the 1988 Lugano Convention on jurisdiction and the enforcement of judgments in civil and commercial matters ('1988 Lugano Convention');⁶

- Regulation 593/2008 on the law applicable to contractual obligations ('Rome I'),⁷ superseding the 1980 Rome Convention on the law applicable to contractual obligations ('Rome Convention');⁸
- Regulation 864/2007 on the law applicable to non-contractual obligations ('Rome II');⁹
- Directive 96/71/EC concerning the posting of workers in the framework of the provision of services ('Posted Workers Directive' or 'PWD').¹⁰

European PIL of employment pursues the objective of protection of employees as weaker contractual parties. Recital 13 Brussels I states: 'In relation to...employment, the weaker party should be protected by rules...more favourable to his interests than the general rules provide for.' In essentially identical words, Recital 23 Rome I also endorses the objective of employee protection. Somewhat differently, Recital 5 PWD speaks of 'a climate of fair competition and measures guaranteeing respect for the rights of workers'. At least regarding Brussels I and Rome I, the goal seems clear. The special PIL rules concerning employment should grant protection to the employee *and* be more favourable to his interests than the general rules. Such view of the objective of employee protection, focused on the protection and benefit that individual employees should receive, is shared by the CJEU. The Court has consistently held that jurisdiction

⁵ [2009] OJ L147/1, implemented in the UK by CJJA 1982.

⁶ [1988] OJ L319/9, implemented in the UK by CJJA 1982.

⁷ [2008] OJ L177/6.

⁸ [1980] OJ L266/1, implemented in the UK by the Contracts (Applicable Law) Act 1990.

⁹ [2007] OJ L199/40.

¹⁰ [1997] OJ L18/1.

should be given to the courts for the place of work ‘as that is the place where it is least expensive for the employee to commence or defend court proceedings’.¹¹ Furthermore, in explaining the meaning of the objective of employee protection, the Court has often cited with approval¹² the following part of the Giuliano/Lagarde Report accompanying the Rome Convention:

‘the question was one of finding a more appropriate arrangement for matters in which the interests of one of the contracting parties are not the same as those of the other, and at the same time to secure thereby more adequate protection for the party who from the socio-economic point of view is regarded as the weaker in the contractual relationship.’¹³

It therefore seems to be clear that the interests of employees in minimising their litigation costs and maximising their welfare hold sway over the competing interests of employers. Employers engaged in international employment would arguably achieve the greatest business efficiency if all disputes with their employees were resolved in their own courts and by application of their own laws. But European PIL does not permit this. To protect individual employees, Brussels I and Rome I restrict party autonomy and mandate the jurisdiction of the courts and application of the law considered most favourable for the employee.

Such an *individualistic* view of the objective of employee protection fits in well with the traditional conception of PIL as a field of law concerned with resolving individual private disputes and achieving private justice and fairness in individual cases. Thus, in the introductory pages of their treatises, the authors of *Dicey, Morris and Collins on the Conflict of Laws* and *Cheshire, North & Fawcett: Private International*

¹¹ Most recently in Case C-437/00 *Pugliese* [2003] ECR I-3573, [18].

¹² Most recently in Case C-29/10 *Koelzsch* [2011] ECR 00000, [40].

¹³ [1980] OJ C282/1, 25.

Law find justification for PIL in that it implements ‘the reasonable and legitimate expectations of the parties to a transaction or an occurrence’,¹⁴ in the need to avoid ‘great injustice and inconvenience’ that would arise if English courts refused to apply foreign law and recognise and enforce foreign judgments in appropriate cases,¹⁵ and in the ‘desire to do justice’ to the parties.¹⁶ The statements of purpose found in the Recitals to Brussels I and Rome I and in the CJEU case-law disclose the intention to achieve justice and fairness in individual international employment cases by favouring the interests of employees over those of employers. Many authors writing about European PIL of employment talk about employee protection in similar terms.

But such a bipolar view oversimplifies the structure and nature of the interests involved in international employment relations. By focusing on the relative positions of the parties to such relations, this view does not seem sufficiently to take into account the public interests involved. Furthermore, by focusing exclusively on the protection of employees as weaker parties, this view fails to consider other objectives that the modern employment regulation pursues such as greater economic efficiency and competitiveness of businesses. On the one hand, countries have an interest in safeguarding their existing regulatory objectives, regulatory techniques, and levels of terms and conditions of employment. States are thus often interested in applying their labour legislation to everyone carrying out work within their territory. On the other hand, the fact that the regulation of employment primarily takes place at national level in today’s globalised world means that employment legislation is one of the factors on the basis of which countries compete for attracting investments and thereby achieving greater prosperity of their citizens. States are thus often interested in the application of their employment legislation to economic operators established within their territory,

¹⁴ L. Collins (gen ed), *Dicey, Morris and Collins on the Conflict of Laws* (London, 14th ed, 2006), [1-005].

¹⁵ *ibid* [1-006]-[1.007].

¹⁶ J.J. Fawcett and J.M. Carruthers, *Cheshire, North & Fawcett: Private International Law* (Oxford, 14th ed, 2008) 5.

even in some situations where they operate abroad and employ workers abroad to that end. Not infrequently, the interests of countries clash, which is particularly visible in the EU where a significant gap exists between the level of wages and other terms and conditions of employment among Member States, and where both the freedom of establishment and freedom to provide services are guaranteed.

What does the objective of employee protection really entail in European PIL? Should the private interests of the parties to international employment relations be the exclusive or even prevalent concern? What role should the public interests involved have in the process of making and interpreting the special PIL rules concerning employment? These questions define the first theme of this dissertation. The argument advanced here is that the individualistic view of the objective of employee protection, seemingly adopted by the drafters of the European PIL instruments and the CJEU, gives an incomplete picture of European PIL of employment. The goal of this field of law should not be to favour the interests of employees unreservedly over those of employers, but to adequately allocate and safeguard regulatory (i.e. legislative and adjudicatory) authority of states in the field of labour law, primarily in the EU context. Differences among the Member States' labour laws are not accidental. They reflect a conscious decision to refrain from complete unification of labour law in Europe, thereby respecting national peculiarities. A mechanism is needed to maintain and manage the diversity of the national labour law systems existing in the EU and at the same time to safeguard the objectives of uniform and harmonised EU employment legislation. European PIL of employment is that mechanism. The argument advanced here is not new. Other authors have pointed to the regulatory function of PIL.¹⁷ This dissertation

¹⁷ U. Liukkunen, 'Managing Legal Diversity in the EU: The Case of Subject-Specific Conflicts Rules' (2012) 4 *European Review of Private Law* 1045; R. Michaels, 'New European Choice-of-Law Revolution' (2007-2008) 82 *Tulane Law Review* 1607; A. Mills, *The Confluence of Public and Private International Law: Justice, Pluralism and Subsidiarity in the International Constitutional Ordering of Private Law* (Cambridge, 2009); H. Muir Watt, 'Choice of Law in Integrated and Interconnected Markets:

attempts to contribute to this debate by focusing on the conceptualisation of one particular area of PIL, that of employment, in terms of its regulatory function. This, in turn, is expected to reveal something about the nature of the discipline as a whole. If European PIL of employment indeed performs a regulatory function, then that is another piece of evidence supporting the proposition that the division between the ‘private’ and the ‘public’, traditionally perceived as embedded in the foundations of the discipline and even expressed in its very name, is fading away.

The purpose of this dissertation is not to be primarily an exploration of PIL theory. There is a second theme concerning the content of European PIL of employment. This dissertation therefore builds upon the path-breaking work by MERRETT.¹⁸ If European PIL of employment has a regulatory function, how well is it performing this task? To answer this question, a detailed descriptive and normative analysis of the concrete European PIL rules concerning employment is required. The insights obtained by exploring the first theme provide the necessary theoretical framework. It is shown that the rules concerning employment of the European PIL instruments listed above have certain shortcomings that could be remedied in the future. The rules of Brussels I, Rome I and Rome II seem to require some, largely technical, changes. But the interaction between those instruments and the fundamental economic Treaty freedoms, largely regulated by PWD, is a reason for concern. As things stand, service providers from Member States with relatively low levels of terms and conditions of employment that post workers to affluent Member States for the purpose of providing services there remain by and large subject to labour legislation of their home countries. They must comply only with a limited range and type of the host Member State

A Matter of Political Economy’ (2002-2003) 9 *Columbia Journal of European Law* 383; H. Muir Watt, ‘European Integration, Legal Diversity and the Conflict of Laws’ (2004-2005) 9 *Edinburgh Law Review* 6; R. Wai, ‘Transnational Liftoff and Juridical Touchdown: The Regulatory Function of Private International Law in an Era of Globalisation’ (2002) 40 *Columbia Journal of Transnational Law* 209.

¹⁸ L. Merrett, *Employment Contracts in Private International Law* (Oxford, 2011).

employment standards, and are thus capable of undercutting local competitors. Whether such downward pressures on the host Member State labour law systems are acceptable goes to the core of the question of what social model is best for Europe. Being a cause of the problem of posting of workers in Europe, can European PIL of employment be a part of the solution?

The ‘Europeanization’ of PIL of employment necessarily leads to significant changes in the traditional rules and perceptions in this field of law in individual Member States. Whereas European PIL of employment is concerned with maintaining and managing the diversity of European national labour law systems and safeguarding the objectives of uniform and harmonised EU employment legislation, many national PIL regimes traditionally dealt solely with protecting their own regulatory objectives, regulatory techniques and levels of employment standards. But Member States cannot pursue purely domestic interests anymore. They must cooperate to achieve the supranational objectives of European PIL of employment. The extent of the impact of the European regime on English conflict of laws of employment forms the third theme of this dissertation, thus drawing upon the work by MERRETT and other English scholars. Although the focus here is on the law of England and Wales, the discussion and the conclusions reached are also potentially relevant for the laws of Scotland and Northern Ireland.

European PIL of employment does not share the logic of the traditional English approach to choice of law and conflict of jurisdictions in employment matters. Brussels I, with its special jurisdictional rules concerning employment, is an obvious example of the changes brought about in English conflict of laws. Rome I and Rome II seem to have an even greater, but much subtler, impact. Whereas in English conflict of laws all employment claims fall into three basic categories for choice-of-law purposes, namely

contractual, statutory and tortious claims, the two Regulations recognise only two categories: claims based on breach of a contractual obligation, triggering the application of Rome I, and claims based on breach of a non-contractual obligation, triggering the application of Rome II. The conceptual differences between English conflict of laws and European PIL in this area raise complex difficulties. A central question is, for example, how traditionally perceived statutory claims, which in English conflict of laws are understood as not being subject to choice-of-law rules but as defining their own scope of application, fit within the ‘European’ approach? Given that the two Regulations cover all obligations, it seems that the choice-of-law process must have some impact on resolving the question of whether an employee engaged in international employment can claim under a statute forming part of English law. Furthermore, the notions of contractual and non-contractual obligations for the purposes of the two Regulations do not necessarily correspond to the traditional English concepts of contract and tort. Some of the traditionally perceived tortious claims might have to be classified as contractual for the purposes of Rome I. The same goes for some of the traditionally perceived contractual claims. Depending on the extent of the changes, i.e. on whether EU law still allows English courts to pursue the traditional approach or whether it mandates a radically different approach that largely merges contractual, statutory and tortious claims into one type of claim for choice-of-law purposes, one could talk either of an evolution or tectonic shift in English conflict of laws in this field. Although the focus here is on European PIL of employment, the broadest implication of this dissertation is that Rome I and Rome II may have profound impact on the traditional approach to conflict of laws issues in England in all fields of law where the problems of the territorial scope of statutes and concurrence of contractual and other causes of action arise.

The title of this dissertation, *The International Employment Contract: Ideal, Reality and Regulatory Function of European Private International Law of Employment*, attempts to capture the three themes examined here. Chapter II starts by exploring the ideal of this field of law, namely the objective of employee protection, from the standpoint of PIL theory. It is argued that the individualistic view of this objective is too narrow a view, and that PIL of employment plays an important regulatory task. Chapters III, IV and V analyse in detail the rules of Brussels I and Rome I. Chapter III deals with the personal scope of the special rules concerning employment of the two Regulations. It is shown that the wide and inclusive scope of those rules can be perceived as an attempt both to provide PIL protection to all workers in a genuine need of protection and to allocate and protect regulatory authority of states that have intermediate legal categories of dependent self-employed workers or ascribe employer responsibilities to multiple employing entities. The rules concerning employment of Brussels I and Rome I are described and critically analysed in Chapters IV and V, respectively. The shortcomings of those rules are exposed and certain amendments are proposed. Chapters VI and VII focus on the third theme of this dissertation. Chapter VI examines the impact of Rome I on statutory employment claims brought before English courts, whereas Chapter VII explores the joint effect of Rome I and Rome II on claims traditionally perceived as being of a tortious nature. It is argued that the two Regulations have introduced profound changes in the traditional rules and perceptions in English conflict of laws of employment by largely merging contractual, statutory and tortious claims into one type of claim for choice-of-law purposes and, furthermore, abolishing concurrent causes of action in choice of law. The interaction between European PIL of employment and the fundamental economic Treaty freedoms is dealt with in Chapter VIII. It is shown that European PIL is a cause of the

problem of posting of workers in Europe, and, as things stand, is incapable of assisting in the resolution of the problem. Chapter IX concludes.

II EMPLOYEE PROTECTION IN PRIVATE INTERNATIONAL LAW

‘Seeing that Mr. Sayers put his faith in the company, I trust that the company will play fair by him and grant him just compensation for his injuries.’

LORD DENNING MR¹

When LORD DENNING made this statement, English conflict of laws did not regard employees as a category requiring any special treatment.² Conflicts rules applied equally to commercial and employment matters. If any protection was to be given to employees, it was in the realm of substantive law: either by means of employment law provisions of the applicable law or domestic overriding employment statutes. *Sayers*³ exposed the inadequacy of that approach. Here, neither the governing law (Dutch) nor the *lex fori* (English) provided protection to the claimant employee. The case fell outside the territorial scope of their employment statutes, since the work was performed in Nigeria. Nigerian law was disregarded for not being sufficiently closely connected. Mr Sayers therefore found himself in a legal vacuum, without statutory protection to which he would have been entitled had he worked in England or the Netherlands, presumably also had Nigerian law been found applicable. All he could do was ‘put his faith in the company’ and ‘trust that the company [would] play fair by him’. *Sayers* is

¹ *Sayers v International Drilling Co NV* [1971] 1 WLR 1176 (CA), 1182 (*Sayers*).

² See J.H.C. Morris (ed), *Dicey and Morris on the Conflict of Laws* (London, 8th ed, 1967).
³ (n1).

also illustrative of how classical PIL operated before the advent of the European regime. Since neither England nor the Netherlands had an interest in protecting their own regulatory objectives and employment standards, their employment statutes did not apply. Nigerian law, which presumably had an interest, was disregarded on a rather technical point. The allocation and protection of regulatory authority was not a concern for classical PIL.

Inspired by the idea of employee protection, many PIL instruments nowadays contain special rules concerning employment, such as Arts.18-21 Brussels I and Art.8 Rome I. As mentioned, the Recitals of the two instruments clarify that those rules pursue the objective of protection of employees as weaker contractual parties,⁴ which has been confirmed by the CJEU.⁵ This chapter examines what this objective entails in PIL. It explores the role that the public interests involved have in the process of making of the PIL rules concerning employment in order to assess the validity of the individualistic view of this objective, seemingly adopted by the drafters of the European PIL instruments and the CJEU. The reasons for protecting employees in PIL are presented first. An account of employees who merit such protection follows. Next, various ways are analysed in which the objective of employee protection shapes choice-of-law and jurisdictional rules. The examination undertaken here is conducted from a comparative perspective and primarily from the standpoint of PIL theory. The purpose is to provide a theoretical background for the assessment of the solutions of EU law in subsequent chapters.

⁴ Brussels I, Recital 13; Rome I, Recital 23.

⁵ Case 133/81 *Ivenel* [1982] ECR 1891, [14], [16], [19]; Case C-125/92 *Mulox* [1993] ECR I-4075, [18]-[19]; Case C-383/95 *Rutten* [1997] ECR I-57, [17], [20], [22]; Case C-37/00 *Weber* [2002] ECR I-2013, [40], [49]; Case C-437/00 *Pugliese* [2003] ECR I-3573, [18], [22]; Case C-462/06 *GlaxoSmithKline* [2008] ECR I-3965, [17]; Case C-29/10 *Koelzsch* [2011] ECR 00000, [40]-[42], [46]; Case C-384/10 *Voogsgeerd* [2011] ECR 00000, [35]; Case C-154/11 *Mahamdia* [2012] ECR 00000, [44], [46], [64].

1. Reasons for protecting employees in private international law

Not so long ago, a salient feature of PIL was its neutrality.⁶ Compared to other branches of the law, the impact of social facts and policies on the development and operation of classical PIL was minimal. Choice-of-law rules decided which national law was to apply in a particular case, and for this purpose used abstract legal categories (e.g. contract) and connecting factors (e.g. party autonomy, place of contracting, place of performance). The idea behind this jurisdiction-selecting approach, advanced by VON SAVIGNY, was to find a legal system in which the legal relation had its seat or centre of gravity.⁷ The search for such legal system was perceived as the specific ‘conflicts justice’, distinguished from the ‘material justice’ of substantive law.⁸ Protection of employees was a matter primarily left to the substantive rules of the applicable law. According to RABEL:

‘To care for social prosperity is the responsibility of the municipal private laws, which have to resolve the merits of each particular problem. The principle, *jus suum cuique tribuere*, instructs legislators and judges to ponder carefully private and public interests. But this is what each private law does for itself; the function of private international law rules is to choose the applicable law with all its evaluations whatever they may be... But, as things are, to inject national policies directly into conflicts law, will destroy it.’⁹

⁶ K. Zweigert, ‘Zur Armut des internationalen Privatrechts an sozialen Werten’ (1973) 37 RabelZ 435, 436, 443.

⁷ F.C. von Savigny, *A Treatise on the Conflict of Laws* (Edinburgh, 1869).

⁸ S. Symeonides, ‘Material Justice and Conflicts Justice in Choice of Law’ in P. Borchers and J. Zekoll (eds), *International Conflict of Laws for the Third Millennium: Essays in Honour of Friedrich K. Juenger* (Ardsley, NY, 2001) 125.

⁹ E. Rabel, *The Conflict of Laws: A Comparative Study* Vol 1 (Ann Arbor, 2nd ed, 1958) 97.

Similarly, no special jurisdictional treatment was traditionally given to employees or other weaker parties.¹⁰

This state of affairs, labelled ‘poverty of PIL in social values’,¹¹ turned a blind eye to the shortcomings of party autonomy in international employment contracts and to the states’ legitimate interests in the application of their employment laws. Indisputably, the freedom to choose the applicable law and competent court is a basic principle of PIL of contract.¹² But none of the three main reasons that justify the widespread acceptance of this principle, namely freedom of contract, economic efficiency and legal certainty,¹³ holds fully in relation to most international employment contracts. Special rules are required to remedy deficiencies of party autonomy. In addition, such rules are needed to ensure that party autonomy and other abstract connecting factors do not undermine important values and policies pursued by national employment laws.

1.1. Shortcomings of party autonomy: freedom of contract

Party autonomy in PIL is derived from the wider principle of freedom of contract. ‘Whether the case brought before the judge raises issues of private international law or not, the principle that those who make agreements...ought to perform them is central to the nervous system of...law.’¹⁴ The parallelism between substantive law and PIL of contract is not surprising. Historically, the freedom to choose the applicable law became recognised in many countries in the latter part of the 19th century.¹⁵ This was the heyday of liberalism and its *laissez-faire* credo. The parties were regarded as

¹⁰ For instance, in his work ‘The Doctrine of Jurisdiction in International Law’ (1964-I) 111 *Recueil des Cours* 1, F.A. Mann mentions no jurisdictional rules concerning weaker parties.

¹¹ Zweigert (n6).

¹² P. Nygh, *Autonomy in International Contracts* (Oxford, 1999).

¹³ *ibid* 2-3.

¹⁴ A. Briggs, *Agreements on Jurisdiction and Choice of Law* (Oxford, 2008) 22.

¹⁵ O. Lando, ‘The Conflict of Laws of Contracts: General Principles’ (1984-VI) 189 *Recueil des Cours* 225, 256-284.

private legislators in their contractual relationships. Their will was placed at the forefront of the law of contract as the source of contractual rights and obligations. The role of the law and courts was minimal. Their primary task was to facilitate enforcement of contractual rights and prevent fraud, misrepresentation and duress.¹⁶ The logical extension of this freedom was to allow the parties to subject the contract to the law of their choice.¹⁷ The freedom to choose the competent court has been justified on the same principle. As the United States Supreme Court stated in *M/S Bremen v Zapata Off-Shore Co*, ‘This approach [of enforcing choice-of-court agreements]...accords with ancient concepts of freedom of contract.’¹⁸ Freedom of contract is therefore a strong argument in favour of party autonomy in the fields of law, such as commercial law, where state interference is minimal.

But employment law is of an essentially different nature. For much of the 19th century, the relationship between employers and workers was primarily regulated by the general law of contract and property.¹⁹ The parties to this relationship were seen as equals before the law, freely exercising their will over the letting and hiring of the worker’s services. Wages given in exchange depended on the law of supply and demand. This liberal model of regulating employment, however, never brought about genuine equality. Instead, it exposed the difference in socio-economic power between employers and workers that enabled the former to impose their terms on the latter. It became acknowledged that the typical features of employment contracts were not freedom and equality, but submission, subordination and inequality of bargaining power. As famously observed by KAHN-FREUND: ‘In its inception [the relation between an employer and an employee] is an act of submission, in its operation it is a condition

¹⁶ P.S. Atiyah, *The Rise and Fall of Freedom of Contract* (Oxford, 1979) 402–408.

¹⁷ A.L. Diamond, ‘Harmonization of Private International Law Relating to Contractual Obligations’ (1986-IV) 199 *Recueil des Cours* 233, 265.

¹⁸ 407 US 1 (1972) 11 (*per* Mr Chief Justice Burger).

¹⁹ B. Veneziani, ‘The Evolution of the Contract of Employment’ in B. Hepple (ed), *The Making of Labour Law in Europe: A Comparative Study of Nine Countries up to 1945* (London, 1986) 31.

of subordination, however much the submission and subordination may be concealed by that indispensable figment of the legal mind known as the “contract of employment”.²⁰ This change in perception led to the creation of an autonomous notion of employment contract and to the development and extension of collective bargaining and protective legislation.²¹ A goal of regulating employment has thereafter been to compensate employees for their typically weaker position. Apart from pursuing the goal of distributive justice, modern legal regulation of employment is also motivated by the objectives of social inclusion, protection of human rights in the workplace, and greater economic efficiency and competitiveness of businesses.²² Achieving parallelism with substantive law of employment requires commensurable efforts in PIL.

1.2. Shortcomings of party autonomy: economic efficiency

Scholars engaged in economic analysis of PIL support party autonomy for reasons of economic efficiency.²³ Their conclusions, however, depend upon certain assumptions. Most economic analyses assume that the parties are rational, that there are no transaction costs, imperfect information and externalities.²⁴

But the typical features of international employment contracts are high transaction costs and asymmetric information. The comparison of national employment

²⁰ P. Davies and M. Freedland, *Kahn Freund's Labour and the Law* (London, 3rd ed, 1983) 18. See also H. Collins, *Employment Law* (Oxford, 2nd ed, 2010) 6-14.

²¹ Atiyah (n16) 523-544.

²² H. Collins, ‘Against Abstentionism in Labour Law’ in J. Bell and J. Eekelaar (eds), *Oxford Essays in Jurisprudence 3rd Series* (Oxford, 1987) 79; H. Collins, ‘Is there a Third Way in Labour Law?’ in J. Conaghan, R.M. Fischl and K. Klare, *Labour Law in an Era of Globalization* (Oxford, 2002) 449; H. Collins, ‘Justifications and Techniques of Legal Regulation of the Employment Relation’ in H. Collins, P. Davies and R. Rideout (eds), *Legal Regulation of the Employment Relation* (London, 2000) 3; A.C.L. Davies, *Perspectives on Labour Law* (Cambridge, 2nd ed, 2009).

²³ See J. Basedow and T. Kono (eds), *An Economic Analysis of Private International Law* (Tübingen, 2006).

²⁴ S. Ota, ‘Choice of Law and Economic Analysis: A Methodological Introduction’ in Basedow and Kono (eds) *ibid* 3, 8.

laws is an expensive task.²⁵ Employees typically lack resources that employers have. They usually cannot afford legal advice of comparative employment law specialists or employment lawyers from different jurisdictions. Furthermore, a rational party will engage in such comparison only if the value of the envisaged transaction corresponds to the cost of legal advice, or if the result thereof can be applied in a great number of cases. Employment contracts are characterised by a standardisation on the employers' side. It is they who benefit from the economies of scale: the greater the number of employees, the lower the cost of legal advice per employee. For employees, by contrast, entering into an employment contract does not form part of a large series of similar transactions. It is an isolated occurrence, whose value normally does not justify a comprehensive and expensive legal analysis. The difference in practical availability of legal advice and experience results in information asymmetry. Employees are typically far less likely than their employers to be knowledgeable of the available alternatives and possible risks. Furthermore, choice-of-law and choice-of-court clauses often form part of lengthy and complex standard-form employment contracts, and may therefore pass unnoticed by employees. As with many other contractual terms and conditions, employees may underestimate the importance of, or simply not understand, choice-of-law and choice-of-court clauses. An employee, even if aware of the available alternatives and possible risks, may not object to the employer's choice of law or court for fear of losing the job. As discussed in the following section, not even managerial, advisory and specialist staff can routinely be assumed to be on an equal footing with their employers regarding transaction costs and availability of information. To remedy these deficiencies, PIL should safeguard the application of the law and jurisdiction of the courts with which employees are sufficiently closely connected and presumably familiar, and whose application and jurisdiction the parties reasonably expect. PIL can

²⁵ J. Basedow, 'Lex Mercatoria and the Private International Law of Contracts in Economic Perspective' in Basedow and Kono (eds) *ibid* 57, 67-68.

thereby also assist in the building and maintenance of trust between the parties to an international employment contract, which is a key ingredient in improving competitiveness.²⁶

The application of lax employment laws may create negative externalities for the country in whose labour market the employee participates. In some countries employers are allowed to dismiss employees without stating reasons for dismissal, giving notice, or providing redundancy payment. In England, for example, to qualify for the right not to be unfairly dismissed and to a redundancy payment, an employee must be continuously employed for more than two years.²⁷ In the US, there is the ‘contract at will’: ‘men must be left, without interference to buy and sell where they please, and to discharge or retain employees at will for good cause or for no cause, or even for bad cause without thereby being guilty of an unlawful act *per se*.’²⁸ At the far end of the spectrum are countries where employers can require their employees to work excessively long hours for low wages in unhealthy and unsafe conditions, without job security or freedom of association and the right to collective bargaining. If employers were allowed to impose on their employees the application of the law and jurisdiction of the courts of such countries, they might be able to avoid the otherwise applicable protective legislation. Such a choice may be efficient for the business itself. But if the broader social costs are taken into account (e.g. the costs of supporting unemployed or injured workers and their dependants), the choice may not be efficient overall. Legal

²⁶ H. Collins, ‘Regulating the Employment Relation for Competitiveness’ (2001) ILJ 17; H. Collins, *Regulating Contracts* (Oxford, 2002); S. Deakin and F. Wilkinson, ‘Labour Law and Economic Theory: A Reappraisal’ in Collins, Davies and Rideout (eds) (n22) 29.

²⁷ Employment Rights Act 1996 (‘ERA 1996’), ss.108, 155.

²⁸ *Payne v Western & Atl. R.R.* 81 Tenn. 507 (1884), 518-519. See R. Epstein, ‘In Defence of the Contract at Will’ (1984) 57 *University of Chicago Law Review* 947.

regulation is often necessary to compel employers to internalise at least a part of the social costs.²⁹ Party autonomy should not be allowed to thwart this goal.

1.3. Shortcomings of party autonomy: legal certainty

International contracts require legal certainty. Where a number of laws are potentially applicable and several forums can assume jurisdiction, the parties should, in principle, be allowed to choose the law and forum. Otherwise, the outcome of a particular case will depend on the PIL rules and the administration of justice in the state where the claim is brought.

But because of the importance of the underlying values and policies, states are often unwilling to give full effect to choice-of-law and choice-of-court clauses contained in international employment contracts.³⁰ Inserting such clauses in favour of the law or courts of a country not sufficiently closely connected with, and legitimately interested in regulating or adjudicating disputes arising out of, a particular employment contract may produce a high level of uncertainty. It may be uncertain whether the chosen court will take jurisdiction and whether the courts whose jurisdiction is derogated will accept this. The effect of the choice-of-law clause depends on the forum's PIL rules. It may be given full effect, limited effect or no effect at all. Even if the chosen court assumes jurisdiction and upholds the choice-of-law clause, the proceedings may not be recognised abroad (e.g. through *lis pendens* or the recognition and enforcement of the resulting judgment) or may even be restrained abroad by means of anti-suit injunctions, particularly in the country whose employment law and courts were avoided. Achieving legal certainty in this field of PIL therefore requires taking into consideration the states' legitimate interests in applying their laws to, and

²⁹ H. Collins, 'Justifications and Techniques of Legal Regulation of the Employment Relation' (n22) 15-16.

³⁰ Various restrictions of party autonomy are examined in sections 3 and 4 below.

adjudicating disputes arising out of, employment contracts with which they are sufficiently closely connected. Restrictions of party autonomy that achieve this goal, and that the parties to an employment contract can reasonably foresee, are justified.

1.4. States' legitimate interests in the application of their employment laws

The struggle of workers for better terms and conditions of employment was made in different countries at different times. The outcomes depended on many circumstances: diverging political histories, paths and stages of economic development, the relative power of employers' and workers' associations, the role of the state etc.³¹ Each country's employment law is unique and represents a result of hard bargaining and compromises among workers, employers and the state. It is also a means for states to pursue important domestic social, political and economic objectives. States therefore normally have an interest in the application of their employment laws to work performed within their borders, often also to their nationals and workers habitually working in their territory who are posted abroad, in order to protect their social, political and economic organisations and objectives. This is reflected in the express or implied territorial scope of many employment statutes. For instance, statutes forming part of English law apply to employees who work or are based in Britain or the UK, regardless of the law governing the employment contract.³² Similarly, some US statutes expressly

³¹ See Hepple (ed) (n19).

³² Patents Act 1977; Trade Union and Labour Relations (Consolidation) Act 1992 ('TULR(C)A 1992'); National Minimum Wage Act 1998 ('NMWA 1998'); *Serco Ltd v Lawson; Botham (FC) v Ministry of Defence; Crofts and others v Veta Ltd* [2006] UKHL 3 (*Lawson v Serco*), concerning the territorial scope of ERA 1996; *Bates Van Winkelhof v Clyde & Co LLP* [2012] EWCA Civ 1207 (*Van Winkelhof*), concerning the territorial scope of the Equality Act 2010 ('EqA 2010'). The territorial scope of employment legislation forming part of English law is discussed in detail in Chapter VI.

extend their application to US corporations employing US workers and operating overseas.³³

Irrespective of the differences, national employment laws share a common social objective. ‘Labour is not a commodity’, the motto of the ILO,³⁴ best reflects the essence of employment law. The fight against ‘commodification’ of labour and the resulting dangers for human dignity and social injustice is at the heart of this field of law. The common social objective should make it acceptable for states to uphold not only their own but also foreign employment laws in appropriate circumstances.³⁵ This idea is especially strong in federal and quasi-federal unions of states. Such circumstances exist when another state is sufficiently closely connected with the employment contract and has a legitimate interest in regulating it (such as when the work is performed in that state). The unwillingness to uphold foreign employment laws may result in leaving the employee without any protection. This is what occurred in the mentioned *Sayers* case.³⁶ Here, the countries of the forum and of the governing law had no interest in regulating the employment contract, as reflected in the fact that the case fell outside the territorial scope of their protective statutes. Had the Court of Appeal upheld the law of Nigeria, which was arguably sufficiently closely connected with the contract and had an interest in the application of its employment legislation to work performed in its territory, the outcome might have been different.

³³ Civil Rights Act 1964, §2000e(f); Age Discrimination in Employment Act 1967, §630(f); Americans with Disabilities Act 1990, §§12101-12213. For case-law on ‘extraterritorial’ application of US statutes see K. Stone, ‘Labour and the Global Economy: Four Approaches to Transnational Labour Regulation’ (1995) 16 *Michigan Journal of International Law* 987, 1011-1017.

³⁴ 1944 Declaration concerning the aims and purpose of the ILO (Declaration of Philadelphia), available at <http://www.ilo.org/public/english/bureau/leg/declarations.htm> (last accessed 26/09/2012).

³⁵ M. Keller, ‘Schutz des Schwächeren im Internationalen Vertragsrecht’ in P. Böckli and others (eds) *Festschrift für Frank Vischer zum 60. Geburtstag* (Zurich, 1983) 175, 179-186; J. Kropholler, ‘Das kollisionsrechtliche System des Schutzes der schwächeren Vertragspartei’ (1978) 42 *RabelZ* 634, 648-649; P. Mayer, ‘La protection de la partie faible en droit international privé’ in J. Ghestin and M. Fontaine (eds) *La protection de la partie faible dans les rapports conflictuels: Comparaisons franco-belges* (Paris, 1996) 513, 518, 525, 527; R.J. Weintraub, ‘Functional Developments in Choice of Law for Contracts’ (1984-IV) 187 *Recueil des Cours* 239, 251, 258-259.

³⁶ (n1).

1.5. Conclusion

Typically, employees are in a weak socio-economic position in relation to their employers. This creates social injustice and market failures that justify state intervention. Employees are assured protection in substantive employment law by means of mandatory minimum standards backed by administrative, criminal or civil sanctions, and by the promotion of collective bargaining. Employees are also often guaranteed the right to commence proceedings before specialised labour courts or tribunals. The shortcomings of party autonomy in international employment contracts and the states' legitimate interests in the application of their employment laws speak in favour of commensurable safeguards in PIL. General PIL rules, and the principle of party autonomy in particular, cannot adequately accommodate these concerns. Special rules that safeguard the application of the law and jurisdiction of the courts of the country sufficiently closely connected with, and legitimately interested in regulating and adjudicating disputes arising out of, the employment contract, with which law and courts the parties to the contract are sufficiently closely connected and presumably familiar, and whose application and jurisdiction the parties reasonably expect, are justified.

The examination of the reasons for protecting employees in PIL shows that the individualistic view of the objective of employee protection is oversimplified. Employee protection in PIL is not only about special rules giving protection to individual employees and being more favourable to their interests than the general rules. It is also about allocating and protecting adjudicatory and legislative authority of states in the field of labour law. Therefore, the idea of 'protection of employees' in PIL is somewhat of a misnomer. It seems to be equally, if not more, correct to talk about the idea of protection of the labour law system of the country to which the employee

‘belongs’, in whose labour market he partakes. For the sake of simplicity, however, the conventional term ‘employee protection’ is used throughout this dissertation.

2. Employees protected in private international law

In a way, the reasons for protecting employees in PIL can be reduced to one fact: their typically weaker socio-economic position. The shortcomings of party autonomy exist because of this fact, which also serves as a justification for legal regulation of employment. But not all employees engaged in international employment are in an inferior position. Many are managerial, advisory or specialist staff, highly qualified and well paid. As MANKOWSKI notes, ‘As an employer, you ordinarily do not order your worst and least specialised workers abroad, but to the contrary your expert workforce. We are talking about some of the most highly trained and educated (and best paid) employees available.’³⁷ Should protective PIL rules take this fact into account, and limit their scope to employees in a genuine need for protection? Looking comparatively, we can distinguish three approaches.

First, the courts may be authorised to examine in each particular case whether a contractual party is in a weak position in relation to the other party. If so, the courts should take this fact into account, along with other relevant factors, when applying PIL rules. For example, Art.3540 of the Louisiana Civil Code subjects party autonomy to the public policy of the state whose law would otherwise be applicable. That state is determined by reference to factors set out in Art.3537, one of which is the policy ‘of protecting one party from undue imposition by the other’.³⁸ A similar approach to jurisdictional issues has been adopted by the US Supreme Court, which stated in *M/S*

³⁷ P. Mankowski, ‘Employment Contracts under Article 8 of the Rome I Regulation’ in F. Ferrari and S. Leible (eds), *Rome I Regulation* (Munich, 2009) 172.

³⁸ Similarly, Oregon Revised Statutes, §15.360. See also *Restatement of the Law Second: Conflict of Laws* (St Paul, Minnesota, 1971) §187, comment g).

*Bremen v Zapata Off-Shore Co*³⁹ that, ‘There are compelling reasons why a freely negotiated [choice-of-court clause], unaffected by fraud, undue influence or overweening bargaining power...should be given full effect’ (emphasis added).

The merit of this solution is that it can encompass any worker who finds himself in a weaker position in a particular case. The downside is that it can also embrace independent contractors who do not receive protection in substantive employment law. Moreover, protection of the weaker party is reduced to one of the factors that the courts should take into account. It is thus uncertain whether the weaker party will actually be protected in a particular case, since this depends on a complicated consideration of the circumstances of the case, connecting factors and governmental interests.

The second approach consists in special PIL rules covering all employees, except certain senior workers who are deemed to be on an equal footing with their employers. This solution is arguably inspired by German employment law, where there are two categories of employees (collectively referred to as *Arbeitnehmer*). There are manual workers (*Arbeiter*) and white-collar workers (*Angestellte*), on the one hand, and executive staff (*leitende Angestellte*), on the other. It is assumed that the problems and interests of executive staff, due to their position, are in many ways not commensurable to those of other employees. Protective legislation is therefore not fully applicable to the former category.⁴⁰ This approach was suggested in the 1976 proposal for a Regulation on the provisions of conflict of laws on employment relationships within the Community (‘draft Regulation’).⁴¹ The draft Regulation distinguished between workers ‘with special position in the establishment’ or ‘with special nature of...work’⁴² and all

³⁹ (n18) 12-13. See also Second Restatement of the Conflict of Laws, §80; cf *Carnival Cruise Lines, Inc v Shute* 499 US 585 (1991). Similarly, Swiss Federal PIL Code, Art.5(2).

⁴⁰ M. Weiss and M. Schmidt, *Labour Law and Industrial Relations in Germany* (Aalphen aan den Rijn, 4th ed, 2008) 49-50.

⁴¹ COM(75) 653 final, containing the text of the draft Regulation and the accompanying Explanatory Memorandum.

⁴² Art.7(1).

other workers. Workers carrying out managerial or advisory functions and workers with a high degree of specialisation fell into the first category.⁴³ If the courts verified that these workers were in fact ‘in a position to negotiate on an equal footing with the employer’, they were free to agree on the applicable law. This freedom, however, was not absolute. The choice could not have the effect of undermining the law of the country of the place of work in respect of 9 specific topics.⁴⁴ For the second category, the applicable law was the law of the country of the normal or usual place of work,⁴⁵ with party autonomy being allowed only exceptionally.⁴⁶

Shortcomings of this solution are legal uncertainty that it generates and difficulty of application. Even if a person was employed in a managerial, advisory or specialist capacity, the courts had to verify that he was indeed free to negotiate a particular choice-of-law clause. Conversely, even in cases concerning blue-collar workers, the employer could argue that the worker should be free to choose the applicable law due to the ‘special nature of his work’. The possibility of allowing unfettered choice-of-court clauses entered into by senior executives was considered during the negotiations of the Hague Convention on jurisdiction and foreign judgments in civil and commercial matters, but rejected on the grounds of legal uncertainty and difficulty of application.⁴⁷ Furthermore, this approach does not reflect substantive employment laws of many countries. English law, for example, does not differentiate between managerial, advisory and specialist staff and other employees.⁴⁸ Even in

⁴³ Art.7(2). The Explanatory Memorandum gave, at p10, further examples of workers falling into this category: works superintendants, legal advisors, economic planners, executive staff, and highly qualified skilled workers. It went on to say that, ‘In view of the many different ways in which companies are organised [these] concepts...cannot be defined more closely.’

⁴⁴ Art.8.

⁴⁵ Art.3(1).

⁴⁶ Arts.5 (certain cases of intra-group transfers of employees), 6 (certain cases where a normal place of work did not exist). See also Art.8.

⁴⁷ C. Kassedjian, ‘International Jurisdiction and Foreign Judgments in Civil and Commercial Matters’ (Preliminary Document No 7, 1997), available at http://www.hcch.net/upload/wop/jdgm_pd7.pdf (last accessed 26/9/2012), [95].

⁴⁸ S.F. Deakin and G.S. Morris, *Labour Law* (Oxford, 5th ed, 2009) 191.

German employment law the exempted category is defined very narrowly (executives), and these employees are not completely removed from the scope of protective legislation. This approach would therefore not bring about the desired parallelism between substantive law and PIL, and might enable employers to avoid protective legislation that would otherwise be applicable to senior employees.

Most countries that have special PIL rules adhere to the third approach. It entails bringing all employees as a category of persons who are in a typically weaker socio-economic position within the scope of those rules. The courts need not verify in each particular case whether the employee in question is in fact in a weaker position. This is the approach of Rome I and Brussels I and many national codes.⁴⁹ It is also favoured in legal doctrine.⁵⁰

This approach has several merits compared to the abovementioned two, and seems to be the most appropriate one from the standpoint of the objective of employee protection. First, it acknowledges that employees are typically in an inferior position in relation to their employers. This does not mean that equality cannot exist, or that the roles may not be reversed, but it is certainly not the case in a great majority of cases. There are no guarantees, as the 1976 draft Regulation concedes, that even highly paid and skilled workers are on an equal footing with their, often transnational, employers. Legal certainty and ease of application are enhanced because the courts need not verify the existence of disparity of bargaining power in each particular case. Second, by not differentiating between different categories of employees, this approach corresponds to

⁴⁹ Rome I, Art.8; Brussels I, Arts.18-21; Chinese PIL Act, Art.43; Quebec Civil Code, Arts.3118, 3149; Swiss Federal PIL Code, Arts.115, 121.

⁵⁰ Mayer (n35) 535-540; Nygh (n12) 143; F. Pocar, ‘La protection de la partie faible en droit international privé’ (1984-V) 188 *Recueil des Cours* 339, 362-371; F. Vischer, ‘The Antagonism between Legal Security and the Search for Justice in the Field of Contracts’ (1974-II) 142 *Recueil des Cours* 1, 28-30; A.T. von Mehren, ‘Adjudicatory Jurisdiction: General Theories Compared and Evaluated’ (1983) 63 *Boston University Law Review* 279, 313.

the vast majority of substantive employment laws and prevents employers from avoiding protective legislation that would otherwise be applicable to senior employees.

3. Protecting employees by choice-of-law rules

It is now explored how PIL pursues the objective of employee protection. Owing to different considerations that apply in relation to choice of law and jurisdiction of courts, these two areas are treated separately. With regard to choice of law, a further differentiation is made between the freedom of the parties to choose the applicable law and the determination of the applicable law in the absence of choice. A view has been expressed in relation to the choice-of-law rules concerning employment of the Rome Convention that:

‘it is impossible to identify one single theoretical background in private international law in employment matters, the choice of law process rather being a blend of different approaches. And, additionally, this blend is not the product of a systemic thinking, but simply the amalgamation of the different factors affecting the finding of the applicable law.’⁵¹

A purpose of this section is to examine whether the European choice-of-law rules are indeed the product of haphazardness, or whether there is some underlying theory.

3.1. Employee protection and party autonomy

Many legal systems impose general restrictions on party autonomy.⁵² This section deals with specific restrictions concerning employment contracts. There are essentially two approaches. First, party autonomy can be either completely excluded or limited to

⁵¹ S. Krebber, ‘Conflict of Laws in Employment in Europe’ (2000) 21 CLLPJ 501, 519.

⁵² Lando (n15) 286-293.

certain legal systems. Second, party autonomy can be harnessed by the operation of mandatory rules.

Total exclusion of party autonomy is a rather exceptional measure. It seems to have been pursued in the former German Democratic Republic⁵³ and exists now in China.⁵⁴ An explanation for such exclusion is that Communist countries do not regard employment law as part of private law, since labour is not perceived as a commodity that can be bargained for. To be employed is to enter into the collective of the workers of the socialist enterprise.⁵⁵ This measure has also been proposed, with certain exceptions, in relation to blue-collar workers in the 1976 draft Regulation.⁵⁶ Here, the exclusion aimed at achieving equal treatment of all workers in an establishment.⁵⁷ A less radical version of this approach is adopted in Switzerland, whose Federal PIL Code limits party autonomy by listing the laws among which the choice can be made. The parties may choose between the law of the country in which the employee is habitually resident or in which the employer has his place of business, domicile, or habitual residence.⁵⁸ The purpose of this restriction is to avoid the application of the law that is not sufficiently closely connected with the employment contract and the uncertainties concerning the determination of the habitual place of work, as well as to enable employers to submit their overseas employees to the application of one law.⁵⁹

⁵³ 1975 GDR PIL Act, §27. Employment relations were governed either by the law of the country of the employer's principal place of business or, if the employee there resides, of the place of work. The text of the Act with comment by F.K. Juenger can be found in (1977) 25 AJCL 332.

⁵⁴ Chinese PIL Act, Art.43. Labour contracts are governed by the laws of the working locality of labourers. If it is difficult to determine the working locality of a labourer, the laws at the main business place of the employer apply. See J. Liang, 'Statutory Restrictions on Party Autonomy in China's Private International Law of Contract: How far does the 2010 Codification go?' (2012) 8 JPIL 77.

⁵⁵ Lando (n15) fn318.

⁵⁶ Art.3(1); cf Arts.5-7.

⁵⁷ Explanatory Memorandum (n41) 6.

⁵⁸ Art.121(3).

⁵⁹ A. Bucher, 'Les nouvelles règles du droit international privé suisse dans le domaine du droit du travail' in *Le droit social à l'aube du XXIe siècle - mélanges Alexandre Berenstein* (Lausanne, 1989) 147, 159.

Similarly, the 1966 Polish PIL Code enabled the parties to choose the governing law ‘provided it has some connection with their relationship’.⁶⁰

The downsides of these solutions seem to outweigh their merits.⁶¹ The connection of the employment contract with the objectively applicable law or a listed law may be rather tenuous. Furthermore, the objectively applicable law or a listed law may contain low employment standards. In such cases, the purpose of restricting party autonomy would be defeated. The parties may end up with the law of a country that has weak links to, and no interest in regulating, the employment contract, that is an unknown factor for one or even both parties, or that is unduly protective of employers’ interests. For example, the Swiss Federal PIL Code allows the parties to choose the law of the country of the employer’s place of business. An English employer can therefore insert a valid choice-of-law clause in favour of English law even if the employee is habitually employed elsewhere. But as the employee would be neither working nor based in England in this situation, he would most likely fall outside the territorial scope of employment statutes forming part of English law,⁶² which are the primary means of employee protection in this country. Moreover, this approach (especially total exclusion of party autonomy) disregards the fact that freedom of contract is the starting point in employment law. Statutes and collective agreements usually afford protection to employees by setting the floor of rights. The parties are free to agree to more beneficial terms and conditions of employment. If that is so in substantive law, a corresponding possibility should exist in PIL.

Many legal systems restrict party autonomy by means of overriding mandatory rules or public policy of the forum. This was the solution in many EU countries before

⁶⁰ Art.32(1). The text of the Code with comment by D. Lasok can be found in (1966) 15 AJCL 330.

⁶¹ Nygh (n12) 155-156; Pocar (n50) 373-378; cf Kropholler (n35) 646; Lando (n15) 298-299; Mayer (n35) 518, 530; Vischer (n50) 42-43.

⁶² (n32).

the advent of the Rome Convention. For example, many English employment statutes expressly or impliedly defined, and still define, their territorial scope.⁶³ If a case falls within their scope, the statutes override any choice of foreign law. In Germany, the courts used to determine the reach of domestic labour legislation in a particular case. If a provision of the chosen law was contrary to the ‘object and purpose’ (*Sinn und Zweck*) of the legislation, the general public policy exception would exclude its application.⁶⁴ French courts applied domestic labour law provisions as *lois d'ordre public*, *lois de police* or *règles d'application immédiates* whenever the employment contract was most closely connected with France, and these provided a more beneficial treatment to the employee than the provisions of the chosen law.⁶⁵ A downside of this unilateralist method of employee protection is that foreign employment laws not chosen by the parties cannot be applied, regardless of how strongly the foreign country may be connected with the employment contract, and interested in regulating it. French law was an exception in this respect. French courts seemed willing to uphold the law of the foreign country of the place of work when it was more favourable for the employee than the chosen law.⁶⁶ Another downside of the unilateralist method, which *Sayers*⁶⁷ illustrates, is that it is possible that a particular case may not fall within the territorial scope of protective legislation both of the forum and of the chosen law, in which case the employee is left without any protection.

A solution truly mindful of the parties’ reasonable expectations and the states’ legitimate interests should therefore not exclude party autonomy or limit it to specific laws. The parties should be free to agree on any law, but only to the extent that the

⁶³ *ibid.*

⁶⁴ B. von Hoffmann, ‘Über den Schutz des Schwächeren bei internationalen Schuldverträgen’ (1974) 38 *RabelZ* 396, 407-410; Lando (n15) 269.

⁶⁵ *Cour de cassation*, 9 December 1960, cited in P. Lagarde, ‘Sur le contrat de travail international: analyse rétrospective d’une évolution mal maîtrisée’ in *Les transformations de droit du travail. Etudes offertes à Gérard Lyon-Caen* (Paris, 1989) 83, 85.

⁶⁶ *Cour de cassation*, *Royal Air Maroc*, 31 March 1978, and *Cour de cassation*, 25 January 1984, cited in Lagarde *ibid* 86-88.

⁶⁷ (n1).

agreement improves upon the mandatory minimum standard of protection. The issue of protection then largely depends on determining the law that sets the minimum standard. This cannot be left solely to the *lex fori*. The minimum standard should be set by the law of the country, home or foreign, which is both sufficiently closely connected with a particular employment contract and legitimately interested in regulating it, and whose application the parties can reasonably foresee.

Two techniques for achieving this goal have been put forward. The first is to give the forum a general freedom to apply, as the case may be, domestic or foreign overriding mandatory provisions.⁶⁸ This solution is accepted in Art.11(2) of the 1994 Inter-American Convention on the Law Applicable to International Contracts.⁶⁹ One should, however, recall the fate of Art.7(1) of the Rome Convention to see that such a solution is not generally acceptable, certainly not in the EU, because of legal uncertainty it creates.⁷⁰ The second technique is to let the objectively applicable law set the minimum standard. This approach was first introduced in the Austrian 1978 PIL Act⁷¹ and is today accepted in Art.8(1) Rome I.⁷² The solution of the Second Restatement of the Conflict of Laws is similar. In a general manner, §187(2)(b) gives preference over the chosen law to the fundamental policy of a state that has a materially greater interest than the chosen state in the determination of the particular issue and that would be the state of the applicable law in the absence of choice. Rules designed to protect employees are, indeed, an expression of fundamental policy.⁷³

⁶⁸ von Hoffmann (n64) 407-417.

⁶⁹ F. Juenger, 'Contract Choice of Law in the Americas' (1997) 45 AJCL 195, 204.

⁷⁰ A. Dickinson, 'Third-Country Mandatory Rules in the Law Applicable to Contractual Obligations: so long, farewell, Aufwiedersehen, adieu?' (2007) 3 JPIL 53.

⁷¹ §44(3). The text of the Act with comment by E. Palmer can be found in (1980) 28 AJCL 197. As an additional means of protection, the Act allowed only express choice of law in employment contracts. Similarly, choice of law pursuant to Arts.5-7 of the 1976 draft Regulation was allowed only if made in writing or evidenced in writing.

⁷² Also Quebec Civil Code, Art.3118(1).

⁷³ §187, comment g). See also Louisiana Civil Code, Art.3537; Oregon Revised Statutes, §15.360.

The solution of Rome I has been praised and criticised by many.⁷⁴ While it does eliminate many of the pitfalls to which the abovementioned approaches lead, it also gives rise to criticism because of the increased legal uncertainty and difficulty of application. Given that only mandatory provisions of the objectively applicable law are taken into account under this solution, its effectiveness ultimately depends on the formulation of the default rules. This solution will be analysed in detail in Chapter V.

3.2. Employee protection and the law applicable in the absence of choice

Numerous solutions have been developed for determining the applicable law for employment contracts in the absence of choice. Some rely on hard and fast rules, whereas others adopt flexible connecting factors; some seem to be concerned primarily with the parties' interests, whereas others seem to emphasise public interests.⁷⁵ This diversity is a reflection of different approaches to determining the objectively applicable law existing in PIL of contract⁷⁶ and of various factual situations that such rules have to accommodate.

Some authors have suggested that the objective of employee protection requires giving the courts the power to consider the laws of all or some of the states with which a particular employment contract is connected, and to apply the law that is most

⁷⁴ In favour are Kropholler (n35) 648-654; Mayer (n35) 332; Nygh (n12) 158; Pocar (n50) 382-383; S. Symeonides, 'Party Autonomy in Rome I and II from a Comparative Perspective', available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1697372 (last accessed 26/9/2012); cf M. Franzen, 'Conflicts of Laws in Employment Contracts and Industrial Relations' in R. Blanpain (ed), *Comparative Labour Law and Industrial Relations in Industrialized Market Economies* (The Hague, 9th ed, 2007) 215, 227-228; F. Gamillscheg, 'Rules of Public Order in Private International Labour Law' (1983-III) 181 *Recueil des Cours* 285, 319-320; B. Hepple, 'Conflict of Laws on Employment Relationships within the EEC' in K. Lipstein (ed), *Harmonization of Private International Law by the EEC* (London, 1978) 39, 44-45; Lando (n15) 303; F.A. Mann, 'Contracts: Effect of Mandatory Rules' in Lipstein (ed) *ibid* 31, 35; C.G.J. Morse, 'Contracts of Employment and the E.E.C. Contractual Obligations Convention' in P.M. North (ed), *Contract Conflicts: the E.E.C. Convention on the Law Applicable to Contractual Obligations: A Comparative Study* (Amsterdam, New York, Oxford, 1982) 143, 172-173.

⁷⁵ F. Gamillscheg, 'Labour Contracts' in K. Lipstein (ed), *International Encyclopedia of Comparative Law* Vol 3 (Tübingen, 1972) Ch 28, 18-30; F. Morgenstern, *International Conflicts of Labour Law: A Survey of the Law Applicable to the International Employment Relation* (Geneva, 1984) 21-43.

⁷⁶ Lando (n15) 318-393.

favourable for the employee. POCAR argues that the employment laws of all the states connected with an employment contract should be compared.⁷⁷ LECLERC would limit the comparison to the law of the country of the place of work and the law of the country of the employer's place of business.⁷⁸ But the appropriateness of these solutions is questionable.⁷⁹ The states whose laws are to be considered in the course of this exercise may have weak links to, and no legitimate interest in regulating, the employment contract. In addition, the position of the parties and judges, who would have to determine the content of a range of different laws, would become extremely difficult. This would result in a high level of legal uncertainty. Moreover, there is no reason why employees engaged in international employment should be better protected than other employees. The task of PIL should not be to favour employees unreservedly over employers. It should consist in ensuring the application of the law of the state that has a sufficiently close connection with the employment contract, that is legitimately interested in its regulation, and whose application the parties can reasonably foresee.⁸⁰ It should be noted in this respect that under LEFLAR's 'better law approach' the 'application of the better rule of law' is one of 5 policies underlying the choice-of-law process.⁸¹ Others are the predictability of results, maintenance of interstate and international order, simplification of the judicial task, and advancement of the forum's governmental interests. The state whose law applies pursuant to this analysis has to be substantially connected with, and legitimately interested in regulating, a particular case. The better law is not necessarily the one most beneficial for the weaker party in terms of its substantive content.

⁷⁷ (n50) 404-408.

⁷⁸ F. Leclerc, *La protection de la partie faible dans les contrats internationaux* (Brussels, 1995).

⁷⁹ Keller (n35) 178; Kropholler (n35) 657; Mayer (n35) 528-529; Nygh (n12) 159.

⁸⁰ Similarly, Keller (n35) 179-182; Kropholler (n35) 641; Mayer (n35) 529; Nygh (n12) 159; Vischer (n50) 27-28; cf Pocar (n50) 392-394.

⁸¹ R. Leflar, *American Conflicts Law* (Indianapolis, 3rd ed, 1977) 212-215.

A connecting factor that usually accords with the mentioned considerations is the *habitual (normal, usual, ordinary) place of work*. In a typical employment relation the employee works and resides for the entire period of employment in one place, where the employer is also established. In such cases, there is usually no reason to look at another law. The employee is integrated into the working community at the place of work, and is entitled to expect equal treatment with his colleagues. The employer is assured that the employment contracts with employees working at a certain place will usually be governed by the law of that place, and that he will not be easily exposed to the application of foreign laws. Both parties can be seen as acquiescing to the application of this law: the employer by setting up the place of work, the employee by agreeing to work there. Public interests are also ordinarily satisfied, since the protective legislation of a country is primarily enacted for the benefit of employees who habitually work in that country, and is intended to equally burden all employers employing workers there. Equal treatment of all workers in an establishment also promotes labour peace. The courts for the place of work will normally have jurisdiction, and should be enabled to apply their own law. Not surprisingly, this is the presumptive solution in Rome I and many national codes.⁸²

International employment relations, however, are very diverse. The application of the law of the country of the habitual place of work will not be most suitable in all cases. For instance, there may be good reasons for the application of the law of the country of the *employer's principal place of business*. Transnational employers often transfer their managerial, advisory or specialist employees from one of the countries in which they do business to another, or to their branches, subsidiaries or affiliates abroad. It is in employers' interest that such employment relations are governed by the law of

⁸² Rome I, Art.8(2); Chinese PIL Act, Art.43; Quebec Civil Code, Art.3118(2); Swiss Federal PIL Code, Art.121(1).

the country of their principal place of business, since this avoids them having to consider new laws every time a transfer occurs. Moreover, it is from the employer's principal place of business that such employees usually receive their salary, briefings and instructions, to which they are obliged to report, i.e. to which their employment is oriented. Given the nature of such employment relations, one might argue that the employees should reasonably expect the application of the employer's law. The application of this law is particularly justified if the parties share the nationality of, or if both are domiciled or habitually resident in, the country in which they enter into an employment contract for work abroad. In such cases, the parties may not reasonably contemplate the application of any other law, especially if the work is performed in a country whose law is based on fundamentally different notions or contains low employment standards. The state to which the parties belong usually also has a legitimate interest in having its law applied.⁸³ Similarly, there is a strong argument for applying the law of the country of *the parties' joint nationality* in cases of employees who work in diplomatic missions abroad or are members of the armed forces stationed abroad.

There are situations where the application of the law of the country of the *employee's domicile or habitual residence* may be most suitable. An employer may actively seek out an employee in the latter's home country, and conclude or negotiate the contract of employment with him there. The parties may foresee that the employee would retain strong links with his homeland, and that he will return there after the termination of employment. In such cases, the application of the law of the employee's country may accord with the parties' reasonable expectations. That country may also be legitimately interested in having its employment law applied, since any adverse

⁸³ Some US statutes expressly extend their application to US corporations employing US workers and operating overseas: (n33).

consequences of the employment relation (unemployment, injury) would ultimately be felt there.⁸⁴ A parallel can be made with consumer contracts in this regard. The consumer's habitual residence is often used as a relevant connecting factor when the supplier seeks out the consumer in his home country.⁸⁵

Employees whose employment contracts are governed by the law of the country of the habitual place of work or of the employer's principal place of business or of the employee's domicile or habitual residence can be temporarily sent to an employer's ancillary foreign place of business, branch, subsidiary or affiliate. In such cases, the country to which the employee is posted may also have an interest in the application of certain aspects of its employment legislation to posted workers. For instance, in order to protect local employers and workers from competition from abroad, the host country may impose on foreign employers posting workers to its territory the application of certain local employment law provisions that are of immediate interest during the period of posting, e.g. provisions concerning health and safety, minimum wage or anti-discrimination. The interest of the host country in the application of its employment law frequently conflicts with those of the home country and of home country employers. The interests of posted workers are ambiguous. On the one hand, local employment standards may give them more protection than the home country law. On the other hand, the costs that the employer would have to bear if local employment standards were applied might eventually drive the employer out of the host country's market and lead to the loss of jobs for posted workers. The Posted Workers Directive attempts to strike the proper balance between the competing interests in the EU context.⁸⁶

⁸⁴ Weintraub (n35) 286-287.

⁸⁵ Rome I, Art.6(1); Quebec Civil Code, Art.3117(1), 3117(2); Swiss Federal PIL Code, Art.120(1).

⁸⁶ See Chapter VIII.

Furthermore, particular problems are caused by employment relations where there is no habitual place of work. Commercial representatives, for instance, may be covering territories of several countries. Depending on the circumstances of a particular case, the applicable law may be the law of the country from which such employee works, the law of the country of the employer's principal place of business, or even a third country's law (e.g. the law of the country of the place of engagement).⁸⁷ Another example is international transport workers, such as seafarers or air crew members. Various solutions have been proposed for them, most widespread being the laws of the countries of the ship's flag or of the place of registration of the aircraft, of the employer's principal place of business, of the place of engagement, and of the base from which the work is performed.⁸⁸ The shortcoming of the first solution is obvious if the vessel flies a flag of convenience. The second and third solution may point to the law of the country that is not particularly closely connected, such as where the country of the employer's principal place of business or of the place of engagement is not the country from which the vessel operates. The fourth solution seems to be suitable in most cases, except where the connections between the international transport worker's work and his base are very weak. Similar problems arise where there is a fixed place of work, but which is not located in any particular country, e.g. offshore installations.⁸⁹

These different factual patterns show that the determination of the objectively applicable law is a delicate matter. In the words of KAHN-FREUND:

‘The need for flexibility in the criteria used for the determination of the proper law of the contract of employment arises from the generality of the concept of

⁸⁷ Morgenstern (n75) 28-30. Rome I uses ‘the place of business through which the employee was engaged’ as the relevant connecting factor in case ‘the country in which or, failing that, from which’ the work is habitually carried out cannot be determined: Art.8(2), 8(3). The Swiss Federal PIL Code provides for the application of the law of the country of the employer's place of business, domicile or habitual residence: Art.121(2). Similarly, Chinese PIL Act, Art.43; Quebec Civil Code, Art.3118(2).

⁸⁸ Morgenstern *ibid* 28-32.

⁸⁹ *ibid* 32-33.

the contract of employment: it covers so many social phenomena that any formula of conflict of laws seeking to treat all cases alike would force an infinite variety of factual relations into too rigid a legal mould.⁹⁰

An appropriate default rule therefore needs to be flexible and take into account the various interests involved. The solution of Rome I (with its primary and subsidiary rules, exception clause, and the possibility of applying overriding mandatory provisions of the forum, and even, under certain conditions, of third countries)⁹¹ represents one attempt in this regard. Another attempt is the solution of the Second Restatement of the Conflict of Laws and its progeny.⁹²

4. Protecting employees by jurisdictional rules

There are various factors that make a forum more attractive to one party than the other in an international employment dispute: operation of choice-of-law rules, existence of specialised labour courts or tribunals, system of legal fees, availability of legal aid, methods of obtaining and location of evidence, geographical proximity, neutrality (or even bias, actual or perceived, towards a party), cultural or legal tradition and the like.⁹³

Parties normally seek to pursue their claims or defend their cases in the forums that are most advantageous for them according to these factors. Since it is claimants who ordinarily select the forum when initiating proceedings, the parties' litigational positions ultimately depend upon the number and diversity of available jurisdictional bases. The more available and diverse the bases, the greater the chance that the claimant will

⁹⁰ O. Kahn-Freund, 'Notes on the Conflict of Laws in Relation to Employment in English and Scottish Law' in *Selected Writings* (London, 1978) 259, 262.

⁹¹ Arts.8, 9. For similar solutions which provide for a broader possibility of applying overriding mandatory provisions of third countries see Quebec Civil Code, Arts.3079, 3082, 3118; Swiss Federal PIL Code, Arts.15, 18, 19, 121.

⁹² Second Restatement of the Conflict of Laws, §§6, 196; Louisiana Civil Code, Art.3537; Oregon Revised Statutes, §15.630.

⁹³ A.T. von Mehren, 'Theory and Practice of Adjudicatory Authority in Private International Law: A Comparative Study of the Doctrine, Policies and Practices of Common- and Civil-Law Systems' (2002) 295 *Recueil des Cours* 9, 194-196.

pursue his claim in an advantageous forum, but also that the defendant will have to defend his case in a disadvantageous forum.

As VON MEHREN rightly noted:

‘The highest ideal of procedural justice in civil matters is that, insofar as possible, each party should be treated equally... [W]here the parties are considered essentially equal in litigational capacity and neither’s claim to corrective justice is thought to be stronger than the other’s, neither should be accorded a jurisdictional preference.’⁹⁴

Where the parties are of essentially unequal litigational capacity, however, there are compelling reasons to protect the weaker party by granting him a jurisdictional preference. Otherwise, equal treatment could lead to unjust results.

The manner of achieving corrective justice in employment matters depends on whether employees, as a typically weaker category of litigants, act as claimants or as defendants. In the former situation, one or more jurisdictional bases could be made available to them in addition to those available to claimants in general. In the latter situation, employers could be denied the use of some generally available jurisdictional bases.⁹⁵ Furthermore, the judgment of a foreign court that has unjustifiably assumed jurisdiction over an employee could be refused recognition and enforcement. The purpose of such measures is to ensure that employees are able to present their claims in favourable forums, and do not have to defend their cases in inaccessible and unfamiliar forums.

Rules of jurisdiction in employment matters should also accord with the following two considerations: proportionality and vindication of legitimate state

⁹⁴ *ibid* 196-197.

⁹⁵ *ibid* 200-203.

interests.⁹⁶ Proportionality seeks to ensure, among other things, that the jurisdictional preference given to employees is not overly burdensome for employers. The forums made available to employees should be appropriate in terms of having sufficient connection with the parties or the claim, but also no more numerous than is required to achieve corrective justice. Moreover, barring employers from accessing certain forums should not exceed what is necessary for this purpose. The second consideration arises from the states' legitimate interests in having their courts adjudicate the disputes that touch significantly upon their policies. As discussed, choice-of-law rules for employment contracts should be designed in such a way as to ensure the application of the law of the country that is sufficiently closely connected with the employment contract in question and legitimately interested in regulating it. It follows that, in principle, choice-of-law rules for employment contracts and rules of jurisdiction in employment matters should be complementary and, where possible, point to the law and courts of the same country.⁹⁷ This is an especially important concern given that many states have set up specialised labour courts or tribunals, often with worker representation, that are not experienced in applying foreign law. However, the importance of this concern should not be exaggerated. There are many employment disputes where the *forum* and *ius* do not coincide.⁹⁸

Many countries have special jurisdictional rules for employment disputes that seek to accommodate at least some of the mentioned concerns. The current situation is one of great diversity. A study on residual jurisdiction of Member State courts

⁹⁶ *ibid* 68.

⁹⁷ *Koelzsch* (n5), Opinion of AG Trstenjak, [80]; Nygh (n12) 166; M. Polak “*Laborum dulce lenimen*”? Jurisdiction and Choice of Law Aspects of Employment Contracts’ in J. Meeusen, M. Pertegás and G. Straetmans (eds), *Enforcement of International Contracts in the European Union – Convergence and Divergence between Brussels I and Rome I* (Antwerp, Oxford, New York, 2004) 323, [12-01], [12-23], [12-51].

⁹⁸ *Mulox* (n5), Opinion of AG Jacobs, [26]-[28]; B. Hess, T. Pfeiffer and P. Schlosser ‘Report on the Application of Regulation Brussels I in the Member States’, available at http://ec.europa.eu/civiljustice/news/docs/study_application_brussels_1_en.pdf (last accessed 26/9/2012), [350]-[351].

conducted in 2007 illustrates the multitude of existing approaches.⁹⁹ Out of 27 Member States, only 7 do not have a jurisdictional rule of this kind. Jurisdiction is usually conferred on the courts for the habitual place of work. In some countries, jurisdiction is asserted on other bases, such as the place of conclusion of the contract, the place of business that engaged the employee, the place of payment of salary, common nationality of the parties, and the employee's domicile or habitual residence. While in most Member States these jurisdictional bases are available only to employees, in some Member States they are equally available to both parties. In addition, many countries impose restrictions on the effect of choice-of-court agreements in employment contracts. The restrictions consist in either allowing the courts, if the goal of employee protection so requires, to deny effect to a particular choice-of-court agreement that derogates their jurisdiction, or in denying effect against employees to all choice-of-court agreements concluded before the dispute has arisen.

The *habitual place of work* is a head of jurisdiction that best satisfies the considerations of proportionality and vindication of legitimate state interests. In addition, it does not favour any party *a priori*. Other bases are objectionable. The shortcomings of the *place of contracting* rule are too well known to be repeated here. There are no guarantees that the country where an employment contract was concluded will be sufficiently closely connected with, or legitimately interested in adjudicating disputes arising out of, it. Moreover, employers might easily manipulate this connecting factor and thus seek the benefit of litigating in the forums favourable for them. The same concerns apply to the *place of business that engaged the employee*¹⁰⁰ and the *place of payment of salary*. *Common nationality of the parties* will frequently confer jurisdiction on the courts of the country that is sufficiently closely connected

⁹⁹ A. Nuyts, 'Study on Residual Jurisdiction: General Report', available at http://ec.europa.eu/civiljustice/news/docs/study_residual_jurisdiction_en.pdf (last accessed 26/9/2012), 43-46.

¹⁰⁰ *Mulox* (n5), Opinion of AG Jacobs, [37].

with, and legitimately interested in adjudicating disputes arising out of, employment contracts between its nationals. However, the problem arises in defining ‘nationality’ of legal persons, which the majority of international employers are. ‘Nationality’ of legal persons is usually determined by connecting factors such as the place of incorporation or corporate seat.¹⁰¹ Since these connecting factors also determine the domicile of legal persons, thus representing grounds of general jurisdiction over them,¹⁰² the common nationality rule would ordinarily not open an additional forum to claimant employees. On the other hand, this jurisdictional basis would effectively give employers access to the courts of their domicile, which obviously does not accord with the objective of employee protection. Finally, *employee’s domicile or habitual residence* has a rather tenuous connection in cases involving frontier workers and whenever the employee changes his domicile or habitual residence after the termination of employment, but before the commencement of proceedings. Art.115(2) of the Swiss Federal PIL Code, which adopts this solution, has been criticised on the ground that any judgment rendered on this basis has virtually no chance of being recognised and enforced abroad, which makes the protection that it provides illusory.¹⁰³

However, there seems to be one situation where the connecting factor of the *employee’s domicile or habitual residence* accords with the mentioned considerations. This situation exists when an employer actively seeks out an employee in the latter’s home country for work abroad, and the parties foresee that the employee will retain strong connection with his home country and return there after the termination of employment. This country is arguably sufficiently closely connected with the employment relation, and legitimately interested in adjudicating disputes arising out of it, since all adverse consequences of the employment relation would ultimately be felt

¹⁰¹ F. Vischer, ‘Connecting Factors’ in *International Encyclopedia of Comparative Law* (n75) Ch 4, 14.

¹⁰² See, for example, Brussels I, Art.60.

¹⁰³ Bucher (n59) 149.

there. Thus, the employer's initiative to recruit the employee away from his home state is enough to establish jurisdiction of that state's courts in the US under the 'purposeful availment' test.¹⁰⁴

With regard to the restrictions of choice-of-court agreements, the solution which allows the courts to deny effect to such agreements, if the goal of employee protection so requires, seems inappropriate. It leads to considerable legal uncertainty, and does not guarantee that employees in a genuinely weak position will actually receive protection.¹⁰⁵ The goal of employee protection is better advanced by denying effect against employees to all choice-of-court agreements entered into before the dispute has arisen. On the one hand, employees are guaranteed that the number of forums which are available to them cannot be reduced in advance. The parties may even expand the list of options available to the employee. On the other hand, the number of forums which are available to employers cannot be increased in advance. This solution, however, works well only when the default jurisdictional rules satisfy the considerations of jurisdictionally preferring employees, proportionality and vindication of legitimate state interests. Since this solution is accepted in Brussels I,¹⁰⁶ Chapter IV will focus on examining the available jurisdictional bases¹⁰⁷ in this light. Yet another possibility is to 'guide' the parties' choice by listing the forums among which a valid choice can be made. This solution, however, does not guarantee that the listed forums will be favourable for the employee, or that they will be sufficiently closely connected with, and legitimately interested in adjudicating disputes arising out of, the employment contract in question.¹⁰⁸

¹⁰⁴ E. Scoles and others, *Conflict of Laws* (St Paul, Minnesota, 4th ed, 2004) 395-396.

¹⁰⁵ See text to n39 above.

¹⁰⁶ Art.21.

¹⁰⁷ Arts.18-20.

¹⁰⁸ For arguments against a similar restriction in relation to choice of law see text to nn58-62 above.

Conclusions

The shortcomings of party autonomy and the states' legitimate interests in the application of their employment laws are strong arguments in favour of special PIL rules for employment contracts. Employees must not be placed in a position where they can only 'put their faith in employers' and 'trust that employers will play fair by them'. Employment law of the state that is sufficiently closely connected with the employment contract in question, legitimately interested in regulating it, with which law the parties to the contract are sufficiently closely connected and presumably familiar, and whose application they reasonably expect, should be safeguarded. At the same time, the floor of protection should not be turned into the ceiling of protection. Party autonomy should be allowed as long as it benefits the employee by building upon the mandatory minimum. In addition, employees should be guaranteed the right to pursue their claims in favourable forums, and not to defend their cases in unfamiliar and inaccessible forums. Jurisdictional preference accorded to them, however, should be proportionate and take into account the states' legitimate interests. In particular, the courts of the country that is sufficiently closely connected with, and legitimately interested in adjudicating disputes arising out of, the employment contract, and whose jurisdiction the parties can reasonably foresee, must be available.

This chapter demonstrates that the objective of employee protection is not only about special PIL rules giving protection to individual employees and being more favourable to their interests than the general rules. It is also about safeguarding the application of the law and jurisdiction of the courts of the country that is closely connected with, and legitimately interested in, the employment contract in question. A PIL regime that is motivated by such objective can therefore be seen as performing a regulatory function, one of allocating and protecting regulatory authority of states in the

field of labour law. The following chapters assess whether, and to what extent, the rules of European PIL of employment accord with the mentioned considerations, and explore the possibilities for improvement. Before exploring in detail the special jurisdictional and choice-of-law rules of Brussels I and Rome I, their ‘personal scope’ must be examined.

III 'INDIVIDUAL EMPLOYMENT CONTRACTS' IN EUROPEAN PRIVATE INTERNATIONAL LAW

'[I]n deciding whether jurisdiction should be claimed, it is relevant that the plaintiff is [an employee] but not that he is a pauper or a millionaire.'

VON MEHREN¹

The rules of Brussels I and Rome I concerning employment apply 'in matters relating to individual contracts of employment',² i.e. to 'individual employment contracts'.³ Clearly, those rules cover neither collective labour agreements nor 'contracts for the provision of services'.⁴ It is unclear, however, which contracts for the performance of work do fall within the scope of those rules.

Most workers work under 'standard' employment contracts, i.e. permanent full-time contracts with a single employer that bears the chance of profit and risk of loss, and has the right to control the workers who are integrated into its organisation.⁵ National laws classify such workers as 'typical' employees' (and the contracts under which they work as typical employment contracts), and accord them the full protection

¹ A.T. von Mehren, 'Adjudicatory Jurisdiction: General Theories Compared and Evaluated' (1983) 63 *Boston University Law Review* 279, 313.

² Brussels I, Art.18(1). Also 2007 Lugano Convention, Art.18(1); Brussels and 1988 Lugano Conventions, Arts.5(1), 17(5).

³ Rome I, Art.8(1). Also Rome Convention, Art.6.

⁴ Brussels I, Art.5(1)(b); Rome I, Art.4(1)(b).

⁵ B. Burchell, S. Deakin and S. Honey, *The Employment Status of Individuals in Non-standard Employment* (March 1999), available at www.dti.gov.uk/files/file11628.pdf (last accessed 26/9/2012); A. Perulli, *Economically Dependent/Quasi-subordinate (Parasubordinate) Employment: Legal, Social and Economic Aspects* (2003), available at <http://ec.europa.eu/social/BlobServlet?docId=2510&langId=en> (last accessed 26/9/2012).

of labour and social legislation. This is because such workers are subject to a considerable degree of control by the employer, and are dependent upon the employer economically and/or for the fulfilment of certain social and psychological needs.⁶ Work relations between such workers and their employers also typically fall within the scope of the European PIL rules concerning employment.

Nowadays, a large and increasing number of work relations lack one or more features of the typical employment contract. Vertical disintegration of production⁷ has led to the distancing of workers from the producing enterprise, as manifested by the rising number of fixed-term, part-time, casual, home, volunteer and other types of ‘atypical’ work arrangements, as well as by the growth of both nominal and genuine entrepreneurship. The loosening of the employer’s control over such workers, their relatively low level of integration into the employer’s organisation, and the assumption of many business risks have often resulted in the courts classifying such workers as self-employed, thus outside the scope of protective legislation. Furthermore, the phenomenon of decomposition of the producing enterprise into distinct legal entities connected, for instance, by bonds of ownership and control⁸ has created situations where a worker may be nominally employed by one legal entity (e.g. one member of a corporate group) but work, occasionally or exclusively, for one or more other legal entities (e.g. group members). A related phenomenon is the outsourcing of labour through employment agencies. But the splitting and sharing of employer functions among multiple entities is often not followed by a corresponding ascription of employer responsibilities. Given that many workers working under these and other ‘non-

⁶ The reference to control and dependence in economic, social and psychological terms as determinative of the need of protection is derived from G. Davidov, ‘The Three Axes of Employment Relationship: A Characterisation of Workers in Need of Protection’ (2002) 52 *University of Toronto Law Journal* 357.

⁷ H. Collins, ‘Independent Contractors and the Challenge of Vertical Disintegration to Employment Protection Laws’ (1990) 10 OJLS 353.

⁸ H. Collins, ‘Ascription of Legal Responsibility to Groups in Complex Patterns of Economic Integration’ (1990) 53 MLR 731.

standard' work relations may be subject to a considerable degree of control by, and dependence upon, their employers, national laws are faced with a difficult question of whether and how to adequately bring such workers within the fold of protective legislation. Some countries have responded to this challenge by widening the concept of employee to encompass some categories of atypical workers, whereas some countries have created intermediate legal categories of workers who are not employees but, nevertheless, fall to a certain extent within the scope of protective legislation (referred to as the 'dependent self-employed' in the following text). Moreover, countries differ with regard to the way they ascribe employer responsibilities among multiple employing entities. European PIL is faced with essentially the same question: should the rules concerning employment cover some non-standard work relations? This question goes to the core of the problem of employee protection in PIL.

This chapter starts by exploring the genealogy of the term 'individual employment contracts' of Brussels I and Rome I. It is shown that the use of this term does not imply a policy of narrowly interpreting the scope of the special rules by confining it to typical employment contracts. Next, it is examined whether this term has an autonomous meaning. After concluding that an autonomous interpretation should be adopted, it is investigated how this term should be defined for the purposes of European PIL. The third section demonstrates that the CJEU case-law concerning the free movement of workers and equal pay provisions of TFEU provides crucial guidance. Since the third section focuses on the concept of employee, i.e. person working under an 'individual employment contract', the fourth section examines who is the employer for the purposes of European PIL. It is shown that the wide and inclusive scope of the special rules can be perceived as an attempt both to provide PIL protection to all workers in a genuine need of protection and to allocate and protect regulatory authority

of states that have intermediate legal categories of dependent self-employed workers or ascribe employer responsibilities to multiple employing entities.

This chapter does not deal with the concept of ‘worker’ under the Posted Workers Directive. Since it is to be interpreted according to the law of the host Member State,⁹ no problem of classification of interest for PIL arises.

1. The genealogy of the term ‘individual employment contracts’

It may appear at first sight that the term ‘individual employment contracts’ of Brussels I and Rome I should be equated with the notion of typical employment contract. The purpose of this section is twofold. By examining its genealogy, it is explored whether the use of the term ‘individual employment contracts’ implies, first, either an autonomous or national interpretation and, second, a policy of narrowly interpreting the scope of the special rules by excluding non-standard work relations from their ambit.

The original 1968 version of the Brussels Convention did not contain any special jurisdictional rules concerning employment. A preliminary draft, however, contained such rules which, according to the Jenard Report, were to apply ‘in matters relating to *contracts of employment* in the broadest sense of this word.’¹⁰ A reason why the special rules were not incorporated into the final version was because at that time work was in progress to harmonise choice-of-law rules within the European Economic Community (‘EEC’). It was thought that the jurisdictional rules should follow the choice-of-law rules, and the adoption of the special jurisdictional rules concerning employment was postponed.¹¹

⁹ Art.2(2).

¹⁰ Jenard Report [1979] OJ C59/1, 24 (emphasis added).

¹¹ *ibid.*

Indeed, the European Commission was then drafting two instruments containing special choice-of-law rules concerning employment. The first instrument, which never came to fruition, was the Regulation on the provisions of conflict of laws on employment relationships within the Community, two drafts of which were published in 1972 and 1976.¹² The draft Regulation was to apply to ‘*employment relationships*’.¹³ According to the Explanatory Memorandum accompanying the 1976 draft Regulation, ‘Each Member State determines, through its own legislation, which legal relationships should be considered as employment relationships.’¹⁴ Since the interpretation of the term ‘employment relationships’ would have been national under this instrument, the breadth of the scope of the special choice-of-law rules would have depended on the content of the Member States’ employment laws.

The second instrument started off as the 1972 draft Convention on the law applicable to contractual and non-contractual obligations.¹⁵ The application of the choice-of-law rules for contract or tort would have depended on the legal basis of the claim. While the 1972 draft Convention contained special rules for contractual employment claims that were to apply to ‘*contracts relating to labour relations*’ or ‘*labour contracts*’,¹⁶ it contained no special rules for tortious employment claims. After the project of unifying choice-of-law rules for tort had been abandoned, the choice-of-law rules for contract of the 1972 draft Convention came to life in the form of the 1980 Rome Convention. Art.6 of this Convention contains special rules concerning employment that apply to ‘*individual employment contracts*’. The Giuliano/Lagarde Report provides little guidance regarding the interpretation of this term. After stating the obvious that ‘Article 6 applies to individual employment contract and not to

¹² [1972] OJ C49/26; COM(75) 654.

¹³ 1976 draft Regulation, Art.1.

¹⁴ COM(75) 653, 5.

¹⁵ The text of the 1972 draft Convention with comment by K.H. Nadelmann can be found in (1973) 21 AJCL 584.

¹⁶ Art.5.

collective agreements', the Report notes that the 'wording of Article 6 speaks of "contract of employment" instead of "employment relationship"', and concludes that it 'covers the case of void contracts and also *de facto* employment relationships in particular those characterised by failure to respect the contract imposed by law for the protection of employees'.¹⁷ The Rome Convention and the Giuliano/Lagarde Report therefore left room for debate whether the term 'individual employment contracts' should be interpreted autonomously, and did not define its content.

Largely inspired by the Rome Convention's choice-of-law rules concerning employment, the CJEU carved, in the ground-breaking *Ivenel* case of 1982,¹⁸ a special jurisdictional rule for '*contracts of employment*' into the Brussels Convention. But the Court neither said whether this term should be interpreted autonomously nor provided guidance regarding its content. Since the referring court (French *Cour de cassation*) had found that the contract for commercial representation between the parties had been an employment contract, the CJEU was concerned only with the jurisdictional consequences of that finding. In a subsequent case, *Shenavai*,¹⁹ the Court addressed the scope of the *Ivenel* rule. Mr Shenavai, a German architect, was commissioned by a Dutch client to draw up plans for the building of holiday homes. The question was whether the contract fell within the scope of the *Ivenel* rule. In an important paragraph, the CJEU stated that:

'contracts of employment, like other contracts for work other than on a self-employed basis, differ from other contracts – even those for the provision of services – by virtue of certain particularities: they create a lasting bond which brings the worker to some extent within the organizational framework of the business of the undertaking or employer, and they are linked to the place where

¹⁷ [1980] OJ C282/1, 26.

¹⁸ Case 133/81 [1982] ECR 1891.

¹⁹ Case 266/85 [1987] ECR 239.

the activities are pursued, which determines the application of mandatory rules and collective agreements.²⁰

Since the contract between Mr Shenavai and his client had no such particularities, it fell outside the scope of the *Ivenel* rule.

The special jurisdictional rules concerning employment were incorporated into the 1988 Lugano Convention and, by means of the 1989 Convention on the accession of Spain and Portugal,²¹ into the Brussels Convention. With regard to the term ‘*individual employment contracts*’ that was used to delineate their scope, the Jenard/Möller Report accompanying the 1988 Lugano Convention stated that, ‘The question whether a contract of employment exists is not settled by the Convention... Although there is as yet no independent concept of what constitutes a contract of employment, it may be considered that it presupposes a relationship of subordination of the employee to the employer.’²² The CJEU has not had another opportunity to decide on the scope of the special jurisdictional rules, but it did confirm the cited paragraph of *Shenavai*.²³

The Rome, Brussels and 1988 Lugano Conventions have been replaced by Rome I, Brussels I and the 2007 Lugano Convention. The special rules concerning employment underwent little changes of substance, and continue to apply to ‘*individual employment contracts*’. Choice-of-law rules for tort have been unified by Rome II. There are no special rules for tortious employment claims, however.

There seem to be two reasons for the use of the term ‘*individual employment contracts*’ in Brussels I and Rome I and their predecessors. This term prevailed over other terms (‘employment relations’, ‘labour relations’, ‘labour contracts’) with the adoption of the Rome Convention in 1980 and the CJEU decision in *Ivenel* in 1982. At

²⁰ *ibid* [16] (emphasis added).

²¹ [1989] OJ L285/1.

²² [1990] OJ C189/57, [41].

²³ Case 32/88 *Six Constructions* [1989] ECR 341, [10]; Case C-125/92 *Mulox* [1993] ECR I-4075, [15].

that time, the binary divide between employment contracts and services contracts was paradigmatic in the laws of Member States.²⁴ National employment laws, in principle, covered only employees working under employment contracts. The concept of employment contract was defined by reference to the following characteristics: personal subordination of the employee in the performance of work, continuity, full-time working hours and bilaterality.²⁵ Although some Member States also brought certain categories of workers working under atypical work relations within the scope of some of their protective legislation, this was rather exceptional.²⁶ Thus, it must have been quite obvious and uncontroversial in the early 1980s that the rules of European PIL concerning employment should cover employees working under employment contracts.

Another reason probably lies in the fact that the UK and Ireland, countries familiar with the legal concept of employment contract but not employment relationship or labour relations, joined the EEC in 1973. Since the concept of employment contract was also in use in other Member States, the term ‘individual employment contracts’ was arguably accepted as common to all Member States.

Two conclusions can be derived from this presentation of the evolution of European PIL of employment. First, it has never been conclusively clarified whether the term ‘individual employment contracts’ should be interpreted autonomously. Second, the use of this term does not imply a policy of narrowly interpreting the scope of the rules concerning employment.

²⁴ N. Countouris, *The Changing Law of the Employment Relationship* (Aldershot, 2007) Ch 1.

²⁵ *ibid.*

²⁶ *ibid.*

2. Autonomous or national interpretation?

An autonomous interpretation of the term ‘individual employment contracts’ is favoured by the overwhelming majority of academics and in national case-law.²⁷

Nevertheless, the reasons for adopting such an interpretation must be examined. This is because a national interpretation is still preferred by a very influential minority, and pursued by an occasional judge.²⁸ Furthermore, such an interpretation was favoured, in relation to the rules of the Rome Convention, by the authors of *Dicey, Morris and Collins on the Conflict of Laws*, under the influence of MORSE.²⁹

Brussels I and Rome I are directly effective EU legislation and, as a matter of EU law, should, as far as possible, be accorded an autonomous interpretation.³⁰ Furthermore, many EU employment law instruments expressly refer to national

²⁷ A. Briggs and P. Rees, *Civil Jurisdiction and Judgments* (London, 5th ed, 2009) [2.103]; G. Cavalier and R. Upex, ‘The Concept of Employment Contract in European Union Private Law’ (2006) 55 ICLQ 587; L. Collins (gen ed) *Dicey, Morris and Collins on the Conflict of Laws*, 4th *Cumulative Supplement to the 14th Edition* (London, 2010) [33-063]–[33-066]; J. Hill and A. Chong, *International Commercial Disputes: Commercial Conflict of Laws in English Courts* (Oxford, 4th ed, 2010) [15.5.25]; F. Jault-Seseke, ‘L’adoption du règlement 593/2008 (Rome I) sur la loi applicable aux obligations contractuelles: le choix de la continuité pour le contrat de travail’ [2008] *Revue de droit du travail* 620, 621-622; A. Junker, ‘Arbeitsverträge’ in F. Ferrari and S. Leible (eds), *Ein neues Internationales Vertragsrecht für Europa: Der Vorschlag für eine Rom I-Verordnung* (Munich, 2007) 111, 113-114; P. Kaye, *The New Private International law of Contracts of the European Community* (Aldershot, 1993) 222-223; A. Layton and H. Mercer (eds), *European Civil Practice* (London, 2004) [18.005]; P. Mankowski, ‘Commercial Agents under European Jurisdiction Rules’ (2008) 10 YPIL 19, 22-24; L. Merrett, *Employment Contracts in Private International Law* (Oxford, 2011) Ch 3; C.E. Mota and G.P. Moreno, ‘Section 5: Jurisdiction over Individual Contracts of Employment’ in U. Magnus and P. Mankowski (eds), *Brussels I Regulation* (Munich, 2007) 326, 328; *Mercury Publicity Ltd v Wolfgang Loerke GmbH* [1993] ILPr 142 (CA); *WPP Holdings Italy SRL v Benatti* [2006] EWHC 1641 (Comm); [2007] EWCA Civ 263; *Samengo-Turner v J&H Marsh & McLennan (Services) Ltd* [2007] EWCA Civ 723 (*Samengo-Turner*); *Duarte v Black & Decker Corp* [2007] EWHC 2720 (QB); German *Bundesarbeitsgericht*, 20 August 2003, 5 AZR 45/03 [2003] IPRspr No 140; *Arbeitsgericht Münster*, 26 January 1999, 3 Ca 1563/98 [2000] IPRspr No 111.

²⁸ P.R. Beaumont and P.E. McEahey, *Anton’s Private International Law* (Edinburgh, 3rd ed, 2011) [10.371]; C.M.V. Clarkson and J. Hill, *The Conflict of Laws* (Oxford, 4th ed, 2011) 244 (in relation to Rome I); R. Plender and M. Wilderspin, *The European Private International Law of Obligations* (London, 3rd ed, 2009) [11-010]–[11-024] (in relation to Rome I); *WPP Holdings Italy SRL v Benatti* [2007] EWCA Civ 263, [76]-[77] (*per* Buxton LJ) (in relation to Brussels I).

²⁹ L. Collins (gen ed), *Dicey, Morris and Collins on the Conflict of Laws* (London, 14th ed, 2006) [33-063]–[33-066]; C.G.J. Morse, ‘Contracts of Employment and the E.E.C. Contractual Obligations Convention’ in P.M. North (ed), *Contract Conflicts: the EEC Convention on the Law Applicable to Contractual Obligations: A Comparative Study* (Amsterdam, New York, Oxford, 1982) 143, 146-147; C.G.J. Morse, ‘Consumer Contracts, Employment Contracts and the Rome Convention’ (1992) 41 ICLQ 1, 13.

³⁰ Merrett (n27) [3.12]-[3.15].

definitions of the terms ‘worker’, ‘employee’, ‘employment contract’ and ‘employment relationship’ they employ; *a contrario*, since Brussels I and Rome I are silent in this respect, an autonomous definition should *prima faciae* be adopted.³¹

Only an autonomous interpretation enables the achievement of the objectives pursued by European PIL. According to Recital 6 Rome I:

‘The proper functioning of the internal market creates a need, in order to improve the predictability of the outcome of litigation [and] certainty as to the law applicable, for the conflict-of-law rules in the Member States to designate the same national law irrespective of the country in which an action is brought.’

Recital 2 Brussels I is worded in similar terms. Truly uniform jurisdictional and choice-of-law rules (as well as rules on recognition and enforcement of judgments) cannot exist unless the terms and concepts they employ are interpreted identically in all Member States. Lack of uniformity should, as far as possible, be avoided, since it leads to legal uncertainty, unpredictability and, according to the Preambles to the two Regulations, also hampers the sound operation of the internal market. Truly uniform rules can be achieved only if the terms and concepts they use are interpreted autonomously, not by reference to national law.

The following example illustrates this point. Suppose an atypical worker (W), who is domiciled and habitually resident in one Member State (MS1), habitually works in another Member State (MS2) for an employer from a third Member State (MS3). Furthermore, suppose W is classified as an independent contractor in MS1, as a dependent self-employed in MS2, and as an employee in MS3, and thus falls outside the scope of employment law of MS1, within the scope of some of the protective legislation of MS2, and within the scope of the whole of employment law of MS3. A recent CJEU

³¹ *ibid* [3.26]-[3.29], [3.32]. EU employment law instruments are listed in nn100-103 below.

case, *Voogsgeerd*,³² shows that factual scenarios of this kind are not just fictional. Here, a Dutch national and domiciliary entered into an employment contract with a Luxembourg company to habitually work from Belgium. The following section of this chapter shows that an atypical worker can indeed be classified as an independent contractor in one country, but as a dependent self-employed or an employee in another. If the term ‘individual employment contracts’ of the two Regulations were interpreted by reference to national law, the application of their rules concerning employment would be uncertain and unpredictable.

If the *lex fori* classification were adopted, the application of the European PIL rules concerning employment would depend on where the claimant brought his claim. Those rules would not apply if the claim were brought in MS1, but would apply if the claim were brought in MS3. If the claim were brought in MS2, another point of uncertainty and unpredictability would arise. Would the fact that W is classified as a dependent self-employed in MS2 be enough to also bring W within the scope of the special rules of the two Regulations? *Prima facie* the answer should be negative, since the dependent self-employed by definition do not work under employment contracts. However, if the law of MS2 gave W the right to access the labour courts, there would be a good argument in favour of bringing W at least within the scope of the special jurisdictional rules of Brussels I.³³

Even the authors favouring a national interpretation reject the *lex fori* classification. As MORSE notes in relation to the rules of the Rome Convention,³⁴ after deciding that the relationship between the parties is an employment contract under the *lex fori*, the court may discover that this contract is governed by a foreign law that

³² C-384/10 [2011] ECR 00000.

³³ W.A. Allwood, ‘Characteristic Performance and Labour Disputes under the Brussels Convention: Pandora’s Box’ (1987) 7 YEL 131, 139.

³⁴ Morse, ‘Contracts of Employment and the E.E.C. Contractual Obligations Convention’ (n29) 146-147. See also Plender and Wilderspin (n28) [11-013]-[11-014].

regards it as a services contract. If the court, nevertheless, applied the rules of the applicable law concerning employment, it would seriously distort the applicable law, and apply it contrary to the intentions of the enacting legislature. ‘And, as a matter of logic, of course, the forum which adopts such an approach disposes of the case by applying neither the foreign law nor, for that matter, the law of any country whatsoever.³⁵ MORSE further notes that it may appear that the distortion can be avoided if the court applies the rules of the applicable law concerning services contracts. But in this situation, ‘a choice-of-law rule deemed appropriate for contracts of employment may be used to secure the application of domestic substantive rules which are not applicable to the contracts of employment... Such a result might be thought to distort the [Rome] Convention itself.³⁶ Similar distortions occur if the *lex fori* does not regard the contract as one of employment, but the applicable law determined pursuant to the general choice-of-law rules does.

The authors who still favour a national interpretation argue for the *lex causae* classification.³⁷ Since choice-of-law rules for contract are uniform within the EU and aim to ‘designate the same national law irrespective of the country in which an action is brought’, in the view of the proponents of the *lex causae* classification, no uncertainty and unpredictability would arise if the applicable law were to classify the relationship between the parties. Returning to the given example, the choice-of-law rules of Rome I would lead to the application of one of the laws of MS1, MS2 and MS3 regardless of the court seized, and that applicable law would determine whether W works under an employment contract for the purposes of the European choice-of-law rules. But this argument cannot withstand closer scrutiny.

³⁵ Morse *ibid* 147.

³⁶ *ibid*.

³⁷ Clarkson and Hill (n28) 244; Plender and Wilderspin (n28) [11-015]–[11-016], [11-021]. See also Morse *ibid* 147–148; *WPP Holdings Italy SRL v Benatti* [2007] EWCA Civ 263, [76]–[77] (*per* Buxton LJ).

Where W's employee status is unclear, the question arises of whether the general or special choice-of-law rules of Rome I should apply to designate the law that, in turn, would determine whether W works under an employment contract. If, in the given example, the general choice-of-law rules were applied, the applicable law would, absent a choice-of-law agreement and a manifestly more closer connection with another country, be the law of the country of W's habitual residence, i.e. MS1.³⁸ Since W is classified as an independent contractor in MS1, he would fall outside the scope of the rules concerning employment of the two Regulations. If, on the other hand, the choice-of-law rules for employment contracts were applied, the applicable law would, absent a choice-of-law agreement and a closer connection with another country, be the law of the country of the habitual place of work, i.e. MS2.³⁹ Although W is classified as a dependent self-employed in MS2, the court might still find that he falls within the scope of the European PIL rules concerning employment. It is therefore of crucial importance whether the law that should determine whether W works under an employment contract is determined by applying the general or special choice-of-law rules.

PLENDER and WILDERSPIN attempt to solve this problem in the following way.⁴⁰ The court should apply, in the first instance, the choice-of-law rules for employment contracts, and then ascertain whether the law designated by those rules classifies the relationship between the parties as an employment contract. If so, the court should apply the rules of the applicable law concerning employment. If not, the court should apply the law designated by the general choice-of-law rules. The application of the special choice-of-law rules as the first step is justified by analogy with Art.10 Rome I which provides that the existence and validity of a contract, or any term thereof, shall be determined by the law that would govern it if the contract or term were valid. Returning

³⁸ Rome I, Art.4(1)(b), 4(2), 4(3).

³⁹ Rome I, Art.8(2), 8(4).

⁴⁰ (n28) [11-015]–[11-016]. See also Morse, 'Contracts of Employment and the E.E.C. Contractual Obligations Convention' (n29) 147-148.

to the given example, the court should, as the first step, apply the law of MS2 to determine whether the relationship between the parties is an employment contract. If the court finds that a dependent self-employed falls within the scope of the rules concerning employment of the two Regulations, it should apply the law of MS2. Otherwise, it should apply the law designated by the general choice-of-law rules, i.e. the law of MS1.

Even if one disregards the problems inherent in determining the content of foreign laws and their interpretation, this solution leads to considerable legal uncertainty and unpredictability on two accounts. Suppose W is classified as an employee in the Member State where he is domiciled and habitually resident (MS1), but as an independent contractor in the Member State where he habitually works (MS2). First, the parties to an employment contract may choose the applicable law.⁴¹ But the choice cannot deprive the employee of the protection afforded to him by mandatory provisions of the objectively applicable law.⁴² An employment contract can therefore be governed by two laws. If the parties chose the law of MS1, both the law of MS1 (the chosen law) and MS2 (the objectively applicable law) would logically have to be taken into consideration for determining the nature of the relationship between the parties. Where one applicable law, but not the other, regards the worker as an employee, preference would have to be given to the view of one applicable law over the other. Second, and assuming there is no choice-of-law agreement, the court should, as the first step, apply the law of MS2 to determine whether the relationship between the parties is an employment contract. However, since W is classified as an independent contractor in MS2, the court should apply the law designated by the general choice-of-law rules, i.e. the law of MS1. But the problem is that W is classified as an employee in MS1. If the

⁴¹ Rome I, Art.8(1).

⁴² *ibid.*

court applied the rules of MS1 concerning employment, it would, in the opinion of the proponents of the *lex causae* classification, distort Rome I.⁴³ If, on the other hand, the court applied the rules of MS1 concerning services contracts, it would, in their opinion, distort the applicable law.⁴⁴ This is presumably why PLENDER and WILDERSPIN concede that the *lex causae* classification ‘presents certain logical problems’, and adopt it ‘with some hesitation’.⁴⁵

In addition to promoting the objectives of legal certainty and predictability, an autonomous interpretation advances the objective of employee protection. As discussed in the following section, many Member States’ employment laws cover not only typical employees but also, completely or partially, some other categories of workers who are subject to a considerable degree of control by, and dependence upon, their employers. If the term ‘individual employment contracts’ is interpreted autonomously, it can be given a wide meaning that encompasses all workers who are in a genuine need of protection. An autonomous interpretation thereby allows European PIL of employment to take into consideration, and develop under the influence of, legal, economic, social and political trends that shape the scope of national employment laws, and perform a progressive social function of providing jurisdictional and choice-of-law protection to all workers who genuinely need it. An autonomous interpretation puts European PIL of employment in a position to adequately perform its regulatory function. Only an autonomous and wide interpretation enables the allocation and protection of regulatory authority of states that have intermediate legal categories of dependent self-employed workers or ascribe employer responsibilities to multiple employing entities.

The following two sections examine which work relations fall within the scope of the European PIL rules concerning employment. Before proceeding further,

⁴³ (n35).

⁴⁴ (n36).

⁴⁵ (n28) [11-016].

however, an argument that has been advanced against an autonomous interpretation should be addressed:

‘[W]ere an autonomous meaning to be attributed to the concept of contract of employment one might reach the result that a particular State’s employment law would be applied to a particular contract even though that State would regard the contract as not being one of employment...or, alternatively, that a particular State’s employment law would not be applied to the particular contract because although that State’s law regarded the particular contract as one of employment, the autonomous definition would place it under another heading... In either situation, there is a danger of distorting the applicable law.’⁴⁶

But the purpose of choice-of-law rules for contract is to designate a law to govern a particular contractual relationship. The role of the choice-of-law rules is exhausted once the applicable law has been determined. The relationship is governed by the rules of the applicable law which, according to that law, are applicable to the relationship. In other words, if the applicable law regards the relationship as an employment contract, the rules of the applicable law concerning employment apply. Similarly, if the applicable law regards the relationship as a services contract, the rules of the applicable law concerning services contracts apply. An autonomous and wide interpretation of the term ‘individual employment contracts’ enables European PIL of employment to adequately perform its regulatory function. But if the law that is objectively applicable pursuant to the special rules of Rome I regards the worker in question as self-employed and thus outside the scope of protective legislation, there is no reason to safeguard the application of the rules concerning employment of that law. A choice-of-law agreement in favour of a foreign law should be given full effect.

⁴⁶ *Dicey, Morris and Collins* (n29) [33-064]. See also Beaumont and McEavay (n28) [10.372]; Plender and Wilderspin (n28) [11-012], [11-021]; Morse, ‘Contracts of Employment and the E.E.C. Contractual Obligations Convention’ (n29) 148-149.

Absent such an agreement, the rules concerning services contracts of the objectively applicable law should be applied.

In sum, only an autonomous and wide interpretation of the term ‘individual employment contracts’ enables the achievement of the objectives of legal certainty, predictability, and employee protection. This term should also, as far as possible, be interpreted consistently between the two Regulations.⁴⁷

3. Who is the employee?

A number of methods of interpretation are used to interpret autonomous terms and concepts of European law, namely verbal, historic, systematic, comparative and teleological interpretations.⁴⁸ The wording and evolution of the term ‘individual employment contracts’ were explored in section 1. This section examines whether the elements of an autonomous definition can be found, first, in a comparative analysis of the scope of the Member States’ employment laws and, second, in substantive EU law. The focus here is on the concept of employee, i.e. person working under an ‘individual employment contract’ for the purposes of Brussels I and Rome I.

3.1. Elements of an autonomous definition: comparative analysis

The Member States’ employment laws differ considerably regarding their scope. As the following text demonstrates, the differences are such that, as in the examples used in the previous section, a worker may indeed find himself outside the scope of employment law of one Member State but, completely or partially, within the scope of employment

⁴⁷ Rome I, Recital 7. See also Rome II, Recital 7; Case C-29/10 *Koelzsch* [2011] ECR 00000, [33]; *Voogsgeerd* (n32), Opinion of AG Trstenjak, [83].

⁴⁸ P. Mankowski, ‘Introduction’ in Magnus and Mankowski (eds) (n27) 4, 31-39.

law of another Member State. This section presents briefly how some Member States, namely England, France and Germany, delineate the scope of their employment laws.⁴⁹

In all Member States, the concept of employment contract forms the paradigm of the kind of contract that falls within the ambit of, and receives protection in, employment law. On the other side of the binary divide is the concept of services contract that is regulated by commercial or contract law. But these concepts are not perceived and defined identically in Member States.

In England, the common law of employment applies to employment contracts, also labelled as contracts *of* service. Furthermore, only employees who work under employment contracts and meet the qualifying conditions are given all statutory employment rights.⁵⁰ There is no statutory definition of the concept of employee. The statutes using this concept refer to the common law definition.⁵¹ The basic principle of the common law is freedom of contract. An employer can employ the work of another under an infinite variety of contractual arrangements. To determine whether it is an employment contract or a contract *for* services, each contract for the provision of work must be analysed carefully. Classification under the common law is therefore an inherently complex and uncertain process, exacerbated by the fact there are several tests for distinguishing between employment and services contracts under which numerous factors have to be considered. Pursuant to the ‘control test’, one essentially has to consider whether the employer has the right to give orders regarding the workers’

⁴⁹ For a more detailed account see Cavalier and Upex (n27); N. Countouris, ‘The Employment Relationship: A Comparative Analysis of National Judicial Approaches’ in G. Casale (ed), *The Employment Relationship: A Comparative Overview* (Geneva, 2011) 35.

⁵⁰ Statutory employment rights given only to employees include the right to statement of employment particulars; right to itemised pay statement; right to guarantee payment; right not to suffer detriment in employment in various cases; right to time off work for various reasons; right to sick pay; rights relating to maternity, adoption, parental and paternity leave; right to flexible working; right to minimum period of notice; right to written statement of reasons for dismissal; right not to be unfairly dismissed; right to redundancy payment; rights on insolvency of employer; rights relating to transfer of undertaking: ERA 1996, *passim*; Transfer of Undertakings (Protection of Employment) Regulations 2006.

⁵¹ See ERA 1996, s.230.

activities.⁵² But the control test cannot be decisive in cases concerning skilled employees, professionals and managers who enjoy considerable discretion in performing their work. The more inclusive ‘integration’ or ‘organisation test’ considers the extent to which the worker is integrated into the employer’s organisation, i.e. subject to the organisation’s rules and procedures.⁵³ However, the organisation test may not be decisive in some cases of flexible forms of employment. Pursuant to another inclusive test, the ‘economic reality test’, one essentially has to consider whether the worker takes the chance of profit and risk of loss.⁵⁴ But the economic reality test may not be decisive, for example, in cases concerning employees whose payment is tied to personal performance and business profits. Moreover, for an employment contract to exist, there has to be a ‘mutuality of obligations’, i.e. the employer must promise to provide work in exchange for pay, and the worker must promise to perform work.⁵⁵ It is therefore the combination of the factors that fall to be considered under the four tests, i.e. their quantity and quality, rather than the (non)existence of a particular factor, that leads to the conclusion that there is an employment or a services contract.⁵⁶

In France, the employee status also brings a person within the fold of protective legislation. Since there is no statutory definition of the concept of employment contract, this concept is interpreted and developed by the courts and legal doctrine. An employment contract presupposes three elements: personal performance of work (or promise to personally perform work), remuneration (or promise to pay remuneration) and a relationship of subordination.⁵⁷ Only legal subordination arising out of the

⁵² *Lane v Shire Roofing Company (Oxford) Ltd* [1995] IRLR 493 (CA), 495 (*per* Henry LJ).

⁵³ *Stevenson, Jordan & Harrison v MacDonald & Evans* [1952] 1 TLR 101 (CA), 111 (*per* Denning LJ).

⁵⁴ *Market Investigations Ltd v Minister of Social Security* [1969] 2 QB 173, 184-185 (*per* Cooke J).

⁵⁵ *O’Kelly v Trusthouse Forte* [1984] QB 90 (CA); *Nethermere (St Neots) Ltd v Gardiner* [1984] ICR 612 (CA); *Carmichael v National Power Plc* [1999] ICR 1226 (HL).

⁵⁶ *Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance* [1968] 2 QB 497, 515 (*per* MacKenna J).

⁵⁷ J. Péliquier, A. Supiot and A. Jeammaud, *Droit du travail* (Paris, 22nd ed, 2008) 381, 387-390.

contract between the parties, not economic dependence, is relevant.⁵⁸ Legal subordination implies the performance of work under the authority of the employer that has the right to direct, supervise and discipline the employee.⁵⁹ This requirement has been interpreted widely enough to encompass workers who enjoy considerable discretion in performing their work, provided that the employer has a requisite degree of control concerning matters such as the place of work, working hours or discipline.⁶⁰ But in a 2000 decision, the *Cour de cassation* departed from the traditional approach when it found there had been an employment contract between a taxi company and a taxi driver, notwithstanding the fact that the company had leased the vehicle to the driver and had no right to control the driver, who had been free to determine his zone of work and working hours.⁶¹ In any event, the existence of an employment contract does not depend on the will of the parties or the terms of the contract, but on the actual content of the parties' relationship in practice.⁶² To determine whether there is an employment contract, the courts take into consideration a number of factors: the behaviour of the parties; the personal relationship between the parties; the place of work; working hours; the fact that the employee works alone or with the support of another; the ownership of material, tools and equipment; the existence or absence of the employer's direction and supervision; the extent of the employee's integration into the employer's organisation; the existence and methods of remuneration.⁶³

In Germany, although there is no statutory definition of the concept of employee, there is a statutory definition of the term 'self-employed'. Pursuant to §84(1) sentence 2 of the Commercial Code (*Handelsgesetzbuch*), which deals with self-

⁵⁸ *Cour de cassation, Bardou*, 6 July 1931, cited in Péliissier, Supiot and Jeammaud *ibid* 389.

⁵⁹ *Cour de cassation, Société Générale*, 15 November 1996 [1996] *Droit social* 1067, note J.-J. Dupeyroux.

⁶⁰ Péliissier, Supiot and Jeammaud (n57) 389.

⁶¹ *Cour de cassation, Labanne*, 19 December 2000 [2001] *Droit social* 227, note A. Jeammaud; cf *Cour de cassation*, 1 December 2005 [2006](2) *Revue de jurisprudence sociale* No 147.

⁶² Péliissier, Supiot and Jeammaud (n57) 394-395.

⁶³ *ibid* 394-404.

employed commercial representatives, self-employed is ‘anyone who essentially is free to organise his work and to determine his working time’. Despite the narrow scope of application of this section, the courts and academics perceive it as expressing a general principle.⁶⁴ Personal freedom is considered to be the main characteristic of self-employed workers.⁶⁵ The concept of employee, traditionally opposed to that of self-employed workers, implies the lack of such freedom. An ‘employee’ is therefore defined as a person who is obliged to work for another in return for salary on the basis of a private contract in a relationship of personal subordination.⁶⁶ Like in France, the requirement of subordination is interpreted widely. The freedom to organise one’s work and working time is not decisive, since there are employees who enjoy considerable discretion in this respect.⁶⁷ German courts take into consideration a number of different factors when examining whether a worker is an employee. The most important are whether the employer expects the worker to be always ready to accept new tasks, whether the worker is free to refuse new tasks, the extent to which the worker is integrated into the employer’s organisation, and the length of time required by the worker for performing the task for the employer.⁶⁸ Like their French counterparts, German courts place more weight on the actual performance of the contract than its terms.⁶⁹

This synoptic comparative account of the concept of employment contract shows that a person may indeed be regarded as an employee in one Member State, but as self-employed in another. For example, the taxi driver from the 2000 *Cour de cassation* decision would probably have been regarded as self-employed by English

⁶⁴ R. Wank, ‘Germany’ in ‘Labour Law in Motion’ (2005) 53 BCLL 19; M. Weiss and M. Schmidt, *Labour Law and Industrial Relations in Germany* (Aalphen aan den Rijn, 4th ed, 2008) 45.

⁶⁵ Weiss and Schmidt *ibid* 45.

⁶⁶ *ibid*.

⁶⁷ *ibid* 45-46.

⁶⁸ *ibid* 46-47.

⁶⁹ *ibid* 46.

courts.⁷⁰ Similarly, freelance journalists in the media classified as employees by the German *Bundesarbeitsgericht* would probably have been regarded as self-employed in England.⁷¹ English courts place more emphasis on the terms of the contract than their Continental counterparts. This can be explained by the central place accorded to freedom of contract by the common law of employment. Indeed, English employers, in pursuit of numerical flexibility of their internal labour market or of reducing compliance costs, often avail themselves of this freedom by shaping their contracts for the provision of work in a way that appears to bring the worker outside the employee category. The employer may insert clauses that, for example, shift many business risks onto the worker (e.g. by employing him as a casual worker, on a ‘zero-hours’ basis, or by linking the payment to personal performance and business profits), enable the worker to refuse future offers of work (‘obligations clause’), entitle the worker to employ a substitute or oblige him to do so if unable to perform the work personally (‘substitution clause’), prescribe that the worker is to provide his own tools and equipment, provide that the worker is responsible for paying national insurance contributions and taxes, and expressly designate the contract in question as a services contract. Unless the contract containing such clauses is a sham,⁷² the courts are likely to regard it as a services contract.⁷³ In cases concerning casual workers, particularly those entitled to refuse future offers of work, the courts may also find there is no continuous contract between the parties due to the lack of a mutuality of obligations.⁷⁴ However, workers working

⁷⁰ *Mingely v Pennock (t/a Amber Cars)* [2004] EWCA Civ 328.

⁷¹ *Bundesarbeitsgericht*, 13 January 1983, 5 AZR 149/82, *Arbeitsrechtliche Praxis* No 42 §611 BGB *Abhängigkeit*; cf *R (on the application of BBC) v Central Arbitration Committee* [2003] EWHC 1375 Admin.

⁷² *Autoclenz Ltd v Blecher* [2011] UKSC 41.

⁷³ *Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance* (n56) (lorry drivers who owned the vehicles and were paid by task not employees); *O’Kelly v Trusthouse Forte* (n55) and *Carmichael v National Power Plc* (n55) (casual workers not employees); *Express & Echo Publications Ltd v Tanton* [1999] ICR 693 (CA) (a substitution clause incompatible with an employment contract); cf *MacFarlane v Glasgow City Council* [2001] IRLR 7 (EAT) (a limited or partial right of substitution not incompatible with an employment contract).

⁷⁴ *O’Kelly v Trusthouse Forte* (n55) (no overall, global or umbrella employment contract linking separate hirings), affirmed in *Carmichael v National Power Plc* (n55); cf *Nethermere (St Neots) Ltd v Gardiner*

under such contractual arrangements may be in a genuine need of protection. They may be subject to a considerable degree of control by, and dependence upon, their employers. They may be unable to negotiate the change of the contract or to expand their base of clients and customers. In order to advance the objectives of, and to preclude employers from avoiding, protective legislation, many pieces of employment legislation forming part of English law extend their scope to certain categories of workers whom the common law regards as self-employed. The legislatures in Germany and, to a certain extent, in France have also extended the scope of some of their protective legislation to workers who would not be regarded as employees pursuant to the described tests, as shown below.

Some English statutes and analogous regulations, or at least some of the rights they confer, apply to 'workers'. Employment Rights Act 1996 gives 'workers' the right not to suffer unauthorised deductions from wages,⁷⁵ right not to have to make payments to the employer,⁷⁶ and the right not to suffer detriment in employment in working time cases.⁷⁷ The scope of the National Minimum Wage Act 1998,⁷⁸ Working Time Regulations 1998 ('WTR 1998'), Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000 ('PTWR 2000'),⁷⁹ of the right to be accompanied to a disciplinary hearing of the Employment Relations Act 1999 ('ERelA 1999'),⁸⁰ and of the right not to suffer detriment by reason of union membership of the Trade Union and

(n55) (there was an overall employment contract since there was in fact a mutuality of obligations between home workers and their employer). In *Carmichael v National Power Plc* Lord Hoffmann suggested *obiter* that casual workers probably worked under short-term employment contracts when they actually performed the work; similarly, in *McMeechan v Secretary of State for Employment* [1997] ICR 549 (CA) a temporary agency worker was held to be an employee of the agency when he actually performed the work for the end-user.

⁷⁵ s.13(1).

⁷⁶ s.15(1).

⁷⁷ s.45A(1).

⁷⁸ s.1(2)(a).

⁷⁹ Cf Fixed-Term Employees (Prevention of Less Favourable Treatment) Regulations 2002.

⁸⁰ s.13(1).

Labour Relations (Consolidation) Act 1992⁸¹ also extend to ‘workers’. A ‘worker’ is defined as:

‘an individual who has entered into or works under (or, where the employment has ceased, worked under): a) a contract of employment, or b) any other contract, whether express or implied and (if it is expressed) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual.’⁸²

The courts have added a gloss to this definition. In order to qualify as a ‘worker’, a person must work under a contract whose ‘dominant purpose’ is the personal performance of work.⁸³

The scope of anti-discrimination legislation is expressed in different terms. The provisions of the Equality Act 2010 concerning employment apply to ‘employment under a contract of employment, a contract of apprenticeship or a contract personally to do work.’⁸⁴ The wording of this definition, and in particular the lack of an express profession or business undertaking exclusion, suggests that EqA 2010 covers not only ‘employees’ and ‘workers’ but also some other individuals working under a contract personally to do work. However, the courts have interpreted this statutory definition very restrictively. There has to be a mutuality of obligations.⁸⁵ The personal

⁸¹ s.146.

⁸² ERA 1996, s.230(3); NMWA 1998, s.54(3); WTR 1998, reg.2(1); PTWR 2000, reg.1(2); ERelA 1999, s.13(1); TULR(C)A 1992, s.296.

⁸³ *James v Redcats (Brands) Ltd* [2007] ICR 1006 (EAT) (interpreting the scope of NMWA 1998).

⁸⁴ s.83(2). EqA 2010 consolidated, revised and replaced the following anti-discrimination legislation concerning employment which defined its scope in essentially identical words: Equal Pay Act 1970, Sex Discrimination Act 1975 (‘SDA 1975’), Race Relations Act 1976 (‘RRA 1976’), Disability Discrimination Act 1995, Employment Equality (Religion or Belief; Sexual Orientation; Sex Discrimination; Age) Regulations of 2003, 2005 and 2006.

⁸⁵ *Mingely v Pennock (t/a Amber Cars)* (n70) (interpreting the scope of RRA 1976).

performance of work must be the ‘dominant purpose’ of the contract.⁸⁶ Most importantly, in *Jivraj v Hashwani*,⁸⁷ the Supreme Court treated the first two words of the definition (‘employment under’) as imposing a crucial restriction, confining the scope of EqA 2010 to relations of ‘employment’. It seems that *Jivraj* effectively limits the scope of anti-discrimination legislation to employees working under employment contracts ‘either in the traditional sense or in a slightly but not crucially extended sense’.⁸⁸

Finally, it should be mentioned that ERA 1996 contains a special, wide definition of the concept of ‘worker’ for the purposes of the right not to suffer detriment in employment for making protected disclosures, i.e. ‘whistle-blowing’.⁸⁹ Certain statutes and analogous regulations contain provisions that apply to particular categories of workers, e.g. apprentices, trainees, agency and home workers. Legislation concerning health and safety at work extends not only to employees and the dependent self-employed but also to independent contractors.⁹⁰

In France, the Labour Code (*Code du travail*) extends the protection of employment law to particular categories of workers who are not legally subordinated, but are economically dependent upon their employers. It is presumed that the following categories of workers are employees: sales representatives (*voyageurs, représentants ou placiers* – VRPs),⁹¹ journalists,⁹² artists⁹³ and models.⁹⁴ Unlike for VRPs, the presumptions that the contracts entered into by the other three categories of workers are

⁸⁶ *Gunning v Mirror Group Newspapers Ltd* [1986] ICR 145 (CA) (interpreting the scope of SDA 1975).

⁸⁷ [2011] UKSC 40 (interpreting the scope of the Employment Equality (Religion or Belief) Regulations 2003).

⁸⁸ M. Freedland and N. Countouris, ‘Employment Equality and Personal Work Relations – A Critique of *Jivraj v Hashwani*’ (2012) 41 ILJ 56, 56-59; cf C. McCruden, ‘Two Views of Subordination: The Personal Scope of Employment Discrimination Law in *Jivraj v Hashwani*’ (2012) 41 ILJ 30.

⁸⁹ s.45K(1).

⁹⁰ Health and Safety at Work Act 1974 (‘HSWA 1974’), ss.3, 4.

⁹¹ Art.L7313-1. Art.L7311-3 defines VRPs.

⁹² Art.L7112-1.

⁹³ Art.L7121-3.

⁹⁴ Art.L7123-3.

employment contracts are rebuttable. Furthermore, the Code accords some other particular categories of workers such as home workers some employment rights without according them the employee status.

In Germany, some workers who are not in a relationship of personal subordination, but are economically dependent upon their employers, labelled as ‘employee-like persons’ (*arbeitnehmerähnliche Personen*), are also accorded some employment rights. Pursuant to §12a of the Collective Agreements Act (*Tarifvertragsgesetz*), a person is economically dependent and in need of social protection comparable to that of an employee if: 1) he has to perform the work personally and essentially without the help of others, and 2) either the major part of his work is performed for one person or on average more than half of his income is received from one person. For artists, writers and journalists, it is sufficient that more than one third of their income is received from one person. Employment rights of ‘employee-like persons’ include the right to access the labour courts,⁹⁵ right to annual and public holidays,⁹⁶ right not to be discriminated against,⁹⁷ right to collective bargaining,⁹⁸ and the rights relating to health and safety at work.⁹⁹ Two particular categories of ‘employee-like persons’ are treated separately, namely commercial agents and home workers. Furthermore, there are some special rules that apply, for example, to agency workers and apprentices.

In conclusion, employees working under employment contracts are completely covered by the Member States’ employment laws. There are also certain categories of workers who fall outside the concept of employee but are, nevertheless, accorded some employment rights. However, Member States differ significantly regarding the

⁹⁵ Labour Courts Act (*Arbeitsgerichtsgesetz*), §5(1) sentence 2.

⁹⁶ Federal Holidays Act (*Bundesurlaubsgesetz*), §2 sentence 2.

⁹⁷ General Act on Equal Treatment (*Allgemeines Gleichbehandlungsgesetz*), §6(1)(3).

⁹⁸ Collective Agreements Act, §12a.

⁹⁹ Occupational Health and Safety Act (*Arbeitsschutzgesetz*), §2(2)(3).

definition of the concepts of employee and, in particular, the dependent self-employed. A worker may therefore be regarded as an employee in one Member State, but as a dependent self-employed or an independent contractor in another. Given these differences, the definition of the person working under an ‘individual employment contract’ for the purposes of Brussels I and Rome I should not be derived directly from national concepts of employee and the dependent self-employed. Any such definition would run the risk of being reduced to the lowest common denominator. The comparative analysis is, nevertheless, useful for disclosing a trend of enlarging the scope of the Member States’ employment laws. European PIL should acknowledge this trend and give its rules concerning employment a scope wide enough to encompass not only employees but also the dependent self-employed.

3.2. Elements of an autonomous definition: substantive EU law

The instruments of secondary EU law use the terms ‘worker’,¹⁰⁰ ‘employee’¹⁰¹ and ‘contract of employment or employment relationship’¹⁰² to define their scope. Since these instruments refer to national definitions of these terms,¹⁰³ the definition of the

¹⁰⁰ Directive 89/391/EEC on the introduction of measures to encourage improvements in the safety and health of workers at work [1989] OJ L183/1, and the health and safety directives following on from this Directive; PWD.

¹⁰¹ Directive 2001/23/EC on the approximation of the laws of the Member States relating to the safeguarding of employees’ rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses [2001] OJ L82/16; Directive 2002/14/EC establishing a general framework for informing and consulting employees in the European Community [2002] OJ L80/29; Directive 2008/94/EC on the protection of employees in the event of the insolvency of their employer (Codified version) [2008] OJ L283/36; Directive 2009/38/EC on the establishment of a European Works Council or a procedure in Community-scale undertakings and Community-scale groups of undertakings for the purposes of informing and consulting employees (Recast) [2009] OJ L122/28.

¹⁰² Directive 91/533/EEC on an employer’s obligation to inform employees of the conditions applicable to the contract or employment relationship [1991] OJ L288/32; Directive 97/81/EC concerning the Framework Agreement on part-time work [1998] OJ L14/9, Annex, clause 1(2); Directive 1999/70/EC concerning the Framework Agreement on fixed-term work [1999] OJ L175/43, Annex, clause 1(2); Directive 2008/104/EC on temporary agency work [2008] OJ L327/9, Art.1(1); Directive 2010/18/EU implementing the revised Framework Agreement on parental leave [2010] OJ L68/13, Annex, clause 1(2).

¹⁰³ Directive 91/533/EEC, Art.1(1); Directive 97/81/EC, Annex, clause 2(1); Directive 1999/70/EC, Annex, clause 2(1); Directive 2001/23/EC, Art.2(1)(d); Directive 2002/14/EC, Art.2(d); Directive 2008/94/EC, Art.2(2)(1); Directive 2008/104/EC, Art.3(1); Directive 2010/18/EU, Annex, clause 1(2);

person working under an ‘individual employment contract’ for the purposes of Brussels I and Rome I cannot be derived directly from them.

The term ‘worker’ is defined autonomously for the purposes of the free movement and equal pay provisions of TFEU. Since neither Art.45 TFEU (ex Art.39 TEC) concerning free movement nor Art.157 TFEU (ex Art.141 TEC) concerning equal pay defines the term ‘worker’, the CJEU case-law is crucial. The CJEU has held that this term should be given a broad autonomous interpretation in accordance with objective criteria.¹⁰⁴ According to *Lawrie-Blum* and *Allonby*, ‘the essential feature of an employment relationship...is that for a certain period of time a person performs services for and under the direction of another person in return for which he receives remuneration.’¹⁰⁵ Therefore, the autonomous concept of ‘worker’ presupposes three elements: 1) personal performance of work; 2) a degree of control; 3) remuneration. A person is to be regarded as a worker if he carries on genuine and effective economic activities, to the exclusion of activities on such a small scale as to be regarded as purely marginal and ancillary.¹⁰⁶ EU law does not impose additional conditions such as the existence of a formal contract between the worker and the employer. To determine whether a person is a ‘worker’, all factors and circumstances characterising the arrangement between the parties have to be considered ‘such as, for example the sharing of the commercial risks of the business, the freedom for a person to choose his own working hours and to engage his own assistants.’¹⁰⁷ Classification of a person as self-employed under national law does not prevent that person from being regarded as a ‘worker’ for the purposes of TFEU ‘if his independence is merely notional, thereby

PWD, Art.2(2); cf Directive 89/391/EC, Art.3(a), 3(b), and the health and safety directives following on from this Directive.

¹⁰⁴ Case 66/85 *Lawrie-Blum* [1986] ECR 2121, [16]-[17]; Case C-256/01 *Allonby* [2004] ECR I-873, [66].

¹⁰⁵ *Lawrie-Blum* ibid [17]; *Allonby* ibid [67].

¹⁰⁶ Case 53/81 *Levin* [1982] ECR 1035, [17].

¹⁰⁷ Case C-3/87 *The Queen v Ministry of Agriculture, Fisheries and Food, ex parte Agegate Ltd* [1989] ECR 4459, [36].

disguising an employment relationship in the meaning of [TFEU].¹⁰⁸ The concept of ‘worker’ has been interpreted widely enough to encompass certain categories of workers that might not be covered by some of the Member States’ employment laws such as professional sportsmen,¹⁰⁹ trainees and apprentices,¹¹⁰ members of religious communities,¹¹¹ casual workers,¹¹² and agency workers not having a formal contract with the end-user.¹¹³

Deriving the definition of the person working under an ‘individual employment contract’ for the purposes of Brussels I and Rome I from the autonomous concept of ‘worker’ in EU law accords with the objectives pursued by European PIL of employment. Such an approach leads to legal certainty and predictability. Since this concept is interpreted widely, it can bring a wide range of workers who are in a genuine need of protection within the scope of the special rules, thereby putting European PIL of employment in a position to adequately perform its regulatory function.

Although the reports accompanying the two Regulations and their predecessors and the CJEU case-law are inconclusive regarding the manner of interpretation of the term ‘individual employment contracts’, they provide some support for an autonomous interpretation along these lines. The Jenard Report notes that the preliminary draft of the Brussels Convention contained special jurisdictional rules which were to apply ‘in matters relating to contracts of employment *in the broadest sense of this word*.’¹¹⁴ According to the Jenard/Möller Report, ‘it may be considered that [an employment contract] presupposes *a relationship of subordination of the employee to the*

¹⁰⁸ *Allonby* (n104).

¹⁰⁹ Case C-415/93 *Bosman* [1995] ECR I-4921, [73].

¹¹⁰ *Lawrie-Blum* (n104) (trainee teacher); Case C-188/00 *Kurz* [2002] ECR I-10691 (apprentice); Case C-109/04 *Kranemann* [2005] ECR I-2421 (trainee lawyer).

¹¹¹ Case 196/87 *Steymann* [1988] ECR 6159.

¹¹² Case C-357/89 *Raulin* [1992] ECR I-1027.

¹¹³ *Allonby* (n104) [72].

¹¹⁴ (n10) (emphasis added).

*employer.*¹¹⁵ The CJEU referred in *Shenavai* to ‘*contracts of employment*’ and ‘*other contracts for work other than on a self-employed basis*’.¹¹⁶ Moreover, in her recent Opinion in *Voogsgeerd*, dealing with the interpretation of the connecting factor of the engaging place of business for the purposes of the Rome Convention, Advocate General TRSTENJAK assumed that the term ‘individual employment contracts’ should be defined by reference to the autonomous concept of ‘worker’ in EU law.¹¹⁷ In her view:

‘It follows from [the CJEU case-law on Art.45 TFEU] that the fact that the employee acts under direction is a characteristic feature of any employment relationship which, in essence, requires that the person concerned should work under the direction or supervision of another person who determines the services to be performed by him and/or his working hours and with whose instructions or rules the employee must comply.’¹¹⁸

English case-law confirms that the autonomous concept of ‘worker’ in EU law informs the definition of the person working under an ‘individual employment contract’ for the purposes of Brussels I and Rome I. The leading case is *WPP Holding Italy SRL v Benatti*.¹¹⁹ This case concerned a contract between Mr Benatti, an Italian national and domiciliary, and an Italian member of a corporate group, under which Mr Benatti was appointed as a consultant to the employer and the group’s UK parent company in respect of their business activities in Italy. Mr Benatti was to provide his services to the employer and any other group member whenever requested to do so, be subject to the directions and instructions of the parent company’s board, and report to the parent company’s CEO. He was entitled to use the services of another person in the

¹¹⁵ (n22) (emphasis added).

¹¹⁶ (n19) [16] (emphasis added).

¹¹⁷ (n32) [88].

¹¹⁸ *ibid.*

¹¹⁹ (n27) See also *Mercury Publicity Ltd v Wolfgang Loerke GmbH* (n27) (an agency contract is not an employment contract); *Samengo-Turner* (n27) and *Duarte v Black & Decker Corp* (n27) [50]-[53] (a bonus agreement is an employment contract).

performance of his duties, although this entitlement had not been exercised. Mr Benatti was further entitled not to work on average more than one and a half days per week, although he had in fact been working full-time when the contract was terminated. His remuneration consisted of a fixed fee, the amount of which increased on two occasions, and a commission. Mr Benatti was also entitled to a personal assistant and an office. He was responsible for paying his own taxes and national insurance contributions. Furthermore, he was free to have interests in almost 80 listed companies not forming part of the employer's group, many of which were in competition with the group. The contract included English law and exclusive jurisdiction clauses. Following the termination of the contract, the employer, the parent company and a Dutch group member commenced proceedings in England for breach of contract and breach of fiduciary duties. Mr Benatti challenged the English courts' jurisdiction on the basis that the contract was one of employment and that, pursuant to Brussels I, he could only be sued in Italy. FIELD J referred to the CJEU decisions in *Lawrie-Blum* and *Shenavai* in order to create his own test for distinguishing between employment and services contracts:

‘the objective criteria of an employment contract for the purposes of...[Brussels I] are: (i) the provision of services by one party over a period of time for which remuneration is paid; (ii) control and direction over the provision of services by the counterparty; (iii) integration to some extent of the provider of the services within the organisational framework of the counterparty. In applying these broad criteria...regard must be had particularly to the terms of the contract; the conduct of the parties is relevant too.’¹²⁰

TOULSON LJ in the Court of Appeal added that ‘these are not “hard edged” criteria which can be mechanistically applied. For example...there may be degrees of control

¹²⁰ [2006] EWHC 1641 (Comm), [69].

and degrees of integration within the organisational framework of the company.¹²¹ On the facts of the case, the court found that the contract was not one of employment. Of weight in reaching this conclusion were the method of remuneration, the nature of Mr Benatti's duties, his various entitlements, and the fact that he was registered for VAT and submitted VAT invoices. These factors outweighed the fact that Mr Benatti worked under a long-term contract effectively 5 days a week under the directions and instructions of the employer, and was integrated to a significant extent into the employer's organisation. Although this case has been criticised for its focus on the terms of the contract rather than its actual performance,¹²² it is an authority for the proposition that the definition of the person working under an 'individual employment contract' for the purposes of European PIL should be derived from the autonomous concept of 'worker' in EU law.

3.3. Conclusion

This section has shown that the definition of the person working under an 'individual employment contract' for the purposes of Brussels I and Rome I should be derived from the autonomous concept of 'worker' in EU law. This approach accords with the objectives pursued by European PIL, most importantly that of employee protection. This approach is capable of encompassing a wide range of workers who are in a genuine need of protection and puts European PIL of employment in a position to adequately perform its regulatory function. This approach accords with the existing division of legislative competence within the EU, and supports the diversity of the Member States' labour laws. At the moment, Member States retain most of the legislative competence in the field of labour law. While some Member States exercise their legislative

¹²¹ [2007] EWCA Civ 263, [47].

¹²² Merrett (n27) [3.54].

autonomy by according the benefit of protective legislation only to employees working under employment contracts, other Member States also protect, to a certain extent, the dependent self-employed. Although the term ‘individual employment contracts’ of the two Regulations covers a wide range of workers, it does not oblige Member States to extend their protective legislation beyond the boundaries they deem appropriate. But because of the breadth of the scope of the rules concerning employment, European PIL is able to safeguard, in appropriate circumstances, the application of the law and jurisdiction of the courts of states that have intermediate legal categories of dependent self-employed workers.

4. Who is the employer?

This section deals with the flipside of the autonomous definition of the term ‘individual employment contracts’ of Brussels I and Rome I. It examines who is to be regarded as an employer for the purposes of European PIL. In principle, the employer is a natural or legal person at the other end of the employment contract.¹²³ Typically, employees work for, under the control, and within the organisation of a single employer, so the employer’s identity is rarely an issue. But where employer functions are divided among multiple legal entities, the ascription of employer responsibilities becomes problematic. This is illustrated by the cases of triangular employment relationships.

Triangular relationships arise in the context of employment within a corporate group and agency employment. In a triangular relationship, the employee enters into an employment contract with one person, a group member or an employment agency, but works for and under the control of a third person, another group member or the end-user of the employee’s services (the client of the employment agency). While the two group

¹²³ In this section, the terms ‘employment contract’ and ‘employee’ are used in their broadest sense.

members/the employment agency and the end-user normally enter into a contract regulating their rights and obligations regarding the ‘hiring-out’ of workers, the employee does not ordinarily enter into an employment contract with the group member/end-user to which he is ‘hired-out’. But the contract that the employee has with the engaging group member/employment agency normally obliges him to work like an employee of the third person. Sometimes the employee may enter into an employment contract with the person to whom he is ‘hired-out’, particularly when this is mandated by the immigration and other laws of the country where the services are provided. Triangular relationships can take a variety of forms depending on the way employer functions are divided among multiple employing entities. At the far end of the spectrum are the cases in which the engaging group member/employment agency merely administers the employment contract and the employee works for one or more third persons. At the other end are the cases in which the employee works for the engaging group member but also occasionally for another group member(s).

The cases of triangular relationships have caused difficulties in national employment laws, since they do not fit easily with the perception of the typical employment relationship as a personal and binary relationship. National laws are faced with the question of how to distribute employer responsibilities among multiple entities performing employer functions. With regard to agency employment, there are four alternatives.¹²⁴ Some countries place employer responsibilities, in principle, exclusively either on the employment agency or the end-user; some divide employer responsibilities between the two entities; a fourth group of countries makes both entities jointly and severally responsible. Similarly, countries allocate employer responsibilities among different group members in a variety of ways.¹²⁵ In cases concerning international

¹²⁴ G. Davidov, ‘Joint Employer Status in Triangular Employment Relationships’ (2004) 42 BJIR 727, 731-736.

¹²⁵ A. Supiot, *Beyond Employment* (Oxford, 2001) 44.

employment, these problems are exacerbated, since a worker may be engaged by a group member/employment agency in one country, but work for a third person in another country, and the two countries may differ with regard to how they ascribe employer responsibilities to multiple employing entities. A PIL system which aims to uphold the objectives of legal certainty, predictability and particularly employee protection must be able to accommodate the various substantive law systems of ascription of employer responsibilities.

The recent CJEU decision in *Voogsgeerd*¹²⁶ touched upon the question of who is the employer for the purposes of European PIL. Mr Voogsgeerd entered into an employment contract with Navimer SA, a Luxembourg company. The contract was concluded at the headquarters of Naviglobe NV, a Belgian subsidiary. Mr Voogsgeerd worked as a seaman on board ships belonging to Navimer. He received his salary from Navimer. But he was obliged to report to, and received briefings and instructions from, Naviglobe in Belgium, where all of his voyages commenced and terminated. Although this case primarily concerned the interpretation of the connecting factor of the engaging place of business for the purposes of the Rome Convention, both the Opinion of Advocate General TRSTENJAK and the CJEU judgment provide guidance regarding the concept of employer in the context of a triangular relationship.

The Advocate General seems to have adopted a strict approach in stating that:

‘The fact that the third party is entitled, with the employer’s consent, to control the employee’s activities by issuing instructions and carrying out supervisory duties does nothing, from a legal point of view, to alter the fact that the employee ultimately performs his contractual obligations for the employer. In

¹²⁶ (n32).

so far as Mr Voogsgeerd usually took instructions directly from Naviglobe, he clearly did so in performance of his contractual obligations towards Navimer.¹²⁷

According to the Advocate General, the privity of contract precluded any party other than Navimer from being regarded as the employer. This approach would have allowed Mr Voogsgeerd to rely on the jurisdictional and choice-of-law rules concerning employment only against Navimer. Even if the law applicable to the putative relationship between Mr Voogsgeerd and Naviglobe had imposed employer responsibilities on this company, the strict approach adopted by the Advocate General would have disabled Mr Voogsgeerd from relying on the special PIL rules in a dispute against this company.

On the contrary, the CJEU seems to have adopted a more relaxed approach in stating that:

‘it is a matter for the referring court to assess what is the real relationship between the two companies in order to establish whether Naviglobe is, indeed, the employer of the personnel engaged by Navimer. The court seized must, in particular, take into consideration all the objective factors enabling it to establish the actual situation which differs from that which appears from the terms of the contract...

In making this assessment...the absence of a transfer of [the employer’s] authority to Naviglobe, constitutes one of the factors to be taken into consideration, but it is not, in itself, decisive.¹²⁸

According to the CJEU, it is possible to regard a person other than the nominal employer as the employer for the purposes of European PIL.

¹²⁷ ibid, AG Opinion, [90].

¹²⁸ ibid, CJEU judgment, [62]-[63].

But it is not clear whether, in cases of triangular relationships, the CJEU would allow both the engaging group member/employment agency and the group member/end-user to which the employee is ‘hired-out’ to be regarded as employers. Such a possibility should be allowed. For example, if the law of the country in which the employee works for the group member/end-user to which he is ‘hired-out’ imposes employer responsibilities on that group member/end-user, the relationship between the employee and that group member/end-user must not fall outside the scope of the special PIL rules. The alternative would be for this relationship to fall within the scope of the general rules, which must be rejected as being contrary to the scheme and objectives of Brussels I and Rome I. This relationship exhibits all the features justifying the special treatment of employees in PIL. Possible arguments to the contrary based, for instance, on the principle of legal certainty and foreseeability are not compelling. The group member/end-user to which the employee is ‘hired out’ should not be allowed to evade the jurisdiction of the courts and application of the law designated by the European PIL rules concerning employment. After all, it is that group member/end-user that has chosen to procure labour by means of ‘hiring-out’ of workers, and is, as a typically stronger party, in a relatively good position to obtain information on the legal pros and cons of procuring labour in this way. The autonomous definition of the concept of employer for the purposes of the two Regulations should be derived from the autonomous definition of the person working under an ‘individual employment contract’ and, generally speaking, cover entities which in fact benefit from the employee’s work, which control the employee, and upon which the employee is dependent. Furthermore, European PIL should prevent any attempt to evade the rules concerning employment, and not permit members of the corporate group which are not the employee’s nominal employers to bring proceeding against the employee outside the forums available to employers under the special rules of Brussels I.

This view is supported by both the CJEU and English case-law. In *Allonby*,¹²⁹ the employment agency supplied part-time workers as independent contractors to the end-user. The CJEU did not limit the scope of the autonomous concept of 'worker' in EU law to the cases where there was a formal contract between the agency worker and the end-user. On the contrary, the CJEU regarded the agency workers as the 'workers' of the end-user for the purposes of the equal pay provisions of TFEU.

As discussed, *WPP Holding Italy SRL v Benatti*¹³⁰ concerned a consultancy agreement between Mr Benatti and an Italian member of a corporate group, under which Mr Benatti provided services to the group in Italy. Following the termination of the agreement, the nominal employer, the group's UK parent company and a Dutch group member commenced proceeding in England. The nominal employer relied on the English choice-of-court clause contained in the agreement. The other two claimants argued they could also enforce the agreement pursuant to the Contracts (Rights of Third Parties) Act 1999 and, alternatively, that English courts had jurisdiction over their claims for breach of fiduciary duties under Art.5(1) or 5(3) Brussels I. Mr Benatti challenged the English courts' jurisdiction on the basis that the agreement was an employment contract and that, pursuant to Brussels I, he could only be sued in Italy. Although FIELD J held that the agreement was not an employment contract, he did indicate that, had it been otherwise, none of the claimants could have relied on the choice-of-court clause and, furthermore, that the claims for breach of fiduciary duties would have been regarded as claims brought by the employer for the purposes of Brussels I.¹³¹

¹²⁹ (n104).

¹³⁰ (n27).

¹³¹ [2006] EWHC 1641 (Comm), [105], [109]. This point was not addressed by the Court of Appeal.

Another relevant case is *Samengo-Turner*.¹³² The claimants were reinsurance brokers employed in England by the first defendant, the English service company for a corporate group, whose business was to employ persons to work for other group members. The second defendant was the American group member for which the claimants in fact worked. The third defendant was the group's American parent company. During their employment, the claimants became eligible to participate in an executive incentive scheme administered by the group's parent company, and each received a bonus. The terms and conditions of the bonus agreement included an obligation on the part of the claimants to repay the bonus if they engaged in detrimental activity, and to provide information to enable the 'Company' to determine whether they were in compliance with their obligations. The 'Company' was defined as encompassing the parent company or any of its affiliates and subsidiaries. The bonus agreement included a New York law and exclusive jurisdiction clauses. After the claimants had handed in the notice and disclosed their intention to join a competitor, the two American companies brought an action in New York for breach of contract. The claimants then commenced proceedings in England with the view of obtaining an anti-suit injunction to restrain the New York proceedings. The basis of the claim before the English court was that the bonus agreement was an 'individual employment contract' in the meaning of Brussels I, that the New York proceedings were brought by the employers, and that the claimants therefore had the right not to be sued outside of England. After deciding that the agreement was an 'individual employment contract', the Court of Appeal held that the two American companies were the claimant's employers for the purposes of Brussels I. According to TUCKEY LJ:

'their claim in New York...is an employment claim against the employees and one would expect such a claim to be made by an employer... [The two

¹³² (n27).

American companies] as companies in the same group [as the English company] have an economic interest in the contracts containing those terms and their enforcement and should be subject to the same jurisdictional restraint as [the English company]. I do not think that this is a strained construction. It simply recognises the reality of the situation without adopting an over formalistic approach.

Nor does this construction pierce the corporate veil in any real way. [Brussels I] is only concerned with the allocation of jurisdiction. The fact that [the two American companies] should be treated as employers for such purposes does not mean that they should be so treated for any other purpose.¹³³

Conclusions

Many national employment laws extend their scope beyond standard or typical employment contracts to cover certain categories of workers traditionally classified as self-employed or ascribe employer responsibilities to multiple employing entities. Nevertheless, many national employment laws remain under-inclusive, in the sense of not covering certain categories of workers in a genuine need of protection. Calls have been made to redefine employment law around wider, more inclusive concepts. For example, FREEDLAND, an influential participant in this debate, has put forward the concepts of ‘personal employment contract’ and, more recently, ‘personal work contract’, ‘personal work nexus’ and ‘personal work relations’.¹³⁴ The autonomous

¹³³ ibid [33]-[34].

¹³⁴ M. Freedland, *The Personal Employment Contract* (Oxford, 2003); M. Freedland, ‘From the Contract of Employment to the Personal Work Nexus’ (2006) 35 ILJ 1; M. Freedland, ‘Application of Labour and Employment Law Beyond the Contract of Employment’ (2007) 146 ILR 3; see also M. Freedland and N. Countouris, ‘Towards a Comparative Theory of the Contractual Construction of Personal Work Relations in Europe’ (2008) 37 ILJ 49; M. Freedland and N. Countouris, *The Legal Construction of Personal Work Relations* (Oxford, 2011).

definition of the term ‘individual employment contracts’ of European PIL seems to converge towards those wide and inclusive concepts.

From the point of view of their scope, the European PIL rules concerning employment largely meet the proclaimed objectives. The objectives of legal certainty and predictability are largely fulfilled, since the term ‘individual employment contracts’ is interpreted uniformly within the EU. The objective of employee protection is also met given the breadth and inclusivity of this term. The special rules encompass a wide range of workers who are in a genuine need of protection. By enabling the allocation and protection of regulatory authority of states that have intermediate legal categories of dependent self-employed workers or ascribe employer responsibilities to multiple employing entities, an autonomous and wide interpretation of the term ‘individual employment contracts’ also puts European PIL of employment in a position to adequately perform its regulatory function. This approach accords with the existing division of legislative competence within the EU, and supports the diversity of the Member States’ labour laws. European PIL, as a matter of principle, does not oblige Member States to extend the scope of their protective legislation beyond the boundaries they deem appropriate, but is able to safeguard, in appropriate circumstances, the application of their laws and jurisdiction of their courts. The following sections explore whether European PIL of employment does in fact adequately perform its regulatory function by assessing whether, and to what extent, its rules accord with the considerations identified in the previous chapter. This assessment commences with the jurisdictional rules of Brussels I.

IV JURISDICTION*

‘[Brussels I], in its current version, notwithstanding the objective of protection referred to...in the Preamble thereto, does not afford particular protection to an employee in a situation such as [the claimant employee’s]...’

CJEU¹

The structure of Section 5 of Chapter II Brussels I² is simple. There is one set of jurisdictional rules applicable when *employees act as claimants*. In general terms, an employee may commence proceedings:

- in the courts of the employer’s domicile;³
- in the courts for the habitual place of work;⁴
- absent a habitual place of work, in the courts of the engaging place of business;⁵

* An earlier version of this chapter was published in (2012) 61 ICLQ 91.

¹ Case C-462/06 *GlaxoSmithKline* [2008] ECR I-3965, [34].

² The rules of jurisdiction in employment matters of the 2007 Lugano Convention are identical to those of Brussels I and are not analysed explicitly. The relevant provisions of the Brussels and 1988 Lugano Conventions are mentioned to the extent to which they differ from those of Brussels I. Chapter VIII, section 3.1, deals with the jurisdictional rules of PWD.

³ Art.19(1).

⁴ Art.19(2)(a).

⁵ Art.19(2)(b).

- regarding a dispute arising out of the operations of the employer's branch, agency or other establishment, in the courts for the place of that establishment;⁶ and
- on a counter-claim, in the court in which the original claim is pending.⁷

There is another set of jurisdictional rules applicable when *employees act as defendants*.

An employer may commence proceedings:

- in the courts of the employee's domicile;⁸ and
- on a counter-claim, in the court in which the original claim is pending.⁹

A jurisdiction agreement entered into before the dispute has arisen is not given effect if it reduces the number of forums available to the employee or increases the number of forums available to the employer.¹⁰

These rules apply 'in matters relating to' employment contracts and seem to cover all employment claims. As MERRETT demonstrated, regardless of whether a party to an employment contract advances a contractual, statutory or tortious claim during or after the termination of employment, and regardless of whether it concerns employment in the private or public sector, the special jurisdictional rules of Brussels I are engaged, provided that the employment contract is legally relevant to the claim.¹¹ Thus, a claim against an employee for conspiracy to harm the employer's business by soliciting fellow

⁶ Art.18(1). Although, in theory, claimant employers can also invoke this jurisdictional rule, this is practically impossible, since employees do not have ancillary establishments.

⁷ Art.20(2).

⁸ Art.20(1).

⁹ Art.20(2).

¹⁰ Art.21.

¹¹ L. Merrett, *Employment Contracts in Private International Law* (Oxford: OUP, 2011) [4.07]-[4.17], [4.46]-[4.58]. See also A. Briggs and P. Rees, *Civil Jurisdiction and Judgments* (London, 5th ed, 2009) [2.103]; B. Hess, T. Pfeiffer and P. Schlosser, 'Report on the Application of Regulation Brussels I in the Member States', available at http://ec.europa.eu/civiljustice/news/docs/study_application_brussels_1_en.pdf (last accessed 26/9/2012), [352]-[356].

employees is a matter relating to the employment contract.¹² But claims for breaches of copyright and confidence against a former employee who obtained the employer's design drawings by bribing a fellow employee for the purpose of facilitating unlawful competition against the employer are not.¹³

The objective of these rules is employee protection. As mentioned, Recital 13 Brussels I states, 'In relation to...employment, the weaker party should be protected by rules of jurisdiction more favourable to his interests than the general rules provide for.' But the CJEU judgment in *GlaxoSmithKline*¹⁴ casts doubt upon the achievement of this objective. Mr Rouard worked for two companies in the same group. One was domiciled in France, the other in the UK. The work was performed in Africa. Following his dismissal, Mr Rouard brought proceedings in France, French courts having jurisdiction over the French company. Mr Rouard further sought to join the UK company as co-defendant pursuant to Art.6(1) Brussels I. Had the claimant not been an employee, Art.6(1) would undoubtedly have been an available jurisdictional basis. But the CJEU found that Section 5 of Chapter II Brussels I is exhaustive. The Court relied primarily on the wording of Art.18(1): 'In matters relating to individual contracts of employment, jurisdiction shall be determined by this Section, without prejudice to Article 4 and point 5 of Article 5'.¹⁵ Since the provisions of this Section neither referred to Art.6(1) nor prescribed a rule for co-defendants, the CJEU held that this generally available head of jurisdiction could not be invoked by Mr Rouard.¹⁶

¹² *CEF Holdings Ltd v Mundey* [2012] EWHC 1524 (QB), disapproving *Swithenbank Foods Ltd v Bowers* [2002] EWHC 2257 (QB) (a claim for conspiracy to injure the former employer's contractual relations with a supplier not a matter 'relating to' the employment contract).

¹³ *Alpha Laval Tumba AB v Separator Spares International Ltd* [2012] EWHC 1155 (Ch) (appeal pending).

¹⁴ (n1).

¹⁵ *ibid* [18]-[19].

¹⁶ The rules of jurisdiction in employment matters of the Brussels and 1988 Lugano Conventions were not set out in separate, self-contained sections. Hence, Art.6(1) of these Conventions was an available basis of jurisdiction in employment disputes: see French *Cour de cassation, Martine Carasset-Marillier v Salahadin Imam et autres*, 13 January 1998, available at <http://curia.europa.eu/common/reddoc/convention/en/1998/27-1998.htm> (last accessed 26/9/2012).

Evidently, the special rules did not afford the employee any protection and were not more favourable to his interests than the general rules. On the contrary, they were less favourable.

This judgment has received strong criticism throughout Europe.¹⁷ The European Commission has also acknowledged the problem and proposed an amendment to Brussels I that would make the jurisdictional rule for co-defendants available to claimant employees.¹⁸ No other changes to the rules of jurisdiction in employment matters are contemplated by the Commission. The satisfaction with the general operation of these rules echoes the conclusions of the Heidelberg Report on the application of Brussels I: 'No major problems [in relation to the rules of jurisdiction in employment matters] could be discovered';¹⁹ 'None of the open issues [regarding the rules of jurisdiction in employment matters] are of a dimension justifying the conclusion that an amendment being drafted is self-suggesting'.²⁰ This chapter explores whether satisfaction is justified, and in particular whether, and to what extent, Brussels I achieves the objective of employee protection.

The following section presents the evolution of the special jurisdictional rules. It is shown that the reason for the present structure and content of those rules lies in their haphazard evolution. Next, the importance of according a balanced jurisdictional preference to claimant employees is underlined, followed by a demonstration of how Brussels I fails in this respect. Finally, possibilities for improvement are discussed.

¹⁷ S. Frodl, 'Rechtssicherheit vor Arbeitnehmerschutz' (2009) 21 *Österreichische Juristenzeitung* 935; J. Harris, 'The Brussels I Regulation, the ECJ and the Rulebook' (2008) 124 LQR 523; F. Jault-Seseke, 'GlaxoSmithKline' (2008) 97 *Revue critique DIP* 853; S. Krebber, 'Einheitlicher Gerichtsstand für die Klage eines Arbeitnehmers gegen mehrere Arbeitgeber bei Beschäftigung in einem grenzüberschreitenden Konzern' (2009) 19 IPRax 409.

¹⁸ 'Proposal for a Regulation on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast)' COM(2010) 748 final, 11-12.

¹⁹ Hess, Pfeiffer and Schlosser (n11) [311].

²⁰ *ibid* [359].

1. Evolution of jurisdictional rules

Unlike for employment matters, the original 1968 version of the Brussels Convention contained protective jurisdictional rules for matters relating to insurance (Section 3 of Title II) and instalment sales and loans (Section 4 of Title II). Yet the drafters of the Convention did consider prescribing special rules for employment disputes: the preliminary draft contained a provision giving exclusive jurisdiction to the courts either for the place in which the undertaking concerned was situated or in which the work was or was to be performed.²¹ But this provision was omitted from the final version for two reasons. At that time work was in progress to harmonise choice-of-law rules within the EEC, and the adoption of the special jurisdictional rules concerning employment was postponed.²² Second, there was no agreement between the drafters on the question of whether, and to what extent, party autonomy should be allowed.²³ Consequently, the general jurisdictional rules were made applicable to employment disputes.

The lack of jurisdictional protection of employees led to certain problems in practice. First, jurisdiction agreements were given full effect in employment disputes irrespective of the shortcomings of party autonomy in international employment contracts. Second, the general rule of jurisdiction in contractual matters of Art.5(1) of the Convention proved to be ill-suited to employment disputes.

The problem with jurisdiction agreements was revealed by *Sanicentral*.²⁴ Mr Collin, a Frenchman domiciled in France, worked for Sanicentral, a German company. The employment contract, which contained a jurisdiction clause in favour of German courts, was concluded and terminated before the entry into force of the Convention. The employee brought proceedings in France after its entry into force. He invoked a

²¹ Jenard Report [1979] OJ C59/1, 24.

²² *ibid.*

²³ *ibid.*

²⁴ Case 25/79 [1979] ECR 3423. See also Case 150/80 *Elefanten Schuh* [1981] ECR 1671.

provision of French employment law invalidating jurisdiction agreements in employment contracts such as the one at hand. After concluding that the dispute fell within the substantive and temporal scope of the Convention,²⁵ the CJEU held that the provisions of this instrument took precedence over the provisions of national procedural laws.²⁶ Since the requirements of the Convention were satisfied, the jurisdiction agreement was upheld and French courts had to decline jurisdiction. This judgment put employees in an unfavourable position, since it enabled employers to (ab)use their typically superior position and impose upon their employees jurisdiction of the courts favourable for them. The only requirements that such jurisdiction agreements had to fulfil were the formal requirements of Art.17 of the Convention.²⁷

The unsuitability of Art.5(1) of the Convention for employment disputes was discussed in the ground-breaking *Ivenel* case.²⁸ This case concerned a dispute between Mr Ivenel, a French commercial representative, and his German employer over payment of commission and other sums of money. Mr Ivenel performed his work in France, but the commission and other sums were payable in Germany. The proceedings were brought in France. Art.5(1) conferred jurisdiction in contractual matters upon the courts ‘for the place where the obligation was, or was to be, performed’. Jurisdiction of French courts thus depended on which obligation (to work or to pay) was the jurisdictionally relevant obligation, and on its place of performance. The CJEU had previously held that the obligation to be taken into account for the purposes of Art.5(1) was the obligation forming the basis of the claim,²⁹ and that its place of performance was to be determined under the law designated by the choice-of-law rules of the

²⁵ *Sanicentral*, [3].

²⁶ *ibid* [5].

²⁷ Cf 1968 version of the Brussels Convention, Arts.12, 15, regarding the requirements for validity of jurisdiction agreements in insurance and instalment sales and loans contracts.

²⁸ Case 133/81 [1982] ECR 1891.

²⁹ Case 14/76 *De Bloos v Bouyer* [1976] ECR 1497.

forum.³⁰ Since the basis of Mr Ivenel's claim was the employer's obligation of payment, and since under both French and German law the commission and other sums were payable at the address of the debtor, it seemed that Art.5(1) could only give jurisdiction to German courts. However, the CJEU found that this interpretation would be contrary to the Convention's objectives of proximity and protection of weaker parties. It would give jurisdiction to the courts of the country where the work was not performed and that were not closely connected with the dispute,³¹ the courts of the country whose law was not applicable,³² and where the employer had his domicile. The Court therefore departed from the language of Art.5(1) and the preceding case-law, and held that the jurisdictionally relevant obligation regarding employment contracts was always the obligation that characterised the contract, namely the obligation to perform work.³³ It was also implicit in *Ivenel* that the place of work was to be determined autonomously, not by reference to the law applicable under the choice-of-law rules of the forum.³⁴ Thus, French courts had jurisdiction.

These deficiencies of the 1968 version of the Brussels Convention were remedied in the 1988 Lugano Convention, which expanded the 'Brussels regime' to EFTA Member States. First, the problem of jurisdiction agreements contained in international employment contracts was resolved through the insertion of a rule that denied effect to such agreements entered into before the dispute has arisen.³⁵ Second, Art.5(1) of the 1988 Lugano Convention introduced a special rule of jurisdiction in employment matters alongside the general rule of jurisdiction in contractual matters. This special rule incorporated the CJEU case-law, in particular *Ivenel*. Since the ruling in this case was largely influenced by the fact that Art.5(1) of the 1968 version of the

³⁰ Case 12/76 *Tessili v Dunlop* [1976] ECR 1473.

³¹ *Ivenel*, [15].

³² *ibid* [13]-[15], [19].

³³ *ibid* [20]; see also Case 266/85 *Shenavai* [1987] ECR 239.

³⁴ Confirmed in Case C-125/92 *Mulox* [1993] ECR I-4075, [12]-[16].

³⁵ Art.17(5).

Brussels Convention did not give jurisdiction to the courts of the country whose law was applicable pursuant to Art.6 of the Rome Convention, the drafters of the 1988 Lugano Convention decided that the special rule of jurisdiction in employment matters should follow this Article of the Rome Convention.³⁶ Thus, the new jurisdictional rule provided not only that ‘in matters relating to individual contracts of employment, [the place of performance of the obligation in question] is that where the employee habitually carries out his work’ but also that ‘if the employee does not habitually carry out his work in any one country, this place shall be the place of business through which he was engaged’.

However, the jurisdictional rules of the 1988 Lugano Convention had shortcomings of their own. First, this instrument denied *any* effect to jurisdiction clauses contained in international employment contracts entered into before the dispute has arisen, irrespective of whether they were beneficial for employees or not. Second, the rule of the engaging place of business was introduced without any assessment of its appropriateness.³⁷ Moreover, this jurisdictional rule was equally available to both employers and employees.

A further step in the evolution occurred in 1989, when the Convention on the accession of Spain and Portugal to the Brussels Convention was concluded.³⁸ Although this Convention came along less than a year after the conclusion of the 1988 Lugano Convention, it significantly departed from the provisions of the latter instrument. First, the solution of the 1988 Lugano Convention regarding jurisdiction agreements was considered ‘too radical’ by the drafters of the 1989 Accession Convention.³⁹ Thus,

³⁶ Jenard/Möller Report [1990] OJ C189/57, [37]-[38], [40].

³⁷ See Swiss Institute of Comparative Law, *Convention de Lugano: Convention concernant la compétence judiciaire et l'exécution des décisions en matière civile et commerciale faite à Lugano le 16 septembre 1988* (Zurich, 1991) 164-165.

³⁸ [1989] OJ L285/1.

³⁹ Cruz/Real/Jenard Report [1990] OJ C189/35, [27](d).

Art.17(5) of the 1989 version of the Brussels Convention provided that a jurisdiction agreement was effective in an employment dispute not only if it was entered into after the dispute had arisen but also if it was favourable for the employee. Second, Art.5(1) of the Brussels Convention was amended along the lines of Art.5(1) of the 1988 Lugano Convention, with one significant difference: the rule of the engaging place of business could be invoked only by employees, not by employers. Furthermore, it was clarified that the jurisdictionally relevant place was not only where the business that engaged the employee was situated at the moment of engagement but also where it was situated at the moment of commencement of proceedings.

The latest stage in the evolution came with Brussels I in 2001. This instrument introduced several important changes. First, the rules of jurisdiction in employment matters were set out in a separate, self-contained section. Second, the rule extending the notion of the employer's domicile was introduced in Art.18(2). Third, employers lost the right to invoke the rule of the habitual place of work. It would appear that the drafters of Brussels I were of the opinion that the objective of employee protection could be achieved only if the rules of jurisdiction in employment matters closely followed the existing rules of jurisdiction for consumer and insurance disputes.⁴⁰ However, they failed to examine the impact that these changes would have on the jurisdictional position of employees. Similarly, the jurisdictional rules of Brussels I were simply transposed into the 2007 Lugano Convention without assessment of their impact.⁴¹

⁴⁰ The rules applicable in these two types of dispute had been contained in separate, self-contained sections (3 and 4 of Title II) since the adoption of the Brussels Convention. Consumers and insured persons could normally be sued only in the courts of their domicile (Arts.11(1), 14(2)). There was also a rule extending the notion of the insurer's domicile (Art.18(2)). See European Commission, Explanatory Memorandum accompanying the proposal of Brussels I COM(1999) 348 final, 17.

⁴¹ See Pocar Report [2009] OJ C319/1, [85]-[90].

In sum, the reason for the present structure and content of the rules of jurisdiction in employment matters of Brussels I lies in their haphazard evolution. These rules were introduced and amended with the objective of employee protection in mind. The following text examines whether they really achieve this goal.

2. Importance, in practice, of jurisdictionally preferring claimant employees

Indisputably, Brussels I protects employees whenever they act as defendants. An employer can ordinarily bring proceedings only in the courts of the employee's domicile.⁴² This guarantees that employees will not have to defend their cases in foreign, potentially inaccessible and unfamiliar courts. An employee can be sued outside his home country only if he consents to the jurisdiction of a foreign court after the dispute has arisen. Art.21 is explicit in this regard: a jurisdiction agreement purporting to confer jurisdiction over an employment claim on the courts of a foreign country is given effect only if entered *post litem natam*. The general requirements of Art.23 must also be satisfied.⁴³ In practice it may be difficult to determine when an employment dispute has arisen. The Jenard Report suggests that this occurs 'as soon as the parties disagree on a specific point and legal proceedings are imminent or contemplated.'⁴⁴ The rationale of this rule is that an employee who has a specific dispute with his employer is in a position to assess the pros and cons of litigation in various countries. He will not easily give up the privilege of defending in his home country, and will accept the jurisdiction of a foreign court only if he considers that to be

⁴² Art.20(1). According to Art.59, domicile of employees is determined by reference to the Member States' national laws. Under the Brussels and 1988 Lugano Conventions an employer was not confined to suing the employee in the courts of the employee's domicile.

⁴³ Schlosser Report [1979] OJ C59/71, [161].

⁴⁴ (n21) 33; cf Merrett (n11) [4.97]: 'The date of the facts giving rise to the alleged breach may be a more logical and precise date. However, the agreement has to be about *the*, extant, dispute and the dispute must be sufficiently identifiable as a dispute to be described in the agreement.' (footnote omitted)

in his interest. It should be noted, however, that this rule slightly disfavours defendant employees in one respect: an employee who is sued in the courts of his domicile cannot invoke a jurisdiction clause in favour of a foreign court entered into before the dispute has arisen.⁴⁵ The same rationale underlies the employer's right to bring a counter-claim in the court in which the original claim is pending.⁴⁶ By commencing proceedings in a foreign court, the employee accepts the jurisdiction of that court to entertain a counter-claim against him. The court in which the action against the employer is pending must have jurisdiction specifically under Section 5 of Chapter II. In addition, the general requirements of Art.6(3) have to be satisfied: the counter-claim must arise from the same contract or facts on which the original claim was based. The idea of consent also suggests that an employee can confer jurisdiction upon a court by entering an appearance.⁴⁷

In *Samengo-Turner*,⁴⁸ the Court of Appeal interpreted Art.20(1) Brussels I as giving employees a statutory right to be sued in the courts of their domicile and not to be sued elsewhere that could be protected by an anti-suit injunction. Here, the employers, relying on choice-of-court clauses contained in employment contracts, commenced proceedings in New York for breach of contract. According to TUCKEY LJ:

‘Doing nothing is not an option in my judgment. The New York court cannot give effect to [Brussels I] and has already decided...that it has exclusive jurisdiction. The only way to give effect to the English claimants’ statutory rights is to restrain those proceedings. A multinational business must expect to be subject to the employment laws applicable to those they employ in different

⁴⁵ Cruz/Real/Jenard Report (n39) [27](e)(2).

⁴⁶ Art.20(2).

⁴⁷ The fact that the rule of Art.24, dealing with submission to jurisdiction by entering an appearance, is neither contained nor referred to in Section 5 of Chapter II is irrelevant: Case C-111/09 *Bilas* [2010] ECR I-4545, noted by U. Grušić, ‘Submission and Protective Jurisdiction under the Brussels I Regulation’ (2011) 48 CMLR 947.

⁴⁸ [2007] EWCA Civ 723. This case is described in Chapter III, section 4.

jurisdictions. Those employed to work...in London who are domiciled here are entitled to be sued only in the English courts and to be protected if that right is not respected.⁴⁹

This decision has been criticised on a number of grounds, in particular that Brussels I imposes obligations on Member State courts, and does not create rights or obligations in individuals.⁵⁰ Nevertheless, the decision demonstrates the strength of the idea of employee protection which the courts of Member States are bound to uphold.⁵¹ It should be noted, however, that English courts cannot restrain proceedings in other Member States.⁵² Since Member State courts are bound by Brussels I, they must decline jurisdiction over a claim against an employee domiciled in another Member State.

Suppose for a moment that this is the only jurisdictional preference that employees receive; in other words, that the jurisdictional preference consists only in denying claimant employers the use of certain generally available jurisdictional bases. Would this type of jurisdictional imbalance (favouring solely defendant, but not claimant employees), in and of itself, lead to the achievement of the objective of employee protection? The answer largely depends on the relative practical importance of situations where employees act as defendants compared to those where they act as claimants.

The relative practical importance of the two types of situation can be ascertained by looking at the CJEU case-law on Brussels I and the Brussels Convention. So far

⁴⁹ *ibid* [43].

⁵⁰ A. Dickinson, 'Resurgence of the Anti-suit Injunction: The Brussels I Regulation as the Source of Civil Obligations?' (2008) 57 *ICLQ* 465, 469-471. See also A. Briggs, 'Who is Bound by the Brussels Regulation?' [2007] *LMCLQ* 433, 437-438.

⁵¹ Merrett (n11) [9.37]-[9.39].

⁵² Case C-159/02 *Turner v Grovit* [2004] *ECR I-3565*.

employees have initiated proceedings in 13 cases.⁵³ In only 2 cases have employers done so.⁵⁴ This suggests that situations where employees act as claimants are much more frequent than those where they act as defendants. This is hardly surprising. ‘Employers rarely sue employees, not because they cannot do so...but because they have a whole armoury of weapons from gradings, salaries, promotions, through disciplinary process ultimately to dismissal, to enforce the contract upon the employee.’⁵⁵ This impression is corroborated by data from certain national jurisdictions. In Germany, for example, it is estimated that more than 95% of employment disputes are commenced by employees.⁵⁶ For employees, therefore, the jurisdictional rules applicable when they act as claimants are of a crucial practical importance.

This impression is shared by the European Commission. We must now turn briefly to recognition and enforcement of judgments. Brussels I does not allow the court in which recognition and enforcement of a judgment concerning employment is sought to review the jurisdiction of the court of origin. This is in striking contrast to the rule that allows such review in matters relating to insurance and consumer contracts.⁵⁷ The explanation provided by the Commission is that any review of the foreign courts’ jurisdiction would only affect employees, since it is they who generally seek recognition and enforcement of foreign judgments.⁵⁸ This argument clearly implies that disputes in

⁵³ *Sanicentral* (n24); *Elefanten Schuh* (n24); *Ivenel* (n28); Case 32/88 *Six Constructions* [1989] ECR 341; *Mulox* (n34); Case C-383/95 *Rutten* [1997] ECR I-57; Case C-37/00 *Weber* [2002] ECR I-2013; Case C-437/00 *Pugliese* [2003] ECR I-3573; *Turner v Grovit* (n52); Case C-555/03 *Warbecq* [2004] ECR I-6041; *GlaxoSmithKline* (n1); Case C-413/07 *Haase v Superfast Ferries* [2008] OJ C51/40; Case C-154/11 *Mahamdia* [2012] ECR 00000. See also Case C-29/10 *Koelzsch* [2011] ECR 00000 and Case C-384/10 *Voogsgeerd* [2011] ECR 00000, dealing with the Rome Convention, Art.6.

⁵⁴ Case 288/82 *Duijnsteet v Goderbauer* [1983] ECR 3663. In *Turner v Grovit* (n52), an action brought by the employee in England was followed by a vexatious action brought by the employer in Spain.

⁵⁵ R. Smith and V. Cromack, ‘International Employment Contracts – the Applicable Law’ (1993) 22 ILJ 1, 6.

⁵⁶ A. Junker, ‘Vom Brüsseler Übereinkommen zur Brüsseler Verordnung – Wandlungen des Internationalen Zivilprozessrechts’ (2002) 48 RIW 569, 575.

⁵⁷ Art.35(1).

⁵⁸ Explanatory Memorandum (n40) 23.

which employees act as defendants are so rare that protection from wrongful assumption of jurisdiction over them is unnecessary.

Furthermore, judging from English case-law, disputes in which employees act as defendants usually concern senior employees and the enforcement of various restrictive covenants and the employee's duty of fidelity and confidentiality.⁵⁹ *Samengo-Turner*,⁶⁰ for instance, concerned the enforcement of an obligation on the part of reinsurance brokers to repay the bonus they had received if they engaged in detrimental activity. Other cases concerned solicitors, consultants and managers.⁶¹ The reasons for protecting senior employees are not as strong as the reasons for protecting other employees. Consequently, since situations where employees act as claimants are of a significantly greater practical importance, giving a jurisdictional preference solely to defendant employees cannot suffice.

Furthermore, the theoretical considerations discussed in section 4 of Chapter II show that the objective of employee protection requires more than just denying employers the use of some generally available jurisdictional bases. This objective supports favouring claimant employees by making available to them one or more jurisdictional bases in addition to those available to claimants in general. The rules of jurisdiction in employment matters must also accord with the considerations of proportionality and vindication of legitimate state interests.

Given these practical and theoretical considerations, in order for the objective of employee protection to be achieved, it is not enough that the special rules accord a jurisdictional preference solely to defendant employees. These rules must also accord a

⁵⁹ See Merrett (n11) Ch 9.

⁶⁰ (n48).

⁶¹ *Turner v Grovit* (n52) (solicitor); *CEF Holdings Ltd v Mundey* (n12) (managers); *WPP Holdings Italy SRL v Benatti* [2006] EWHC 1641 (Comm); [2007] EWCA Civ 263 (although the consultant in this case was held not to be an employee, this case illustrates the type of dispute in which employers usually act as claimants). See also *Duijnsteet v Goderbauer* (n54) (manager).

balanced jurisdictional preference to claimant employees. Only thereby can the jurisdictional rules of European PIL adequately perform their regulatory function, one of allocating and protecting adjudicatory authority of states in the field of labour law. The following section examines whether this is the case.

3. Claimant employees versus other claimants: is the objective of employee protection yet to be attained?

In order to ascertain whether Brussels I achieves the objective of employee protection, the position of claimant employees will be compared with that of claimants generally. Specifically, the jurisdictional bases available to claimant employees will be compared with those available to other claimants in comparable situations.

3.1. Employer's domicile versus defendant's domicile

An employee may commence proceedings in the Member State where the employer is domiciled.⁶² Even if an employer is domiciled outside the EU, he will be deemed to be domiciled in a Member State where he has a branch, agency or other establishment ('ancillary establishment') regarding disputes arising out of the operations of that establishment.⁶³ Similarly, other claimants may commence proceedings in the Member State where the defendant is domiciled.⁶⁴ However, in this instance there can be no extension of the notion of the defendant's domicile upon which other claimants can rely. The following text examines whether the rule extending the notion of the employer's domicile accords claimant employees a jurisdictional preference.

⁶² Art.19(1). Domicile of legal persons is defined autonomously in Art.60. According to Art.59, domicile of individuals is determined by reference to the Member States' national laws.

⁶³ Art.18(2). See Case C-154/11 *Mahamdia* [2012] ECR 00000 (embassy can be an ancillary establishment); *Wright v Deccan Chargers Sporting Ventures Ltd* [2011] EWHC 1307 (QB), [47]-[56]. The Brussels and 1988 Lugano Conventions did not contain a rule extending the notion of the employer's domicile.

⁶⁴ Art.2.

In principle, the jurisdictional rules of Brussels I apply when the defendant is domiciled in the EU.⁶⁵ Member State courts can normally assume jurisdiction over non-EU domiciliaries only pursuant to the Member States' traditional jurisdictional rules, regardless of any ancillary establishment that such defendants might have in the EU. However, the rule extending the notion of the employer's domicile brings non-EU employers with European ancillary establishments within the scope of Brussels I regarding employment disputes arising out of the operations of those establishments. This rule aims to protect employees by guaranteeing they will be able to commence proceedings against such non-EU employers in at least one Member State. Otherwise (the theory goes) the operation of the Member States' traditional rules might result in employees not being able to sue such non-EU employers anywhere in the EU.

What is, however, the practical result of the application of the rule extending the notion of the employer's domicile? This rule applies in situations such as the one that arose in *Six Constructions*.⁶⁶ *Six Constructions* was a company domiciled in the United Arab Emirate of Sharjah. Mr Humbert was a worker of French nationality and domicile. He was engaged through *Six Constructions*' Belgian branch to work outside the EU. Following his dismissal, Mr Humbert commenced proceedings in France. If the mentioned rule had been applied in this case, *Six Constructions* would have been deemed to be domiciled in Belgium: the employment dispute arose out of the operations of that company's Belgian branch because Mr Humbert was engaged through that branch.⁶⁷ French courts would therefore have been entitled and obliged to apply the jurisdictional rules of Brussels I. Since Mr Humbert's work was performed outside the

⁶⁵ Art.2. The exceptions are exclusive jurisdiction and jurisdiction agreements: Art.4.

⁶⁶ (n53).

⁶⁷ *Six Constructions* was decided under the Brussels Convention. It is interesting to note that, since the CJEU had to assume for procedural reasons that *Six Constructions* was domiciled in Belgium, the outcome was the same as if Brussels I, with its rule extending the notion of the employer's domiciled, had been applied. For a discussion of the requirement that a dispute must arise out of the operations of the ancillary establishment see text accompanying n137 below.

EU, Brussels I would have provided no basis for the jurisdiction of French courts. Mr Humbert would then have been left with the option of bringing proceedings in Belgium (the country where the employer would have been deemed to be domiciled), Sharja (the country where the employer was in fact domiciled) or possibly in Libya, Zaire or Abu Dhabi, another of the United Arab Emirates (non-EU countries where the work was performed).

Had the rule extending the notion of the employer's domicile not existed, the Member States' traditional jurisdictional rules would have been applicable in this situation. The French traditional rules would have conferred jurisdiction upon French courts, possibly on two accounts.⁶⁸ First, Art.14 of the French Civil Code (*Code Civil*) enables claimants of French nationality to sue foreign parties in France. Second, the second indent of Art.R517-1 of the French Labour Code gives employees domiciled in France the right to commence proceedings in France when the work is performed outside any establishment. It is not clear whether the work in *Six Constructions* was performed in an establishment. In any event, Art.14 of the Civil Code would have been sufficient to give jurisdiction to French courts.⁶⁹ In addition, the Belgian traditional rules would have conferred jurisdiction on Belgian courts: Art.5(2) of the Belgian PIL Code mirrors Art.5(5) Brussels I.⁷⁰

The question whether the rule extending the notion of the employer's domicile accords a jurisdictional preference to claimant employees cannot be answered in the abstract. This rule would not, for example, have benefitted an employee in the shoes of

⁶⁸ For the French traditional rules of jurisdiction in employment matters see P. Mayer, 'Les clauses relatives à la compétence internationale insérées dans le contrat du travail' in *Mélanges dédiés à Dominique Holleaux* (Paris, 1990) 263.

⁶⁹ Both jurisdictional bases can be excluded by a jurisdiction agreement in favour of a foreign court: see cases cited by Mayer *ibid* 264 (for derogability of the Civil Code, Art.14), 266-267, 271-272 (for derogability of the Labour Code, Art.R517-1, second indent). No valid jurisdiction agreement existed in *Six Constructions*: see [4]-[5].

⁷⁰ F. Rigaux and M. Fallon, *Droit international privé* (Brussels, 3rd ed, 2005) 995. Art.5(5) Brussels I is discussed in part 4 of this section.

Mr Humbert. On the one hand, it would have given jurisdiction to Belgian courts, which would anyway have been competent under the Belgian traditional rules. On the other hand, it would have precluded such an employee from bringing proceedings in France pursuant to the French traditional rules. In different circumstances, this rule could confer jurisdiction upon the courts that would otherwise not have it. This is most likely to occur where the existence of a non-EU employer's ancillary establishment in a Member State does not give jurisdiction to that Member State's courts pursuant to that country's traditional rules, even over employment disputes arising out of the operations of that ancillary establishment. Given that Greece and Poland seem to be the only Member States that would not give jurisdiction to their courts on this basis,⁷¹ the rule extending the notion of the employer's domicile more often than not actually disfavours employees since it shields non-EU employers with European ancillary establishments from the Member States' traditional, often excessive, jurisdictional rules. Another extremely rare situation where the rule extending the notion of the employer's domicile would give jurisdiction to the courts that would otherwise not have it is where an employee is engaged by a non-EU employer through that employer's ancillary establishment situated in one Member State to work in another Member State and the latter Member State's traditional rules do not confer jurisdiction upon its courts in this situation.⁷²

3.2. Habitual place of work versus place of provision of services

The primary rule of jurisdiction in employment matters (conferring jurisdiction upon the courts for the habitual place of work) will be compared with the rule of jurisdiction in

⁷¹ A. Nuyts, 'Study on Residual Jurisdiction: General Report', available at http://ec.europa.eu/civiljustice/news/docs/study_residual_jurisdiction_en.pdf (last accessed 26/9/2012), 36.

⁷² Not all Member States' traditional rules give jurisdiction to their courts on the basis of the habitual place of work: Study on Residual Jurisdiction *ibid* 43-46.

matters relating to a services contract. This comparison is justified given the similar nature of the two types of contract.

3.2.1. Habitual place of work

An employer domiciled in one Member State may be sued in another Member State in the courts for the place where the employee habitually carries out his work or for the last place where he did so.⁷³ This rule is of practical importance only if there is a habitual place of work in a Member State.⁷⁴ If a habitual place of work does not exist, the fall-back rule of the engaging place of business applies. If there is a habitual place of work outside the EU, neither the primary rule of the habitual place of work nor the fall-back rule of the engaging place of business applies.⁷⁵

The habitual place of work is easily identifiable where the work is performed in one place. However, where the work is carried out in more than one place, determining the habitual place of work is problematic. The CJEU dealt with this problem in the following four cases: *Mulox*, *Rutten*, *Weber* and *Pugliese*.

*Mulox*⁷⁶ concerned a dispute between Mulox, an English company, and Mr Geels, a Dutch national with French domicile. Mr Geels, who was employed as a commercial representative, used his French home as an office and base of operations. In the first 14 months of his employment, he sold Mulox products in Germany,

⁷³ Art.19(2)(a). The wording of Art.5(1) of the Brussels and 1988 Lugano Conventions is slightly different as it does not refer to the courts for the last place where the employee habitually performed his work. This should not, however, result in any practical difference between these instruments.

⁷⁴ Work carried out on fixed or floating installations positioned on or above the part of the continental shelf adjacent to a Member State for the purposes of prospecting and exploiting its natural resources is regarded as work in the territory of that Member State: *Weber* (n53).

⁷⁵ *Six Constructions* (n53); French *Cour de Cassation, Shell International Ltd v Liem*, 21 January 2004 [2004] ILPr 18; Cruz/Real/Jenard Report (n39) [23](e); H. Gaudemet-Tallon, *Compétence et exécution des jugements en Europe* (Paris, 4th ed, 2010) 309; T. Kruger, *Civil Jurisdiction Rules of the EU and their Impact on Third States* (Oxford, 2008) [2.274], [2.291]; cf Briggs and Rees (n11) [2.105]; Merrett (n11) [4.84].

⁷⁶ (n34).

Belgium, the Netherlands and Scandinavia (but not France), to which countries he travelled frequently. In the last 5 months, he worked solely in France. Following his dismissal, Mr Geels brought proceedings in France. The employer argued that the place of performance was not confined to France, that it covered the whole of Europe and that, consequently, French courts had no jurisdiction. The CJEU held that, where the work was performed in more than one country, the multiplication of courts having jurisdiction should be avoided. Jurisdiction should not be conferred upon the courts of each Member State in which the work was performed.⁷⁷ Jurisdiction over the whole dispute should be concentrated at ‘the place where or from which the employee principally discharges his obligations towards his employer.’⁷⁸ The most important factor in determining this place was that ‘the work entrusted to the employee was carried out from an office...from which he performed his work and to which he returned after each business trip.’⁷⁹ Other relevant factors were that Mr Geels was domiciled in France and that the work was carried out solely in France when the dispute arose. French courts therefore had jurisdiction.

The facts of *Rutten*⁸⁰ were strikingly similar.⁸¹ Mr Rutten, a commercial representative of Dutch nationality and domicile, commenced proceedings in the Netherlands against Cross Medical, his English employer. Mr Rutten performed some two thirds of his work in the Netherlands, the rest being divided among the UK, Belgium, Germany and the US. The work was carried out from an office established in Mr Rutten’s home. The CJEU had an easy task: after referring to *Mulox*,⁸² it held, in

⁷⁷ *ibid* [20]-[23].

⁷⁸ *ibid* [24].

⁷⁹ *ibid* [25].

⁸⁰ (n53).

⁸¹ The reference for preliminary ruling was made because *Mulox* was decided under the original 1968 version of the Brussels Convention, which did not contain a special rule of jurisdiction for employment disputes. *Rutten* had to be decided under the 1989 version of the Convention, which did contain such a rule. The referring court was not sure whether the introduction of the special rule meant a change in the law.

⁸² *Rutten*, [12]-[19].

line therewith, that the habitual place of work was ‘the place where the employee has established the effective centre of his working activities and where, or from which, he in fact performs the essential part of his duties *vis-à-vis* his employer.’⁸³ The most important factors in identifying this place were that Mr Rutten carried out two thirds of his work in the Netherlands and that he had an office there.⁸⁴

Mulox and *Rutten* clarify that the most important factors for determining the habitual place of work are the location of the employee’s office and the distribution of the working time among various countries. Since the ‘office’ and ‘time’ factors coincided in these two cases (i.e. the employees had their offices in the countries where they spent most of their working time), the CJEU had no problem in identifying the habitual place of work. However, which of the two factors is to be given greater weight if they do not coincide?

This question was discussed before the CJEU. Advocate General JACOBS, who delivered Opinions in both *Mulox* and *Rutten*, argued that the main purpose of the rule of jurisdiction in employment matters (conferring jurisdiction upon the court with a particularly close connection with the dispute) was best satisfied if the ‘office factor’ was given preference.⁸⁵ In his view, this was because the existence of an office in a place where the work was performed indicated that that place of work was more important than the others. In other words, the Advocate General equated the term ‘habitual place of work’ with ‘principal place of employment’.⁸⁶ The European Commission, on the other hand, argued that preference should be given to the ‘time factor’.⁸⁷ It indicated that the term ‘habitual’ referred to the temporal organisation of

⁸³ *ibid* [23].

⁸⁴ *ibid* [25].

⁸⁵ *Mulox*, AG Opinion, [29], [33]; *Rutten*, AG Opinion, [34].

⁸⁶ *Mulox*, AG Opinion, [32]; *Rutten*, AG Opinion, [25]; cf P. Mankowski, ‘Der gewöhnliche Arbeitsort im Internationalen Privat- und Prozeßrecht’ (1999) 19 IPRax 332.

⁸⁷ For the Commission’s view see *Rutten*, Opinion of AG Jacobs, [33].

work, and that it could not be equated with the term ‘principal’ which referred to the central point of work. It suggested that jurisdiction should be given to the courts of the country where ‘a clear majority of days was spent’.⁸⁸

Although the CJEU refrained from addressing this issue directly, it did indirectly express its preference for the Advocate General’s approach. As previously noted, Mr Geels’ activities did not cover France until 14 months into his employment, and then did so for approximately 5 months. Nevertheless, the CJEU did not compare the amount of time Mr Geels had spent in various countries. It did, however, refer to the ‘place where or from which the employee *principally* discharges his obligations towards his employer’⁸⁹ and then mentioned the location of the office, but not the distribution of the working time, as the relevant factor for determining this place.⁹⁰ Furthermore, in *Rutten* the CJEU referred to ‘the place where the employee has established *the effective centre of his working activities* and where, or from which, he in fact performs the essential part of his duties *vis-à-vis* his employer.’⁹¹ If an employee has an office, the effective centre of his working activities will rarely be somewhere else. The existence of an office in a country therefore creates a strong presumption that the habitual place of work is in that country.⁹² This presumption is rebuttable only in exceptional cases where other relevant factors (the subject matter of the dispute; the amount, value, nature and importance of work performed in another country; the employee’s domicile or residence in another country etc.) establish a particularly strong connection with the courts of another country.

⁸⁸ *ibid.*

⁸⁹ *Mulox*, [24] (emphasis added).

⁹⁰ *ibid* [25].

⁹¹ *Rutten*, [23] (emphasis added).

⁹² *Mulox*, Opinion of AG Jacobs, [33]; *Rutten*, Opinion of AG Jacobs, [34]. See also Italian *Corte di cassazione*, *Pitzolu v Banca Gesfid SA*, 9 January 2008 [2009] ILPr 27.

*Weber*⁹³ concerned an employee who did not have an office that could constitute the effective centre of his working activities. Mr Weber, a German national domiciled in Germany, was employed by Universal Ogden Services, a Scottish company, as a cook. He performed his work on board various vessels and sea installations, initially in the Netherlands, thereafter in Denmark. The CJEU held that, in this situation, which involved a change of the place of work, the habitual place of work ‘is, *in principle*, the place where [the employee] spends most of his working time’; this place is to be determined by looking at the whole period of employment.⁹⁴ Since Mr Weber spent the majority of his working time in the Netherlands, Dutch courts had jurisdiction.

The CJEU acknowledged that the sole application of the quantitative, temporal criterion in this type of case might point to a court that did not have a particularly close connection with the dispute. That is why it stated that the place where the majority of work was performed was ‘*in principle*’ the habitual place of work.⁹⁵ All the circumstances of the case should be taken into account to ascertain whether there is another place with a stronger connection.⁹⁶ In particular, the intention of the parties should be considered. The fact that the parties intended to shift the place of work permanently from one place to another might indicate that the former had ceased, and the latter had become, the habitual place of work, irrespective of the fact that overall the majority of work had been performed in the former place.⁹⁷

The importance of the intention of the parties should, however, not be limited to the *Weber* type of case. It is potentially relevant whenever an employee (irrespective of whether his work is performed from an office or not) is sent abroad by his employer,

⁹³ (n53).

⁹⁴ *ibid* [50]-[52] (emphasis added). See also German *Bundesarbeitsgericht*, 29 May 2002, 5 AZR 141/01, *Re Employment in More Than One State* [2003] ILPr 33.

⁹⁵ *ibid* [50].

⁹⁶ *ibid* [53], [58].

⁹⁷ *ibid* [54].

either to an employer's foreign place of business, branch, subsidiary or affiliate, or to another company under a cooperation agreement or a contract of 'hiring-out' of workers. The fact that the parties intend the sending to be temporary (i.e. limited to the completion of a certain task or to a certain period of time) supports the conclusion that there is no change of the habitual place of work. The fact that the parties intend the sending to be permanent supports a different conclusion.⁹⁸

In *Pugliese*,⁹⁹ the CJEU addressed a related question of whether the habitual place of work under an employment contract with employer B from one country (in this case Germany) was relevant in a dispute arising under an employment contract with employer A from another country (in this case Italy), where employers A and B were related through membership in the same corporate group, and the employment with employer A was suspended owing to the employee's transfer to employer B. The Court held that the habitual place of work under the second employment contract was relevant provided that employer A had an interest in the employee's work for employer B in a place decided on by the latter.¹⁰⁰ The existence of that interest must be determined in an overall manner taking into consideration all the facts of the case, and in particular: the fact that the conclusion of the second contract was envisaged when the first was being concluded; the fact that the first contract was amended on account of the conclusion of the second contract; the fact that there is an organisational or economic link between the two employers; the fact that there is an agreement between the two employers providing a framework for the coexistence of the two contracts; the fact that the first employer

⁹⁸ For the importance of the intention of the parties see Mankowski (n86) 334-335; P. Mankowski, 'Europäisches Internationales Arbeitsprozessrecht: Weiteres zum gewöhnlichen Arbeitsort' (2003) 23 IPRax 21, 23-25; see also *Harada Ltd v Turner* [2000] ILPr 574 (EAT), [26]; French *Cour de cassation*, *Four Winds Charter (Societe) v Latoja*, 31 March 2009 [2009] ILPr 50.

⁹⁹ (n53).

¹⁰⁰ *ibid* [23].

retains management powers in respect of the employee; the fact that the first employer is able to decide the duration of the employee's work for the second employer.¹⁰¹

In conclusion, the CJEU has interpreted the term 'habitual place of work' narrowly in certain respects but widely in others. The term is given a narrow interpretation in the sense that there cannot be more than one habitual place of work. This is considered necessary for avoiding the multiplication of competent courts.¹⁰² The term 'habitual place of work' is thus effectively equated to 'principal place of employment'. The term is interpreted widely in that the determination of the habitual place of work is essentially a search for the place that is most closely connected with the employment dispute.¹⁰³ The 'office' and 'time' factors create presumptions that the habitual place of work is the place where the office is located or, if none, where the employee spends most of his working time. If another place of work is, in light of all relevant objective and subjective factors, more closely connected, the presumption will be rebutted in favour of that place.¹⁰⁴ The following text compares the rule of the habitual place of work with the rule concerning services contracts.

3.2.2. Place of provision of services

Art.5(1)(a) Brussels I lays down the general rule of jurisdiction in contractual matters. In matters relating to a contract, the courts for the place of performance of the obligation in question shall have jurisdiction. The 'obligation in question' is the obligation

¹⁰¹ *ibid* [24].

¹⁰² *Mulox*, [21], [23]; *Rutten*, [18]; *Weber*, [42], [55]; *Pugliese* (n53) [22].

¹⁰³ *Mulox*, [17]; *Rutten*, [16]; *Weber*, [39]; *Pugliese*, [17]. See also *Ivenel* (n28) [14]-[15].

¹⁰⁴ *Mulox*, [25]; *Weber*, [58]; *Mulox*, Opinion of AG Jacobs, [33]; *Rutten*, Opinion of AG Jacobs, [34]; *Weber*, Opinion of AG Jacobs, [49]-[50].

forming the basis of the claim;¹⁰⁵ the ‘place of performance’ is determined by reference to the law applicable under the choice-of-law rules of the forum.¹⁰⁶

With regard to services contracts, the second indent of Art.5(1)(b) contains an exception to the general rule. It prescribes that ‘*unless otherwise agreed*, the place of performance of the obligation in question shall be...the place *in a Member State* where, under the contract, the services were provided or should have been provided’. Therefore, even if the claim under a services contract concerns non-payment, the jurisdictionally relevant obligation is ordinarily the obligation to provide services. Furthermore, the place of provision of services is ordinarily defined autonomously, and is determined by reference to provisions of the contract and the facts of the case, not the applicable law.¹⁰⁷ In this respect, the rule concerning services contracts largely corresponds to the primary rule of jurisdiction in employment matters. However, there are significant differences between the two rules.

First, the jurisdictionally relevant obligation regarding employment contracts is always the obligation to perform work, and the term ‘habitual place of work’ is always defined autonomously. In contrast, the parties to a services contract may agree that the exception contained in the second indent of Art.5(1)(b) does not apply. In other words, they may agree that the jurisdictionally relevant obligation is the obligation forming the basis of the claim, whose place of performance is to be determined by reference to the law applicable under the choice-of-law rules of the forum. This agreement need not satisfy the general requirements concerning jurisdiction agreements of Art.23.¹⁰⁸ Thus, if A contracts with B to provide services in one Member State in return for payment in

¹⁰⁵ *De Bloos v Bouyer* (n29).

¹⁰⁶ *Tessili v Dunlop* (n30). Art.5(1) of the Brussels and 1988 Lugano Convention is identical to Art.5(1)(a) Brussels I.

¹⁰⁷ Case C-381/08 *Car Trim* [2010] ECR I-1255, [53]-[57]; Case C-87/10 *Electrosteel* [2011] ECR 00000.

¹⁰⁸ T. Hartley, *International Commercial Litigation: Text, Cases and Materials on Private International Law* (Cambridge, 2009) 48.

another Member State, the courts of the first Member State shall normally have jurisdiction over the whole dispute. However, if the parties agree that the exception contained in the second indent of Art.5(1)(b) does not apply, the courts of the second Member State shall have jurisdiction over claims for non-payment pursuant to the general rule of Art.5(1)(a). In contrast, the rule of the habitual place of work does not enable an employee to sue his employer for non-payment of salary in a Member State other than that where the work was habitually performed. Therefore, the primary rule of jurisdiction in employment matters is narrower in this respect than the rule concerning services contracts.

The second difference stems from the fact that the exception contained in the second indent of Art.5(1)(b) does not apply where the services were provided or should have been provided outside the EU. In that situation, a '*place in a Member State* where...the services were provided or should have been provided' does not exist, and a requirement for the application of the second indent of Art.5(1)(b) is not met. The general rule of Art.5(1)(a) then regains applicability.¹⁰⁹ Thus, if A contracts with B to provide services in a non-EU country in return for payment in a Member State, the mentioned exception does not apply. A may rely on the general rule, and sue B for non-payment in the Member State where the payment should have been performed. In contrast, if the work under an employment contract is habitually performed outside the EU, the rule of the habitual place of work does not enable an employee to sue his employer for unpaid salary in the Member State where the salary should have been paid. This is another situation where the primary rule of jurisdiction in employment matters is narrower than the rule concerning services contracts.

¹⁰⁹ Art.5(1)(c); see C-19/09 *Wood Floor* [2010] ECR I-2121, Opinion of AG Trestenjak, [86]; cf K. Takahashi, 'Jurisdiction in Matters relating to Contract: Article 5(1) of the Brussels Convention and Regulation' (2002) 27 ELR 530, 540.

With regard to the determination of the place of provision of services for the purposes of the second indent of Art.5(1)(b), there is no problem if the services were provided or should have been provided in one place. The courts for that place shall have jurisdiction. As with employment contracts, the problem arises where the services were provided or should have been provided in more than one place. The CJEU dealt with it in *Rehder*¹¹⁰ and *Wood Floor*.¹¹¹

Those two cases concerned the determination of the place of provision of services where there were several places of performance in different Member States. The CJEU held that, in such cases, it was necessary to identify the court with the closest connection with the dispute, which it said was the court for ‘the place where, pursuant to [the] contract, the main provision of services is to be carried out’.¹¹² Thus, with regard to commercial agency contracts, the relevant place is determined first by reference to the provisions of the contract.¹¹³ In the words of the CJEU, the search is for ‘the place where the agent was to carry out his work on behalf of the principal, consisting in particular in preparing, negotiating and, where appropriate, concluding the transactions for which he has authority’.¹¹⁴ A commercial agent normally performs these activities in his office. If the contract does not enable the determination of the place of the main provision of services (e.g. because several places or none were specified), and if the agent has already provided services in accordance with the contract, account should be taken of the place where the agent has in fact for the most part carried out his activities in performance of the contract.¹¹⁵ The relevant factors, such as the time spent and the importance of the activities carried out in various places,

¹¹⁰ Case C-204/08 [2009] ECR I-6073.

¹¹¹ (n109). For a general discussion of this problem see U. Grušić, ‘Jurisdiction in Complex Contracts under the Brussels I Regulation’ (2011) 7 J PIL 321.

¹¹² *Rehder*, [37]-[38]; *Wood Floor*, [33].

¹¹³ *Wood Floor*, [38]-[39]. See also P. Mankowski, ‘Commercial Agents under European Jurisdiction Rules’ (2008) 10 Y PIL 19, 31-42.

¹¹⁴ *ibid* [38].

¹¹⁵ *ibid* [40].

will also normally point to the agent's office. If the two abovementioned criteria are not helpful, the place where the agent is domiciled (again ordinarily the place where his office is located) will be deemed to be the relevant place.¹¹⁶ Sometimes, however, the place of the main provision of services cannot be determined. For example, the relevant services in cases concerning passenger air transport are, by their very nature, performed in an indivisible and identical manner from the place of departure to that of arrival of the aircraft. One place of the main provision of services does not therefore exist.¹¹⁷ In such cases, jurisdiction is conferred upon the courts for each place of provision of services, provided there is a sufficiently close connection between those places and the dispute.¹¹⁸

3.2.3. Conclusion

The criteria for determining the habitual place of work and the place of provision of services for the purposes of the jurisdictional rules of Brussels I are inherently the same. The habitual place of work is interpreted as the principal place of employment, and the place of provision of services as the place of the main provision of services. In both situations, the purpose of determining these places is to confer jurisdiction upon the court most closely connected with the dispute. The fact that the search for the habitual place of work is facilitated by the existence of presumptions created by the 'office' and 'time' factors reflects the relatively specific nature of the rule of jurisdiction for employment contracts. The more general nature of the rule concerning services contracts (which covers a range of widely distinct contracts) does not allow an *a priori* elevation of one or more factors to the status of presumptions. However, with regard to

¹¹⁶ *ibid* [42].

¹¹⁷ *Rehder*, [42].

¹¹⁸ *ibid* [44]-[45], [47]. If the services consist in a negative obligation not subject to any geographical limits, there is no jurisdictionally relevant place of provision of services: Case C-256/00 *Besix* [2002] ECR I-1699 (the parties undertook to act exclusively and not to commit themselves to other parties anywhere in the world).

commercial agency contracts, which are akin to international employment contracts entered into by commercial representatives, the location of the agent's office weighs more than other factors. This supports the conclusion that the criteria for determining the two places are inherently the same.

Therefore, the primary rule of jurisdiction in employment matters and the rule concerning services contracts correspond closely. However, there are three differences between the two rules. First, the relevant obligation for establishing jurisdiction over an employment dispute is always the obligation to perform work, and the term 'habitual place of work' is always defined autonomously. In contrast, the parties to a services contract may agree that the exception contained in the second indent of Art.5(1)(b) does not apply. If so, the general rule of Art.5(1)(a) allows the service provider to bring the claim for non-payment in the place where the payment should have been performed. Second, the fact that the place of payment of salary is in a Member State is always irrelevant for jurisdictional purposes. In contrast, if the services were provided or should have been provided outside the EU, the exception contained in the second indent of Art.5(1)(b) does not apply. If the place of payment happens to be in the EU, the general rule of Art.5(1)(a) then allows the service provider to bring the claim for non-payment at that place. Third, if the habitual place of work cannot be determined, the fall-back rule of the engaging place of business applies. In contrast, if the place of the main provision of services cannot be identified, the service provider can sue the other party in the courts for each place of provision of services.

Do the differences between the two rules result in claimant employees being in a better or worse jurisdictional position than claimant service providers? The first difference may open an additional forum to service providers. However, this depends on the agreement of the parties. Since the parties to an employment contract may also

agree to expand the number of forums available to the employee, the first difference has no practical importance apart from the fact that a jurisdiction agreement must satisfy the general requirements of Art.23, while an agreement on not applying the exception contained in the second indent of Art.5(1)(b) need not. The second and third differences are of practical importance. They open additional forums to service providers but not to employees in comparable situations. The primary rule of jurisdiction in employment matters is therefore slightly less favourable for claimant employees than the generally applicable rule concerning services contracts is for claimant service providers.

3.3. Engaging place of business

An employee who does not or did not habitually carry out his work in any country may sue the employer domiciled in one Member State in another Member State in the courts for the place where the business that engaged him is or was situated.¹¹⁹ This rule is not applicable where there is a habitual place of work outside the EU.¹²⁰ It is also not applicable where the whole of the employee's work is carried out in a single Member State, but not habitually in any one place within that Member State. By analogy with *Color Drack*,¹²¹ the court for each place of work seems to have jurisdiction over the whole employment dispute in that situation.

The recent CJEU judgment in *Voogsgaerd*¹²² sheds light on the meaning of the concept of the engaging place of business. Although this decision concerned the

¹¹⁹ Art.19(2)(b). The wording of the Brussels Convention is slightly different. It states that an employee who 'does not habitually carry out his work in any one country...may also [sue his employer in the courts of the engaging place of business]'. The use of the word 'also' led some authors to a wrong conclusion that the courts of the engaging place of business were available alongside the courts for the habitual place of work: A.E. Anton and P.R. Beaumont, *Private International Law: A Treatise from the Standpoint of Scots Law* (Edinburgh, 2nd ed, 1990) 183, fn29; A. Briggs, 'Mulox' (1993) 13 YEL 520, 523-524; H. Tagaras, 'Mulox' [1995] *Cahiers de droit européen* 188, 190.

¹²⁰ (n75).

¹²¹ Case C-386/05 [2007] ECR I-3699; also German *Bundesarbeitsgericht*, 29 May 2002, 5 AZR 141/01, *Re Employment in More Than One State* (n94); cf Jenard/Möller Report (n36) [39].

¹²² (n53). This case is discussed in detail in Chapter V, section 3.2.

interpretation of Art.6(2)(b) of the Rome Convention, it is nevertheless relevant for the present discussion, since the concepts used in European PIL instruments should be interpreted consistently. ‘Place of business’ refers not only to the employer’s domicile but also to any establishment, regardless of whether it possesses legal personality, over which the employer exercises effective control so that its actions are attributable to the employer, which possesses a sufficient degree of permanence, and which has been set up in accordance with the relevant provisions of the country in which it has been established.¹²³ Some authors argue that ‘place of business’ also refers to independent employment agencies.¹²⁴ But the fact that jurisdiction is given to the courts for both the place where the engaging place of business is located at the moment of commencement of proceedings and for the place where it was located at the moment of engagement¹²⁵ goes against such a broad interpretation. An employer cannot be exposed to litigation in foreign countries just because an employment agency, which might have been used a long time ago, is transferred from one Member State to another. ‘Place of business’ therefore seems to encompass the employer’s domicile and ‘branch agency and other establishment’ in the meaning of Art.5(5) Brussels I.¹²⁶ The term ‘engaged’ refers to active engagement of employees, manifested by the conclusion and negotiation of the employment contract.¹²⁷

Given that the CJEU has widely interpreted the term ‘habitual place work’, equating it to ‘principal place of employment’, there are not many situations where the

¹²³ *ibid* [54]-[57]; *ibid*, Opinion of AG Trstenjak, [78]-[81]. See also Jenard/Möller Report (n36) [43].

¹²⁴ C.E. Mota and G.P. Moreno, ‘Section 5: Jurisdiction over Individual Contracts of Employment’ in U. Magnus and P. Mankowski (eds), *Brussels I Regulation* (Munich, 2007) 326, 339.

¹²⁵ This results from the wording ‘where the business which engaged the employee *is or was* situated.’ A problem of interpretation might arise if the relevant business moves from country A (where the employee was engaged) to country B and then to country C (where it is situated at the moment of commencement of proceedings). Can the employee then sue the employer in country B? The wording of Art.19(2)(b) is wide enough to support this conclusion. However, this should not be allowed, as the courts of country B would more often than not have no connection with the dispute. See R. Kidner, ‘Jurisdiction in European Contracts of Employment’ (1998) 27 ILJ 103, 112.

¹²⁶ *Voogsgeerd*, Opinion of AG Trstenjak, [83]. See also Cruz/Real/Jenard Report (n39) [23](c), fn1; A. Layton and H. Mercer (eds), *European Civil Practice* (London, 2004) [18.023], fn50.

¹²⁷ *Voogsgeerd* [45]-[50]; *ibid*, Opinion of AG Trstenjak [65]-[70]; cf Briggs and Rees (n11) 109, fn482.

fall-back rule of the engaging place of business applies. It is of practical importance primarily where the employee's work is not carried out from an office (e.g. construction workers), and the distribution of the working time spent in various countries and the parties' intentions do not establish a habitual place of work. This rule is also applicable where an employee maintains two or more offices of equal importance in different countries. In *Portec (UK) v Mogensen*,¹²⁸ for example, the employee worked in Paris and Ruabon, Wales, maintained offices in both places, and divided his time more or less equally between both places (in 1973-74 he worked 83 days inside and 87 days outside Britain). The court held that the employee ordinarily worked, for the purposes of the Trade Union and Labour Relations Act 1974, both in Britain and abroad. Yet another example is employees working outside the territory of any country (e.g. Antarctica¹²⁹ or oil rigs on the high seas).

Does the work of international transport workers fall under the rule of the engaging place of business? Two jurisdictional cases involving the work of this kind have been referred to the CJEU. *Warbecq*¹³⁰ concerned a dispute between an air hostess of Belgian nationality and domicile and an Irish airline. The referring court (the *Tribunal du travail de Charleroi*) wanted to know whether a habitual place of work existed where the work was performed partly on the ground and partly on an aircraft flying the flag of the employer's country. Another case, *Haase v Superfast Ferries*,¹³¹ concerned a dispute brought by a seaman who worked on a ship used for regular passenger services between Germany and Finland. The referring court (the *Landesarbeitsgericht Mecklenburg-Vorpommern*) wanted to know if a habitual place of work existed in such a situation.

¹²⁸ [1976] ICR 396 (EAT).

¹²⁹ These cases are not merely fictional: see the decision of the German *Bundesfinanzhof*, 14 June 1991 (1991) 37 RIW 966, concerning the taxation of wages of a cartographer working in Antarctica.

¹³⁰ (n53).

¹³¹ (n53).

Since the references in these two cases had not been made by the authorised courts, the CJEU had no jurisdiction to render preliminary rulings.¹³² Although the employees in these two cases had no offices, they seem to have had effective centres of their working activities. In the first case, this was Charleroi airport, where Ms Warbeck performed her ground duties and returned after each flight. Given that an air crew member typically works on aircrafts flying from one airport (i.e. one place of departure) to various destinations (i.e. various places of arrival), the essential part of such an employee's working activities is performed at the place of departure. In the second case, the effective centre of the employee's working activities was arguably the place in Germany from which the ferry was departing to Finland and to which the employee returned after each trip. Admittedly, the employee in *Haase v Superfast Ferries* worked on a ship connecting only two places in two different countries, and it cannot be said that the provision of services in one of those places was more important. However, the facts that the employee's activities were directed from the place in Germany, that the employee had his domicile there and that the ship seems to have had its home port there, point to that place as the effective centre of the employee's working activities. As discussed in more detail in Chapter VI, the CJEU has adopted, in the context of Art.6(2)(a) of the Rome Convention, a wide interpretation of the term 'habitual place of work' in disputes involving an international driver and a seaman.¹³³ The practical relevance of the rule of the engaging place of business is therefore limited to cases where the connection between the international transport worker's work and his base are very weak (e.g. some globetrotting seamen).

¹³² Pursuant to the then extant version of Art.68(1) TEC, only a court or a tribunal of a Member State against whose decisions there was no judicial remedy under national law could make references for preliminary ruling regarding the interpretation of Brussels I. The *Tribunal du travail de Charleroi* and the *Landesarbeitsgericht Mecklenburg-Vorpommern* did not meet these criteria.

¹³³ *Koelzsch* (n53); *Voogsgeerd* (n53).

The CJEU has interpreted the term ‘habitual place of work’ widely, and thereby marginalised the rule of the engaging place of business, because this rule does not meet the objectives of proximity and employee protection. First, there is no guarantee that the courts of the engaging place of business will have a sufficiently close connection with the dispute. Suppose an English company were to use its Belgian business to engage European employees for work on a cruise ship. If a dispute arises some time after the engagement, the likelihood that Belgian courts would have a sufficiently close connection with the dispute would be low, particularly if the employee had no other connection with Belgium. The likelihood would be even lower if the business that engaged the employee were transferred from one country to another (e.g. from Belgium to France). The employee might then commence proceedings either at the place where the business that engaged him was situated at the moment of engagement (Belgium) or at the place where it was situated at the moment of commencement of proceedings (France). The courts for neither place would be particularly likely to have a sufficiently close connection with the dispute.¹³⁴ Second, the engaging place of business is ordinarily determined unilaterally by the employer and usually corresponds with the employer’s domicile. That is why this rule is not in employees’ interests.

In conclusion, by interpreting widely the term ‘habitual place of work’, the CJEU reduced the application of the rule of the engaging place of business to a few situations of relatively marginal importance. Even when it is applicable, this rule results in the concentration of the entire employment dispute in the courts of the engaging place of business.¹³⁵ This is clearly less favourable for employees’ interests than the multiplication of competent courts to which the rule concerning services contracts leads

¹³⁴ See *Mulox* (n34), Opinion of AG Jacobs, [37]; *Rutten* (n53), Opinion of AG Jacobs [37].

¹³⁵ Jenard/Möller Report (n36) [40].

in comparable situations (i.e. where the place of the main provision of services does not exist).

3.4. Branches, agencies and other establishments

An employee may sue an employer domiciled in one Member State, regarding a dispute arising out of the operations of that employer's ancillary establishment, in another Member State in the courts for the place where that establishment is situated.¹³⁶ Claimant employees are in the same position as other claimants in this regard since this jurisdictional basis is equally available to both categories.

The requirement that the dispute must arise out of the operations of an ancillary establishment is discussed here in more detail.¹³⁷ Initially, the CJEU interpreted this requirement rather strictly. It held that the concept of 'operations' comprised three types of actions: 1) actions concerning the management of the ancillary establishment 'such as...the local engagement of staff to work [at the place where the establishment was situated];' 2) actions relating to contractual obligations entered into in the name of the parent at the place, and to be performed in the country, where the establishment was situated; and 3) actions relating to non-contractual obligations arising out of the local activities of the ancillary establishment.¹³⁸ It is remarkable that the courts for the place where the ancillary establishment was situated would have had jurisdiction in these three situations on other bases as well.¹³⁹ It is therefore not surprising that the CJEU has subsequently given a wider interpretation to this requirement. With regard to the second type of action, the Court held in *Lloyd's Register of Shipping v Société*

¹³⁶ Arts.5(5), 18(1).

¹³⁷ For the requirement that a defendant domiciled in a Member State must have an ancillary establishment in another Member State see L. Collins (gen ed), *Dicey, Morris and Collins on the Conflict of Laws* (London, 14th ed, 2006) [11-310]-[11-311]; J.J. Fawcett and J.M. Carruthers, *Cheshire, North & Fawcett: Private International Law* (Oxford, 14th ed, 2008) 258-260.

¹³⁸ Case 33/78 *Somafer* [1978] ECR 2183, [13].

¹³⁹ Brussels Convention, Arts.5(1), 5(3); Brussels I, Arts.5(1), 5(3), 19.

*Campenon Bernard*¹⁴⁰ that it was not necessary for the contractual obligations entered into by the ancillary establishment to be performed in the Member State where the establishment was situated. In order for a contractual claim to be regarded as arising out of the operations of the ancillary establishment, it is enough that the contract was either concluded or negotiated¹⁴¹ through that establishment.

Such a wide interpretation means that, whenever an employer's ancillary establishment concludes or negotiates an employment contract on behalf of its parent, the employee may sue the employer under the contract in the courts for the place where that establishment is located, regardless of where the work is in fact performed. This also means that the rule of jurisdiction over defendants dealing through branches, agencies or other establishment covers almost all situations where the rule of the engaging place of business is applicable. The difference between the two rules is that the former is always applicable, whereas the latter is applicable only if there is no habitual place of work. The rule of the engaging place of business is therefore of practical importance only in rare situations where the business that engaged the employee is transferred from one place to another after the engagement. The employee may sue his employer at either place under the rule of the engaging place of business. An equivalent option does not exist under Arts.2 and 5(5).¹⁴²

3.5. Other jurisdictional bases

The CJEU has held that claimant employees cannot invoke the basis of jurisdiction over co-defendants (Art.6(1)), which basis is generally available to other claimants.¹⁴³ The

¹⁴⁰ Case C-439/93 [1995] ECR I-961.

¹⁴¹ Case 218/86 *SAR Schotte GmbH v Parfums Rotschild SARL* [1987] ECR 4905, Opinion of AG Lynn; *Lloyd's Register of Shipping v Société Campenon Bernard* ibid [20]; *Anton Durbeck GmbH v Den Norske Bank ASA* [2003] QB 1160 (CA), [40].

¹⁴² K. Hertz, *Jurisdiction in Contract and Torts under the Brussels Convention* (Copenhagen, 1998) 183.

¹⁴³ See text accompanying n14 above.

reasoning of the CJEU extends to other bases that are neither contained in Section 5 of Chapter II nor referred to therein. The only exception is submission to jurisdiction by entering an appearance.¹⁴⁴ Special jurisdictional rules therefore put claimant employees in a less favourable position in this respect.

3.6. Jurisdiction agreements

Claimant employees are given a significant jurisdictional preference regarding jurisdiction agreements. A jurisdiction agreement is given effect in an employment dispute either if it is entered into after the dispute has arisen or if it allows the employee to bring proceedings in the courts other than those indicated by the default jurisdictional rules, provided that the general requirements of Art.23 are also satisfied.¹⁴⁵ Suppose an employee habitually works in England for a French company. If the parties agree *ex ante* on the jurisdiction of Belgian courts, such an agreement will be effective only if the employee invokes it. Any provision of national law that aims to make such an agreement void¹⁴⁶ does not apply.¹⁴⁷ In contrast, in disputes not involving a weaker contractual party, jurisdiction agreements are given full effect provided they satisfy the requirements of Art.23.

3.7. Conclusion

In certain respects, the rules of jurisdiction in employment matters of Brussels I give claimant employees a jurisdictional preference. Most notably, jurisdiction agreements are given effect against employees under very strict conditions. This guarantees that employers will be unable to (ab)use their typically superior position and reduce the

¹⁴⁴ (n47). The situation is different under the Brussels and 1988 Lugano Conventions: (n16).

¹⁴⁵ Art.21; Schlosser Report (n43) [161].

¹⁴⁶ e.g. ERA 1996, s.203.

¹⁴⁷ *Sanicentral* (n24); *Elefanten Schuh* (n24); cf Layton and Mercer (n126) [18.030].

number of forums available to employees. This is undoubtedly a very important aspect of jurisdictional protection.

However, the crucial aspect of protection is the existence of the relatively numerous and diverse jurisdictional bases that claimant employees can invoke. Only thereby are the chances of employees pursuing their claims in favourable forums increased and safeguarded. Brussels I fails in this respect. First, the rule of general jurisdiction and the primary rule of jurisdiction in employment matters are somewhat less favourable for employees than the generally applicable rule of general jurisdiction and the rule concerning services contracts. Second, the fall-back rule of the engaging place of business does not meet the objectives of proximity and jurisdictionally favouring employees and is, furthermore, deprived of almost any practical importance. Third, the generally available jurisdictional bases that are neither contained in Section 5 of Chapter II nor referred to therein are not available to claimant employees. The examination of the rules of jurisdiction in employment matters therefore reveals that claimant employees are overall not given a jurisdictional preference. In many respects they are even put in a less favourable position than other claimants. Given the theoretical and practical importance of according a balanced jurisdictional preference to claimant employees, Brussels I fails to achieve the objective of employee protection.

4. How to achieve employee protection?

The reason for the current structure and content of the rules of jurisdiction in employment matters of Brussels I lies in their haphazard evolution. If this instrument is to achieve the objective of employee protection, the existing rules need to be amended in a more systematic manner. The first part of this section explores the ways of

improving the existing rules. The second part examines the possibility of introducing new rules.

4.1. Improving the existing rules

The shortcoming of the rule of general jurisdiction is that the rule extending the notion of the employer's domicile often disfavours claimant employees. Admittedly, this rule does guarantee that employees will be able to sue non-EU employers with European ancillary establishments, regarding disputes arising out of the operations of those establishments, in at least one Member State. However, this rule also shields such non-EU employers from the Member States' traditional, often excessive, jurisdictional rules.

There is no reason why this kind of jurisdictional protection should be accorded to non-EU employers with EU ancillary establishments. Rather, such non-EU employers should be treated as all other non-EU defendants, and be amenable to suit in Member State courts pursuant to the traditional rules. Art.18(2) Brussels I should therefore be amended by inserting a provision explicitly stating that the rule extending the notion of the employer's domicile applies without prejudice to Art.4. The European Commission, however, proposed to abolish the traditional rules through the extension of the scope of the existing jurisdictional rules of Brussels I to third states' domiciliaries.¹⁴⁸

The primary rule of jurisdiction in employment matters (conferring jurisdiction upon the courts for the habitual place of work) could be amended to reflect the fact that the CJEU has effectively equated the term 'habitual place of work' with 'principal place of employment'. The CJEU's interpretation has already been implemented in Rome

¹⁴⁸ (n18) 9. This proposal, however, has been rejected by the European Parliament: 'Draft Report on the proposal for a Regulation of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast)', available at http://www.contentieux-international.net/offres/file_inline_src/358/358_A_4254_17.pdf (last accessed 26/9/2012), 7-8.

I.¹⁴⁹ Art.8(2) Rome I, dealing with the applicable law for employment contracts in the absence of choice, refers to the ‘country in which or, failing that, from which the employee habitually carries out his work in performance of the contract.’¹⁵⁰ Arguably, the essence of the CJEU’s interpretation would have been better expressed if the reference to the place ‘in which or from which the employee *principally* carries out his work’ had been made instead. Nevertheless, to achieve the desirable convergence between the two instruments, it is better to amend Art.19(2)(a) Brussels I along the lines of Art.8(2) Rome I. Indeed, the European Commission has proposed the following wording for the recast Brussels I: ‘an employer may be sued...in the courts for the place where or from where the employee habitually carries out his work or in the courts for the last place where he did so’¹⁵¹

As discussed, there are two differences between the primary rule of jurisdiction in employment matters and the rule concerning services contracts, which result in a somewhat less favourable position of claimant employees in comparison to other claimants. The first difference stems from the fact that the obligation of payment of salary is always irrelevant for jurisdictional purposes. In contrast, where the place of provision of services is outside the EU, the obligation to pay remuneration in a Member State represents a jurisdictional basis of that Member State’s courts over the claim for non-payment. Should the rules of jurisdiction in employment matters be amended to enable claimant employees to bring claims for non-payment of salary in the courts for the place of payment if the habitual place of work is outside the EU?¹⁵² Although such a rule would contribute to equating the jurisdictional position of claimant employees

¹⁴⁹ European Commission, ‘Proposal for a Regulation of the European Parliament and the Council on the law applicable to contractual obligations (Rome I)’, COM (2005) 650 final, 7.

¹⁵⁰ Art.8(2) Rome I also prescribes that the ‘country where the work is habitually carried out shall not be deemed to have changed if [the employee] is temporarily employed in another country.’ See also Rome I, Recital 36.

¹⁵¹ (n18) 32.

¹⁵² *Six Constructions* (n53), Opinion of AG Tesauro, [14]-[15].

and other claimants, the answer must be negative. Such a rule would not accord with the considerations of proportionality and vindication of legitimate state interests. The chances of the place of payment of salary being sufficiently closely connected with the dispute and the law of that place being applicable where there is a habitual place of work in another country are low. Moreover, this rule would not be particularly protective of employees' interests. An employer might unilaterally determine the place of payment of salary and thereby seek the benefit of litigating in a favourable forum.

The second difference is that, absent a habitual place of work, an employee can commence proceedings only in the courts of the engaging place of business. In a comparable situation, a service provider can sue the other party in the courts for each place of provision of services. In order to equate the position of claimant employees and other claimants in this respect, the forum of the engaging place of business should be abolished. If this were done, an employee who does not habitually perform his work in any country should be able to commence proceedings in the courts for each place of work, provided there is a sufficiently close connection between those places and the dispute. Thus, if there is no habitual place of work because two or more places of work are equally important, the employee should be able to commence proceedings in each of those places.¹⁵³ However, if the habitual place of work does not exist because no place of work is sufficiently closely connected with the dispute, the employee should not be able to commence proceedings in any place of work.

There are further reasons for abandoning the rule of the engaging place of business. The CJEU has deprived this rule of almost any practical importance by widely interpreting the term 'habitual place of work' and giving a broad scope to the rule of jurisdiction over defendants dealing through branches, agencies and other establishments. Moreover, the rule of the engaging place of business does not accord

¹⁵³ *Mulox* (n34), Opinion of AG Jacobs, [35].

with the consideration of proportionality and jurisdictionally preferring employees. The chances of this place being sufficiently closely connected with the employment dispute are low; moreover it is a place that is determined unilaterally by the employer. It is for these reasons that the Netherlands and Belgium, which have otherwise implemented the solutions of Brussels I in their national jurisdictional codes, have decided not to introduce the rule of the engaging place of business.¹⁵⁴

Seemingly, this rule accords better with the consideration of vindication of legitimate state interests. Rome I prescribes that, absent a habitual place of work, the employment contract is governed by the law of the country where the place of business through which the employee was engaged *is* situated.¹⁵⁵ However, there are many situations where there is no habitual place of work and the *forum* and *ius* do not coincide. First, if the engaging business is transferred from one place to another after the engagement, the employee may commence proceedings in the courts for either place. In contrast, only the latter place seems relevant for choice-of-law purposes.¹⁵⁶ Second, the rule of Rome I that points to the law of the country of the engaging place of business can be departed from whenever it appears from the circumstances as a whole that the employment contract is more closely connected with another country.¹⁵⁷ Since there are no guarantees that the country of the engaging place of business will be sufficiently closely connected with the employment contract, the chances of departure

¹⁵⁴ The Dutch reporter for the Study on Residual Jurisdiction (n71) explains, at p18 of the Dutch Report, available at http://ec.europa.eu/civiljustice/news/docs/study_resid_jurisd_netherlands_en.pdf (last accessed 26/9/2012), that this rule 'has not been introduced into Dutch civil procedure because it was considered unnecessary'.

¹⁵⁵ Art.8(3).

¹⁵⁶ Compare Art.19(2)(b) Brussels I, referring to 'the place where the business which engaged [the employee] *is* or *was* situated', with Art.8(3) Rome I, referring to 'the place of business through which the employee was engaged *is* situated'.

¹⁵⁷ Art.8(4).

from the rule are relatively high. Third, the parties to an employment contract may, under certain restriction, choose the applicable law.¹⁵⁸

Finally, some of the jurisdictional bases that are neither contained in Section 5 of Chapter II nor referred to therein should be made available to claimant employees. This applies primarily to the rule of jurisdiction over co-defendants. Indeed, the European Commission has proposed making this jurisdictional rule available to claimant employees.¹⁵⁹ Furthermore, with regard to submission to jurisdiction, the Commission has proposed a rule that would oblige the court seized with a dispute involving a weaker party to ensure that the defendant is given information concerning his right to contest the jurisdiction of the court and the consequences of entering an appearance.¹⁶⁰

If the changes proposed here were adopted, the rules of jurisdiction in employment matters would cease to be less favourable for claimant employees than the general rules. However, they would not thereby become more favourable. The following part of this section explores the possibility of introducing additional jurisdictional bases.

4.2. Introducing new rules

As discussed in section 4 of Chapter II, many countries have special rules of jurisdiction for employment disputes. Jurisdiction is asserted on various bases such as the location of the habitual place of work, the engaging place of business, the place of conclusion of the contract, the place of payment of salary, common nationality of the parties, and the employee's domicile or habitual residence. It was argued that most of these bases do

¹⁵⁸ Art.8(1).

¹⁵⁹ (n18).

¹⁶⁰ *ibid* Art.24(2).

not accord with the considerations of proportionality, vindication of legitimate state interests and jurisdictionally preferring employees. It was also noted that there seems to be one situation where the connecting factor of the *employee's domicile or habitual residence* accords with the mentioned considerations. This situation exists when an employer actively seeks out an employee in the latter's home country for work abroad, and the parties foresee that the employee will retain strong connection with his home country and return there after the termination of employment.

A rule that confers jurisdiction upon the courts of the employee's domicile where the employer takes the initiative to recruit the employee away from his home state is applied in the US,¹⁶¹ but it is only active seeking out of employees that meets the requirements of the 'minimum contacts' doctrine and the 'purposeful availment' test. The US case-law shows that these tests are satisfied, for example, where the employer advertises in local newspapers and contacts employees locally (either directly or through an agent),¹⁶² uses a local employment agency,¹⁶³ actively recruits employees locally for work abroad¹⁶⁴ and so forth. Mere hiring of a national employment agency is not enough.¹⁶⁵ Jurisdiction is also not allowed where it is the employee who initiates contact.¹⁶⁶

Introducing a jurisdictional rule of this kind in Brussels I appears consistent with the spirit of that instrument. The rationale of the 'seeking out' rule is the existence of a sufficiently strong connection between the *defendant* and the forum, which rationale also underlies some of the existing rules such as the rule of general jurisdiction of

¹⁶¹ E. Scoles and others, *Conflict of Laws* (St Paul, Minnesota, 4th ed, 2004) 395-396; see also Texas Civil Practice and Remedies Code, §17.042(3).

¹⁶² *Runnels v TMSI Contractors, Inc.* 764 F.2d 417 (5th Cir. 1985); *Clark v Moran Towing & Transp. Co* 738 F.Supp. 1023 (E.D.La. 1990); *Mabry v Fuller-Shuwayyer Co, Ltd.* 50 N.C.App. 245 (1981).

¹⁶³ *Moreno v Milk Train, Inc.* 182 F.Supp.2d 590 (W.D. Tex. 2002).

¹⁶⁴ *Shah v Nu-Kote International, Inc.* 898 F.Supp. 496 (E.D. Mich. 1995); *Babineaux v Southeastern Drilling Corp.* 170 So.2d 518 (La.App).

¹⁶⁵ *Conti v Pneumatic Products Corporation* 977 F.2d 978 (6th Cir. 1992).

¹⁶⁶ *Farbman v Esskay Manufacturing Co.* 676 F.Supp. 666 (W.D.N.C. 1987); *Speckine v Stanwick Int'l Inc.* 503 F.Supp. 1055 (W.D. Mich. 1980).

Art.2(1) and the rule of special jurisdiction of Art.5(5). Admittedly, the link between the defendant and the forum under the proposed ‘seeking out’ rule would usually not be as strong as under the mentioned rules of Brussels I. Nevertheless, the objective of employee protection justifies the introduction of such a rule. A parallel can be made with consumer contracts. The consumer’s domicile represents a relevant connecting factor whenever the supplier seeks out the consumer in his home country.¹⁶⁷ The proposed ‘seeking out’ rule for employment disputes is essentially based on the same idea.

If this new jurisdictional rule and the changes proposed in the first part of this section were introduced, employees would arguably be accorded a disproportionate jurisdictional preference. In order to avoid tilting the jurisdictional scale excessively in employees’ favour, an additional jurisdictional basis could also be made available to claimant employers. Claimant employers could be restored the right to initiate proceedings in the courts for the habitual place of work.¹⁶⁸ Several arguments support this proposition.

First, habitual place of work is a jurisdictional basis that best satisfies the considerations of proportionality and vindication of legitimate state interests. The court for this place is usually *the* proper forum for resolving an employment dispute. Moreover, this basis does not favour either party *a priori*, as the habitual place of work can be in the employee’s or the employer’s country, or in a third country. What is important is that the employer cannot unilaterally change the habitual place of work and thereby obtain the benefit of litigating in a favourable forum. As discussed, there must be a combination of objective and subjective factors on both the employee’s and

¹⁶⁷ Arts.15(1)(c), 16(1).

¹⁶⁸ M. Polak “*Laborum dulce lenimen*”? Jurisdiction and Choice of Law Aspects of Employment Contracts’ in J. Meeusen, M. Pertegás and G. Straetmans (eds), *Enforcement of International Contracts in the European Union – Convergence and Divergence between Brussels I and Rome I* (Antwerp, Oxford, New York, 2004) 323, [12-8], [12-53].

employer's side in order for the change of this place to occur. Second, both the Brussels and 1988 Lugano Conventions enabled employers to commence proceedings in the courts for the habitual place of work. There is no empirical evidence that this rule had the effect of putting defendant employees in an unfavourable position.¹⁶⁹ Third, denying claimant employers access to the courts for the habitual place of work has led to practical problems in some Member States. In the Netherlands, for example, employers who wish to terminate an employment contract have the option to petition for judicial rescission instead of dismissal. In some cases, judicial rescission is mandatory.¹⁷⁰ Employers from such Member States therefore have considerable practical problems with terminating employment contracts with employees who work in such a Member State but live elsewhere (e.g. frontier workers). A way of ensuring that the mentioned concerns are accommodated and that defendant employees are given a jurisdictional preference could be to give employers a limited right to commence proceedings in the forum of the habitual place of work only during the employment relationship, not once it has come to an end. Such a rule, for example, was envisaged in Art.8(2)(ii) of the 2000 preliminary draft Hague Convention on jurisdiction and foreign judgments in civil and commercial matters¹⁷¹

In particular, the possibility of introducing new jurisdictional rules should be examined in the context of the forthcoming review of Brussels I. The European Commission has proposed to change this instrument radically by expanding the scope of

¹⁶⁹ Explanatory Memorandum (n40) does not mention any practical reason for denying claimant employers the right to commence proceedings in the courts for the habitual place of work.

¹⁷⁰ See the Netherlands' initiative to amend Brussels I by making the courts for the habitual place of work available to employers in proceedings for termination of employment contracts [2002] OJ C311/16, rejected by the European Parliament: Parliamentary documents P5_TA(2003)0353 and A5-0253/2003. See also Written Question E-0785/02 by B. Pronk and others to the Commission, 19 March 2002, and the Commission's Answer, 21 March 2002 [2002] OJ C309E/47; Written Question E-1517/02 by Mr Smet to the Commission, 29 May 2002, and the Commission's Answer, 10 July 2002 [2003] OJ C92E/62.

¹⁷¹ P.E. Nygh and F. Pocar, 'Report on the Preliminary Draft Convention on jurisdiction and foreign judgments in civil and commercial matters' (Preliminary Document No 11, 2000), available at <http://www.hcch.net/upload/wop/jdgmpd11.pdf> (last accessed 26/9/2012), 55-56.

its jurisdictional rules to persons not domiciled in the EU.¹⁷² But a simple extension of the existing rules to claims against third states' domiciliaries would not be adequate from the standpoint of employee protection. Admittedly, the position of employees who habitually work for foreign companies within the EU would be improved. These employees would be guaranteed the right to initiate proceedings in at least one Member State.¹⁷³ However, the position of claimant employees who habitually work for foreign companies outside the EU would be considerably worsened, since those employees would lose the right to invoke the traditional, often excessive, jurisdictional rules. Consequently, they could not normally commence proceedings in the EU since the relevant connecting factors (employer's domicile and habitual place of work) would be located outside the EU. Furthermore, the simple extension of the existing rules could put EU employers in an unfavourable position whenever their employees move out of the EU after the termination of employment. In this situation, such employers might not be able to bring proceedings anywhere in the EU. These considerations therefore support the introduction of the two additional jurisdictional rules (the 'seeking out' rule for claimant employees and the rule of the habitual place of work for claimant employers) proposed above.

Conclusions

The objective of protecting employees by jurisdictional rules cannot be achieved unless employees are accorded a balanced jurisdictional preference when they act both as claimants and as defendants. Indisputably, Brussels I protects defendant employees since it denies employers the use of most of the generally available jurisdictional bases. However, not only does Brussels I fail to accord a jurisdictional preference to claimant

¹⁷² (n18) 9.

¹⁷³ Not all Member States currently give jurisdiction to their courts on the basis of habitual place of work: (n72).

employees, it actually puts them in a less favourable position in comparison to other claimants. First, the rule of general jurisdiction in employment matters and the rule of the habitual place of work are somewhat less favourable for employees than the corresponding generally applicable rules of general jurisdiction and the rule concerning services contracts. Second, the rule of the engaging place of business is deprived of almost any practical importance. Third, the generally available jurisdictional bases that are neither contained in Section 5 of Chapter II nor referred to therein, particularly the rule of jurisdiction over co-defendants, are not available to claimant employees. Given the theoretical and practical importance of according a balanced jurisdictional preference to claimant employees, Brussels I overall fails to achieve the objective of employee protection. The reason for this lies in the haphazard evolution of the relevant rules.

Bearing in mind the forthcoming review of Brussels I, the time is ripe for a systematic reassessment of the rules of jurisdiction in employment matters. The existing rules need to be improved. However, merely amending them will not suffice. Additional jurisdictional rules could be introduced: one in favour of claimant employees (the ‘seeking out’ rule), the other in favour of claimant employers (the rule of the habitual place of work). These changes would contribute to more evenly balanced protection of employees by jurisdictional rules and enable European PIL to adequately perform its regulatory function, one of allocating and protecting adjudicatory authority of states in the field of labour law.

V CONTRACTUAL CLAIMS

‘Employment is a complex and *sui generis* relationship, contractual in origin but, once created, having elements of status and capable of having consecutive or simultaneous points of contact with different jurisdictions.’

LORD HOFFMANN¹

Finding a competent court is a halfway stop to resolving an international employment dispute. Another problem is the applicable law. As mentioned, employment claims in English law fall into three basic categories: contractual, statutory and tortious claims. A contractual claim is based on a breach of either an express or implied term of an employment contract (e.g. claims for unpaid wages, for breach of a restrictive covenant or of implied duty of mutual trust and confidence). The law applicable to contractual claims, which for example determines whether an express term is valid or whether a particular term is to be implied into the contract, has always been determined pursuant to choice-of-law rules for contract. Such rules are today contained in Rome I.

In a nutshell, Rome I allows the parties to an employment contract to choose the applicable law.² But the choice cannot deprive the employee of the protection afforded to him by mandatory provisions of the objectively applicable law.³ In the absence of

¹ *Lawson v Serco* [2006] UKHL 3, [6].

² Art.8(1).

³ *ibid.*

choice, the contract is governed by the law of the country of the habitual place of work⁴ or, if none, by the law of the country of the engaging place of business.⁵ However, where it appears from the circumstances as a whole that the contract is more closely connected with another country, that country's law applies.⁶ There are also special choice-of-law rules for formal validity of contracts,⁷ whereas the law applicable to legal capacity is determined pursuant to national choice-of-law rules.⁸ Furthermore, the courts are allowed to apply overriding mandatory provisions of the forum and, under certain conditions, even overriding mandatory provisions of the country of performance.⁹

Section 3 of Chapter II examined the theory underlying the European choice-of-law rules for employment contracts. At first sight, those rules seem to accord with the relevant considerations. In particular, the parties are free to agree on any law, but only to the extent that the agreement improves upon the mandatory minimum standard of protection set by the objectively applicable law. The rules for determining the objectively applicable law seem flexible enough to point to the law of a country that is both sufficiently closely connected with a particular employment contract and legitimately interested in regulating it, and whose application the parties can reasonably foresee. Rome I is of universal application in the sense that the country of the applicable law need not be a Member State.¹⁰ This shows that Rome I is concerned not just with the Member States' regulatory authority in the field of labour law. But since the majority of international employment disputes brought in Member State courts involve intra-EU employment relations, Rome I is performing its regulatory function first and foremost in the EU context. Given that the rules of Rome I accord with the

⁴ Art.8(2).

⁵ Art.8(3).

⁶ Art.8(4).

⁷ Art.11.

⁸ Art.1(2)(a); see also Art.13.

⁹ Art.9.

¹⁰ Art.2.

relevant considerations, this instrument seems, at first sight, to be adequately performing its regulatory function. To determine whether practice conforms to theory, this chapter examines in detail the operation of the rules of Rome I.

The first section presents the evolution of the European choice-of-law rules for employment contracts. The following two sections examine party autonomy and its limitations, and the rules for determining the objectively applicable law, respectively. After identifying the shortcomings of those rules, possibilities for improvement are discussed.

1. Evolution of choice-of-law rules

The evolution began in 1972 with the publication of the draft Convention on the law applicable to contractual and non-contractual obligations. Art.2(3) provided that, in labour relations, the choice of law could not affect mandatory provisions for the protection of the worker in force in the country where he habitually worked. Art.5 prescribed that, in the absence of choice, labour contracts were governed by the law of the country of the habitual place of work. If none, the law of the country of the place of business that hired the worker applied, unless it resulted from all the circumstances that the contract was more closely connected with another country. The 1972 draft Convention was revised following the 1973 enlargement of the EEC. The choice-of-law rules for employment contracts remained essentially unchanged and were consolidated in Art.6 of the 1980 Rome Convention.

Simultaneously with the drafting of what eventually became the Rome Convention, the European Commission was working on an instrument dealing exclusively with PIL of employment. This work resulted in the 1972 and 1976 drafts of the Regulation on the provisions of conflict of laws on employment relationships within

the Community. The primary legal basis for this instrument was Art.49 TEC concerning the freedom of movement of workers. The territorial scope of the 1976 draft Regulation was limited to employment relationships executed in the EEC.¹¹ The applicable law was the law of the country of the normal place of work.¹² For seamen, it was the law of the flag,¹³ for international transport workers, it was the law of the country where the employing undertaking had its registered office or a branch or permanent representation by which they were employed.¹⁴ There was neither a rule for determining the applicable law in the absence of a normal place of work nor an escape clause. Party autonomy was allowed only in the most limited circumstances. Employees 'with special position in the establishment' or 'with special nature of their work' were free to agree on the applicable law.¹⁵ Party autonomy, limited to several listed laws, was also allowed in certain cases of intra-group transfers of employees¹⁶ and in certain cases where a normal place of work did not exist.¹⁷ But the choice could not undermine the law of the place of work in respect of 9 topics set out in Art.8. Fortunately, the draft Regulation was withdrawn following the adoption of the Rome Convention. Some aspects of the former instrument, such as the differentiation between white-collar and blue-collar workers and the restrictions of party autonomy, were criticised in section 2 of Chapter II. Moreover, the adoption of both the draft Regulation and the Rome Convention covering the same subject matter would have created not only an unnecessary complication for the users of these instruments but also certain anomalies.¹⁸

¹¹ Art.1.

¹² Art.3(1); see also Art.4 concerning temporary sendings.

¹³ Art.3(1).

¹⁴ *ibid.*

¹⁵ Art.7.

¹⁶ Art.5.

¹⁷ Art.6.

¹⁸ B.A. Hepple, 'Conflict of Laws on Employment Relationships within the EEC' in K. Lipstein (ed), *Harmonisation of Private International Law by the EEC* (London, 1978) 39, 40-41.

Rome I, which largely follows the rules of the Rome Convention concerning employment, was adopted in 2009, to whose provisions this chapter now turns.

2. Party autonomy and its limitations

This section presents the ways in which party autonomy can be exercised before examining its limitations.

2.1. Choosing the applicable law

The first sentence of Art.8(1) stipulates that an employment contract is governed by the law chosen by the parties in accordance with Art.3.¹⁹ Art.3, entitled ‘Freedom of choice’, has 5 paragraphs. The following text analyses three paragraphs thereof: para.1 prescribing that the choice can be either express or tacit, and that the parties may subject different parts of their contract to different laws, and paras.3 and 4 prescribing that the choice cannot prejudice the application of mandatory provisions of the law of the country with which the contract is exclusively objectively connected/of EU law where the contract has no foreign/non-EU elements.²⁰

2.1.1. Express choice

An express choice is usually made at the time of contracting by means of a choice-of-law clause inserted in the contract. It can also be made subsequently by means of a choice-of-law agreement. An express choice seldom causes problems, exceptions being a meaningless choice, a negative choice and a choice of non-state rules of law.

¹⁹ Rome Convention, Art.6(1) is essentially the same.

²⁰ Art.3(2) provides that the parties may exercise party autonomy at any time, that they may vary the applicable law and that the choice made after the conclusion of the contract cannot prejudice its formal validity or adversely affect the rights of third parties. Art.3(5) determines the law governing the existence and validity of the parties’ consent.

In *Shekar v Satyam Computer Services Ltd*²¹ the contract provided:

‘Governing law: The work permit in UK/or any other European country shall be governed by, construed and enforced in accordance with the laws of the country you are placed at and at Secunderabad, India.’

The Employment Tribunal found this clause too unclear to be given a plain meaning. It was unclear whether it referred to the governing law or to work permits. The way it referred cumulatively to multiple laws was meaningless. The applicable law was determined as if the choice had never been attempted.

A negative choice is an express exclusion of a specific law. In *Sayers*,²² for instance, the contract provided:

‘As the company is a Netherlands corporation, and as my employment contract...will be wholly performable...outside of United Kingdom...I realise that I shall not be covered by virtue of my proposed employment with the company by workmen’s compensation insurance or benefits under the law of United Kingdom.’

The Court of Appeal (SALMON LJ dissenting) held that this clause excluded English law in respect of the issue before the court. A problem arises where the parties attempt to exclude the objectively applicable law. If the parties do not simultaneously agree on another law, such a negative choice, if upheld, would place the employment contract outside the reach of any law. But since employment contracts cannot exist in a legal vacuum, such a negative choice should be disregarded as meaningless. Even if the parties do simultaneously agree on another law, a negative choice purporting to exclude

²¹ [2005] ICR 737 (ET).

²² [1971] 1 WLR 1176 (CA).

the objectively applicable law should be disregarded, since upholding it would undermine the mechanism of Art.8(1).

Another problem arises where the parties choose non-state rules of law by, for example, incorporating by reference certain codes of conduct. Such rules of law are often used by multinational companies to establish minimum labour standards that all their businesses worldwide must conform to. Since employment contracts must have a governing national law, non-state rules of law may be given effect only in the context of that law.²³

2.1.2. Tacit choice

According to Art.3(1), a tacit choice must be clearly demonstrated by the terms of the contract or the circumstances of the case.

The courts have drawn inferences from the terms of the employment contract in the following situations: the contract referred to a specific collective agreement;²⁴ the contract referred to a specific employment statute;²⁵ the contract contained an exclusive choice-of-court clause in favour of the courts of a specific country.²⁶ However, one should bear in mind that Brussels I gives full effect to a jurisdiction agreement in an employment dispute only if entered into after the dispute has arisen. A jurisdiction agreement entered into before this moment is therefore unlikely to demonstrate a tacit

²³ See Recital 13.

²⁴ *Cour de cassation, Mme Arsac v United Airlines*, 27 May 2009 [2010] *Droit social* 343, note P. Chaumette; *Bundesarbeitsgericht*, 13 November 2007 (2008) 54 RIW 644 (reference to a US collective agreement between the employer and the Association of Flight Attendants).

²⁵ *Cour de cassation*, 17 October 2000, No. 98-45864, unreported (reference to the provisions of the Portuguese posted workers statute); *Bundesarbeitsgericht*, 9 October 1991 [1991] IPRspr No 68 (reference to the German statute concerning dismissal).

²⁶ *Shekar v Satyam Computer Services Ltd* (n21) [42] (choice-of-court clause in favour of the courts of Secunderabad, India); *Bundesarbeitsgericht*, 26 June 2008 [2008] IPRspr No 40 (German choice-of-court clause). See also Recital 12.

choice.²⁷ Another relevant factor may be a reference to the tax or social security legislation of a specific country.

The courts have also drawn inferences from the circumstances of the case. For example, the existence of a closely connected contract governed by a specific law has been held to demonstrate a tacit choice.²⁸ French courts have often held that French employers and employees who enter into contracts in France tacitly choose French law.²⁹ The courts also often refer to the place of work, the language of the contract, and the place and currency of payment of salary as supplementary indications of a tacit choice.

A tacit choice is a real choice. The courts should not search for the law that the parties would have chosen had they thought about it at the time of contracting.³⁰ The courts should acknowledge a tacit choice only where its existence is apparent.

2.1.3. Severance (*dépeçage*)

Art.3(1) allows the parties to subject different parts of their contract to different laws. Such a choice must be logically consistent, i.e. relate to elements in the contract that can be governed by different laws without giving rise to contradictions.³¹ Some authors argue that *dépeçage* of employment contracts should not be allowed because it enables employers to abuse their typically superior position and impose the application of

²⁷ See F. Jault-Seseke, 'L'adoption du règlement 593/2008 (Rome I) sur la loi applicable aux obligations contractuelles: le choix de la continuité pour le contrat de travail' [2008] *Revue de droit du travail* 620, 622-623 (choice of law and choice of court should be kept separate).

²⁸ *Bundesarbeitsgericht*, 13 November 2007 (n24) (in addition to the reference to a US collective agreement, an important consideration was the fact that the parties had signed a 'Pre-Hire Agreement' expressly subject to US law).

²⁹ *Cour de cassation*, 4 July 2001, No. 99-44519, unreported; *Cour de cassation*, SA CIEC v Piriou, 28 October 1997 [1998] *Droit social* 186, note M.-A. Moreau.

³⁰ Giuliano/Lagarde Report [1980] OJ C282/1, 17.

³¹ *ibid.*

different laws in a way most favourable for them.³² But the mechanism of Art.8(1) provides a solid defence against all abuses of party autonomy. Indeed, the courts allow *dépeçage* of employment contracts.³³

2.1.4. Contracts without foreign or non-EU elements

Art.3(3) prescribes that, where all other elements relevant to the situation at the time of the choice are located in a country other than the country of the chosen law, the choice cannot prejudice the application of mandatory provisions of the law of the former country. Similarly, Art.3(4) upholds mandatory EU law where the contract, apart from the choice of law, has no non-EU elements. However, Art.3(3) and 3(4) are of little importance for employment contracts. Art.8(1) safeguards the application of mandatory provisions of the objectively applicable law. If a contract has no foreign/non-EU elements, the objectively applicable law is the law of the country with which the contract is exclusively objectively connected/the law of a Member State that must give effect to mandatory EU law. The effect of Art.8(1) is therefore largely the same as that of Art.3(3) and 3(4). But, as argued in section 2.2.1. below, Art.8(1) only safeguards the application of mandatory provisions concerning employee protection. Since Art.3(3) and 3(4) safeguard the application of all mandatory provisions, regardless of their objective, there is not a complete overlap between the two Articles.

In conclusion, employment contracts are identical to other contracts regarding the ways in which party autonomy can be exercised. The following part of this section

³² M. Franzen, ‘Conflicts of Laws in Employment Contracts and Industrial Relations’ in R. Blanpain (ed), *Comparative Labour Law and Industrial Relations in Industrialized Market Economies* (The Hague, 9th ed, 2007) 215, 221; F. Gamillscheg, ‘Rules of Public Order in Private International Labour Law’ (1983) 181 *Recueil des Cours* 285, 309-310.

³³ *LAG Frankfurt*, 13 September 2000 [2000] IPRspr No 42 (the contract, otherwise governed by English law, envisaged the application of German law regarding certain issues concerning the employee’s posting to Germany).

examines the limitations of party autonomy, which are the hallmark of the special treatment of employment contracts in European PIL.

2.2. Limitations of party autonomy

The second sentence of Art.8(1) prescribes that the choice of law cannot deprive the employee of the protection afforded to him by mandatory provisions of the objectively applicable law.³⁴ This rule has given rise to many interpretational difficulties. What are the relevant mandatory provisions? What are the sources of such provisions? When do such provisions apply? How should the laws in question be compared? What is the role of the courts?

2.2.1. Relevant mandatory provisions

Art.8(1) safeguards the application of ‘provisions that cannot be derogated from by agreement’ under the objectively applicable law. According to Recital 37, ‘provisions which cannot be derogated from by agreement’ are distinguishable from the narrower category of ‘overriding mandatory provisions’. Art.8(1) therefore refers to the provisions of the objectively applicable law that the parties cannot exclude by agreement in purely domestic situations. Those provisions need not be overridingly mandatory in the sense of Art.9.

Does Art.8(1) refer to all mandatory provisions or only those concerning employee protection?³⁵ As discussed in section 1.4 of Chapter II, states are willing to

³⁴ Rome Convention, Art.6(1) is essentially the same.

³⁵ In favour of the former interpretation: F. Jault, ‘*Mme Briant v Institut culturel autrichien*’ (2003) 92 *Revue critique DIP* 450, 454. In favour of the latter: L. Collins (gen ed), *Dicey, Morris and Collins on the Conflict of Laws* (London, 14th ed, 2006), [33-069]; P. Kaye, *The New Private International Law of Contracts of the European Community* (Aldershot, 1993) 227; C.G.J. Morse, ‘Consumer Contracts, Employment Contracts and the Rome Convention’ (1992) 41 *ICLQ* 1, 14; Max Planck Institute, ‘Comments on the European Commission’s Green Paper on the Conversion of the Rome Convention of 1980 on the Law Applicable to Contractual Obligations into a Community Instrument and its

uphold foreign employment laws in appropriate circumstances because of the common social objective. Indeed, this is a rationale for the universal application of Art.8 of Rome I. But the objectives of mandatory provisions in other areas of law may be of purely political or economic nature. States are unwilling to routinely uphold such foreign mandatory provisions, although they may be willing to do so exceptionally. Rome I recognises this in Art.9(3), and allows the courts to give effect, under certain conditions, to overriding mandatory provisions of the country of performance. Consequently, a wide interpretation of Art.8(1), which would result in safeguarding the application of all mandatory provisions of the objectively applicable law, would run counter to the scheme and objectives of Rome I.

Verbal and historic interpretations of Art.8(1) further support this view. This Article states that the choice of law cannot deprive '*the employee* of the protection afforded to *him*' by mandatory provisions of the objectively applicable law.³⁶ This wording suggests that only provisions concerning employee protection are relevant. Furthermore, Art.2(3) of the 1972 draft Convention referred explicitly to 'mandatory provisions for the protection of the worker'. There is no indication in the Giuliano/Lagarde Report that the drafters of the Rome Convention intended to change this. In fact, when describing the content of the relevant mandatory provisions, the Report refers to provisions concerning employment in the broadest sense: '[the relevant mandatory provisions] consist not only of provisions relating to the contract of employment itself but also provisions such as those concerning industrial safety and hygiene...'³⁷

³⁵ Modernization', available at <http://www.mppipriv.de/shared/data/pdf/commentsgreenpaper.pdf> (last accessed 26/9/2012) 62.

³⁶ Similarly, Recital 35.

³⁷ (n30) 25.

Indeed, the High Court held in *Duarte v Black & Decker Corp*³⁸ that ‘the mandatory rules referred to in Article 6(1) [of the Rome Convention] are specific provisions...whose overriding purpose is to protect employees.’³⁹ English rules on restrictive covenants in employment contracts were held not to be such provisions, but rather part of the general contract law. The court further held that if the covenants had been valid and enforceable under the foreign governing law, but invalid and unenforceable under English law, they would have been denied effect in England as being against public policy. This decision can be criticised on the ground that the limitations of restrictive covenants in employment contracts serve a dual purpose, protection of competition in the labour market and protection of employees. If so, there is no reason not to regard English rules on restrictive covenants in employment contracts as the relevant mandatory provisions in the sense of Art.8(1).⁴⁰ By way of comparison, German rules concerning non-compete clauses in employment contracts are regarded as such provisions.⁴¹ *Duarte v Black & Decker Corp* has also been criticised on the ground that English rules on restrictive covenants do not rise to the standard of public policy for the purposes of PIL.⁴²

2.2.2. Sources of mandatory provisions

In most countries, employment statutes are the most important source of the relevant mandatory provisions. But some authors have voiced a concern that certain mandatory provisions contained in employment statutes forming part of English law, e.g. in the Health and Safety at Work Act 1974, are essentially rules of criminal law and therefore

³⁸ [2007] EWHC 2720 (QB).

³⁹ *ibid* [55].

⁴⁰ Similarly, L. Merrett, *Employment Contracts in Private International Law* (Oxford, 2011) [9.45], [9.47].

⁴¹ *LAG Frankfurt*, 14 August 2000 [2000] IPRspr No 40.

⁴² Merrett (n40) [9.50]-[9.52].

outside the scope of the European choice-of-law instruments for contracts.⁴³ They further state that, in so far as such provisions may create civil liability, the remedy lies in tort and also for this reason outside the scope of those instruments.⁴⁴ Indeed, HSWA 1974 and certain other employment statutes do prescribe that breach of some of their provisions is an offence, and give inspectors or similar bodies the task of monitoring and enforcing the relevant provisions. Furthermore, a breach of statutory duty by the employer normally entitles the employee to a remedy in tort in English employment law.⁴⁵

Nevertheless, employment statutes should be regarded as a source of the relevant mandatory provisions. The issue of whether statutory duties imposed by employment legislation fall within the scope of Rome I is crucial for the analysis undertaken in the following chapter, and is examined there in detail. Suffice it to say here that mandatory provisions of English employment statutes do fall within the scope of, and should consequently be upheld under, Art.8(1). Two further arguments speak in favour thereof. First, since in mainland European countries Art.8(1) undoubtedly safeguards the application of protective statutory provisions,⁴⁶ the goals of legal certainty, predictability and uniform interpretation and application of Rome I require that functionally identical English statutory provisions are treated identically. Second, if Art.8(1) did not uphold mandatory provisions of English employment statutes, the mechanism of Art.8(1) would be inoperable whenever English law is objectively applicable, since other sources of English employment law do not contain mandatory provisions. English courts have no doubts that English employment statutes are a

⁴³ P.R. Beaumont and P.E. McElevy, *Anton's Private International Law* (Edinburgh, 3rd ed, 2011) [10.351].

⁴⁴ Beaumont and McElevy *ibid*; Kaye (n35) 227-228.

⁴⁵ M. Lunney and K. Oliphant, *Tort Law: Text and Materials* (Oxford, 4th ed, 2010) Ch 15.

⁴⁶ In Case C-29/10 *Koelzsch* [2011] ECR 00000, for example, the CJEU had no doubt that mandatory provisions of the German statute concerning dismissal were to be upheld under Art.6(1) of the Rome Convention had German law been found to be objectively applicable; see also Giuliano/Lagarde Report (n30) 25.

source of the relevant mandatory provisions. For example, in *Duarte v Black & Decker Corp*,⁴⁷ FIELD J referred to the Employment Rights Act 1996 and the Factories Acts 1961 as statutes containing the relevant mandatory provisions.

In many countries, collective agreements also contain mandatory provisions.⁴⁸ In many Member States, an employer who is a party, either directly or indirectly, to a collective agreement cannot impose less favourable terms and conditions upon his employees than those contained in the collective agreement. Usually, all employees of an employer who is a party to a collective agreement are covered. Sometimes, only members of the trade union that is a party to a collective agreement are covered. Moreover, in many countries the state may extend the application of a collective agreement to additional employers and their employees, thus giving the collective agreement a status akin to legislation. But in England collective agreements are presumed not to be legally enforceable contracts themselves.⁴⁹ But they may be incorporated into individual employment contracts if suitable or apt for incorporation, either by an express agreement or by inference from the conduct of the parties; collective agreements cannot be extended.

Other sources of employment law are unlikely to contain mandatory provisions. For example, the French *Cour de cassation* has held that customs do not represent mandatory provisions in the sense of Art.6(1) of the Rome Convention.⁵⁰ Although an *a priori* exclusion of customs as a potential source of mandatory rules has been

⁴⁷ (n38) [55].

⁴⁸ On the normative aspect of collective agreements see M. Seweryński, 'Collective Agreements and Individual Contracts of Employment in Labour Law: General Report' in M. Seweryński (ed), *Collective Agreements and Individual Contracts of Employment* (The Hague, 2003) 1.

⁴⁹ TULR(C)A 1992, s.179; see H. Collins, K.D. Ewing and A. McColgan, *Labour Law: Text and Materials* (Oxford, 2nd ed, 2005) 102-111.

⁵⁰ *Mme Briant v Institut culturel autrichien*, 12 November 2002 (2004) 131 *Clunet* 131, note S. Dion; Jault (n35); [2003] *Droit social* 339, note M-A. Moreau.

criticised,⁵¹ this decision indicates that customs are unlikely to be of any importance under Art.8(1) Rome I.

2.2.3. Situations where mandatory provisions apply

Art.8(1) prescribes that the choice of law ‘cannot have the result of depriving’ the employee of the protection afforded to him by mandatory provisions of the objectively applicable law. Mandatory provisions of the objectively applicable law should apply if they are *more favourable* for the employee than provisions of the chosen law. Conversely, if mandatory provisions of the objectively applicable law are *less favourable*, they should give way to provisions of the chosen law. For example, if the notice period is in issue, whichever law prescribes a longer period should apply.⁵²

It is normally not so easy to determine which law is more favourable for the employee. In the area of dismissal, for example, the two laws may not be in direct conflict, but may provide different rights and remedies in the same situation. MORSE gives an example of two laws entitling the employee to different remedies for wrongful dismissal: one to compensation, the other to reinstatement.⁵³ Art.8(1) says nothing about the employee being unable to cumulate benefits under both laws. Since the cumulation of benefits (i.e. both compensation and reinstatement) would be most favourable for the employee, should Art.8(1) not entitle him to ‘double protection’? The answer must be negative. If the employee were entitled to benefits under both laws, he would receive better protection than either law envisages. Such an approach would expose the employer to excessive legal uncertainty and compliance costs. There is no reason why the employee, just because he is engaged in international employment,

⁵¹ Dion *ibid* 141-142; Jault *ibid* 454-456; Moreau *ibid* 342.

⁵² Giuliano/Lagarde Report (n30) 25; Case C-384/10 *Voogsgeerd* [2011] ECR 00000, Opinion of AG Trstenjak, [50].

⁵³ (n35) 15-16.

should enjoy double protection. The employee should receive protection under the law that is more favourable for him.⁵⁴ The problem of comparing the chosen law and the objectively applicable law is therefore central to Art.8(1).

2.2.4. Comparing the chosen law and the objectively applicable law

The key question is the level of abstraction at which this comparison should be performed. Should the two laws be compared in general, issue by issue or at some other level of abstraction?

A general comparison is inappropriate.⁵⁵ It is arbitrary, even absurd, to say, for instance, that English law is more or less favourable for employees than French law. There are surely aspects in which English law is more favourable and vice versa. Furthermore, the courts should refrain, out of respect for other countries, from making such evaluations. A general comparison of the Member States' employment laws seems inconceivable for the CJEU.

An issue-by-issue, analytical comparison also seems inappropriate.⁵⁶ If the employee were entitled to the most favourable provisions of either the chosen law or the objectively applicable law regarding each and every issue, he might receive better protection than either law envisages. Such an approach would expose the employer to excessive legal uncertainty and compliance costs. There is no reason why the

⁵⁴ *Dicey, Morris and Collins* (n35) [33-071]; *Kaye* (n35) 228-229; *Morse* *ibid* 16; R. Plender and M. Wilderspin, *The European Private International Law of Obligations* (London, 3rd ed, 2009) [11-033]-[11-034]; M. Polak, “*Laborum dulce lenimen*”? Jurisdiction and Choice of Law Aspects of Employment Contracts’ in J. Meeusen, M. Pertegás and G. Straetmans (eds), *Enforcement of International Contracts in the European Union: Convergence and Divergence between Brussels I and Rome I* (Antwerp, Oxford, New York, 2004) 323, [12-31]; *Voogsgeerd* (n52), Opinion of AG Trstenjak, [49], fn19; cf A. Philip, ‘Mandatory Rules, Public Law (Political Rules) and Choice of Law in the E.E.C. Convention on the Law Applicable to Contractual Obligations’ in P.M. North (ed), *Contract Conflicts: the E.E.C. Convention on the Law Applicable to Contractual Obligations: A Comparative Study* (Amsterdam, New York, Oxford, 1982) 81, 99-100.

⁵⁵ *Franzen* (n32) 228; *Gamillscheg* (n32) 319-320; *Jault* (n35) 458; S. Krebber, ‘Conflict of Laws in Employment in Europe’ (2000) 21 CLLP 501, 528; *Voogsgeerd* (n52), Opinion of AG Trstenjak, [49].

⁵⁶ *Jault* *ibid* 458-459; *Krebber* *ibid*; *Polak* (n54) [12-31].

employee, just because he is engaged in international employment, should be so favoured. Moreover, both the chosen law and the objectively applicable law contain well-balanced and coherent provisions regarding matters such as dismissal, anti-discrimination etc. Allowing the employee to combine provisions of the two laws concerning such matters would destroy this balance and coherence. It could also lead to logical inconsistencies.

The undesirability of the analytical approach is illustrated by the French *Cour de cassation* decision in *Mme Briant v Institut culturel autrichien*.⁵⁷ Ms Briant was employed, under a contract expressly subject to Austrian law, to work in France. She was dismissed and received compensation under Austrian law. Nevertheless, she commenced proceedings in France claiming 1) compensation for breach of the provisions of French law obliging the employer to summon the employee to a pre-dismissal interview and to offer a ‘conversion agreement’ (*la convention de conversion*) in case of dismissal for economic reasons and 2) compensation for unlawful dismissal. The outcome depended on whether the provisions of the objectively applicable French law applied, which, in turn, depended on whether they were more favourable for the employee than the provisions of Austrian law. The court held that the comparison should be made between the provisions of the two laws having the same object or relating to the same cause.

First, the court held that the provisions of French law concerning pre-dismissal interview and ‘conversion agreement’ were more favourable for the employee because Austrian law contained no equivalent provisions. Consequently, the employee was entitled to compensation for breach of those provisions. Second, the court quashed the judgment of the lower instance court that did not apply the French provisions regarding compensation for dismissal without genuine and serious cause. In the opinion of the

⁵⁷ (n50).

court, Austrian law was also less favourable for the employee in this respect because it did not contain equivalent provisions. The provisions of Austrian law regarding compensation in lieu of notice and compensation for dismissal were incomparable because they dealt with different issues. Ms Briant therefore had a valid claim under both French and Austrian laws. Such an outcome was clearly excessively unforeseeable and costly for the employer.

The correct approach must lie somewhere between the two extremes. The comparison should be made between provisions relating to severable issues.⁵⁸ In *Mme Briant v Institut culturel autrichien* such an issue would have been protection against dismissal. The court should have compared in their entirety the Austrian and French provisions concerning dismissal that were applicable on the facts of the case (i.e. the comparison should not be performed in the abstract). Apparently, Austrian law entitled the employee to a notice of dismissal of 5 months and compensation in the amount of 9 monthly salaries; French law entitled the employee to a pre-dismissal interview, a ‘conversion agreement’ and compensation in the amount of at least 6 monthly salaries. The court should have examined whether the employee would have been better off had the employer complied with the French provisions instead with the Austrian ones.⁵⁹ The employee’s opinion as to which law was more favourable should have been regarded as an important consideration. Had the court found that the employee would not have been better off had the French provisions been complied with, it should have decided in the employer’s favour. Conversely, it should have granted the employee the

⁵⁸ See section 2.1.4. above. Similarly, Jault (n35) 458, fn26; Kaye (n35) 229; Plender and Wilderspin (n54) [11-033]-[11-034]; Polak (n54) [12-31]; W. van Eeckhoutte, ‘The Rome Convention on the Law Applicable to Contractual Obligations and Labour Law (1980)’ (2006) 58 BCLL 167, 173; Voogsgeerd (n52), Opinion of AG Trstenjak, [49], fn20 (comparable subject areas include the right to leave; protection against dismissal; protection of acquired rights).

⁵⁹ In *Cour d’appel de Luxembourg*, 3 December 1992 [1993] *Pasicrisie Luxembourgeoise* 30, the court compared the provisions of French and Luxembourg laws concerning dismissal. It found that the French provisions prescribed a shorter period of notice, whereas the Luxembourg provisions, unlike the French ones, did not afford compensation for dismissal. The court applied the French provisions for being overall more favourable for the employee.

remedies for breach of the relevant French provisions. The benefits that the employee had in fact received would then have to be set-off against the benefits obtainable under French law.

2.2.5. Role of the courts

Art.8(1) says nothing about the role of the courts concerning the operation of the mechanism contained therein. Do the courts have an active or passive role? Given the regulatory function of Rome I, there is a good argument that the courts should be under a duty to determine of their own motion the content of the objectively applicable law, especially if it is a law of a Member State.⁶⁰ But the issue of the role of the courts is closely related to that of pleading and proof of foreign law. Being matters of procedure and evidence, these issues are currently outside the scope of Rome I.⁶¹ National approaches differ considerably.

In England, foreign law is treated as a question of fact. The courts apply foreign law only if a party successfully pleads and proves it.⁶² The Art.8(1) mechanism cannot operate unless either the chosen law or the objectively applicable law, or both, are foreign. The two laws can be compared only if a party successfully pleads and proves the foreign law(s). It is normally the employee who invokes mandatory provisions of the objectively applicable law; the employer normally relies on the chosen law. If the objectively applicable law is foreign, the employee normally has to show that provisions of that law are applicable for being more favourable for him than those of the chosen

⁶⁰ See H. Muir Watt, 'European Integration, Legal Diversity and the Conflict of Laws' (2004-2005) 9 *Edinburgh Law Review* 6, 20-21.

⁶¹ Art.1(3). See *Dicey, Morris and Collins* (n35) [9-011]; J.J. Fawcett and J.M. Carruthers, *Cheshire, North & Fawcett: Private International Law* (Oxford, 14th ed, 2008) 694; F.J. Garcimartin Alférez, 'The Rome I Regulation: Much ado about Nothing?' (2008) 8(2) *The European Legal Forum* I-61, [71]; T. Hartley, 'Pleading and Proof of Foreign Law: The Major European Systems Compared' (1996) 45 *ICLQ* 271, 290-291; cf R. Fentiman, *Foreign Law in English Courts: Pleading, Proof and Choice of Law* (Oxford, 1998) 80-97.

⁶² Hartley *ibid* 282-285.

law.⁶³ If the objectively applicable law is domestic, then the employer has to show that provisions of the chosen foreign law are applicable.⁶⁴ The employee who disagrees has to respond to the employer's pleading and proof of the chosen foreign law and its comparison with the domestic objectively applicable law. Consequently, the operation of the Art.8(1) mechanism in both hypotheses largely depends on the employee's awareness of it and his ability to plead and prove foreign law. This, in turn, may depend on his ability to obtain costly legal advice of comparative employment law specialists or of employment lawyers from different jurisdictions.

In France, the courts are not obliged to apply the relevant choice-of-law rules and establish the content of the foreign applicable law of their own motion where the parties have the free disposition of their rights.⁶⁵ Since employment law is an area of law where the parties' rights are considered to be waivable, at least after the dispute has arisen, it is upon the parties to plead and prove foreign law.⁶⁶ In Germany, the courts must apply the relevant choice-of-law rule and establish the content of the foreign applicable law of their own motion.⁶⁷

The Art.8(1) mechanism is, at least in theory, more effective in Member States such as Germany where the courts have an active role than in Member States such as England whose courts are passive. Since no EU-wide unification of the rules on pleading and proof of foreign law is currently in sight, notwithstanding strong arguments in favour of such unification, the effectiveness of the mechanism will continue to depend upon the differences in national laws. But there is one, arguably uncontroversial, measure that could be implemented. The court could be obliged,

⁶³ *Dicey, Morris and Collins* (n35) [9-025] (the burden of proof lies on the party who bases his claim or defence on foreign law); similarly Fawcett and Carruthers (n61) 111-112; cf Fentiman (n61) 94-96 (the burden is always on the employer).

⁶⁴ *ibid.*

⁶⁵ F. Jault-Seseke, 'L'office du juge dans l'application de la règle de conflit de lois en matière de contrat de travail' (2005) 94 *Revue critique DIP* 253.

⁶⁶ Jault-Seseke *ibid* also mentions cases in which French courts have taken a more active role.

⁶⁷ Hartley (n61) 275-277.

whenever Art.8(1) applies, to ensure that the employee is aware of the existence and the operation of the mechanism, i.e. of the consequences of his failing to plead and prove foreign law. Such an obligation would mirror that proposed in Art.24(2) of the proposal for the recast Brussels I concerning submission to jurisdiction of weaker parties.⁶⁸ But such a provision would not resolve the problem of costs that employees incur in operating the Art.8(1) mechanism. Trade unions could help in this respect.

2.3. Conclusion

The parties to an employment contract are indeed free to agree on any law to the extent that the agreement improves upon the mandatory minimum standard of protection set by the objectively applicable law.

The Art.8(1) mechanism operates only if the parties choose a different law from the objectively applicable law. Given that such choice-of-law agreements work solely in employees' favour, one might wonder whether and why employers agree to them. Employers do agree to such choice-of-law agreements for various reasons.⁶⁹ First, some employers are unaware of the existence and operation of the Art.8(1) mechanism and, therefore, of the consequences of choosing a law other than the objectively applicable law. Second, international employment contracts frequently commence as domestic contracts. Domestic contracts often contain choice-of-law clauses in favour of domestic law, whose purpose is merely declaratory. Such contracts may be left unamended after the change of the objectively applicable law. Third, in cases of permanent sending abroad the parties may choose the law of the country of origin. Fourth, employers may agree to choice of law to please their employees who may

⁶⁸ European Commission, 'Proposal for a Regulation on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast)' COM(2010) 748 final.

⁶⁹ P. Mankowski, 'Employment Contracts under Article 8 of the Rome I Regulation' in F. Ferrari and S. Leible (eds), *Rome I Regulation: The Law Applicable to Contractual Obligations in Europe* (Munich, 2009) 171, 212-215.

expect such agreements or to give them an additional incentive. Finally, employers may insert, in their employment contracts, choice-of-law clauses in favour of their own laws for psychological reasons. When a dispute arises, the first thing an employee does is read the contract. The employer may hope that, after the employee has seen a choice-of-law clause in favour of the employer's law, he will be discouraged from pursuing his claim altogether or at least on the basis of a non-chosen law.

3. Applicable law in the absence of choice

The rules of Rome I and Brussels I concerning employment use the same objective connecting factors, namely the habitual place of work and the engaging place of business. Should these connecting factors be interpreted identically under the two instruments? The following reasons speak in favour thereof: legal certainty; ease of application resulting from the established case-law; achieving coincidence of the *forum* and *ius*. Indeed, the CJEU did so in *Koelzsch*⁷⁰ and *Voogsggerd*.⁷¹ However, choice-of-law rules and jurisdictional rules have different ways of achieving their respective objectives. Whereas the former seek to achieve the objective of employee protection by upholding mandatory provisions of the law of the country that is sufficiently closely connected with the employment contract in question, legitimately interested in regulating it, and whose application the parties can reasonably foresee, the latter seek to accord employees a balanced jurisdictional preference. Consequently, there may be situations where the connecting factors may have to be given different interpretation under the two instruments.⁷² For example, if the changes proposed in the previous chapter were adopted, employees who do not habitually perform their work in any

⁷⁰ (n46).

⁷¹ (n52).

⁷² J. Hill and A. Chong, *International Commercial Disputes: Commercial Conflict of Laws in English Courts* (Oxford, 4th ed, 2010) [14.5.31]; Jault-Seseke (n27) 620; A. Zanobetti, 'Employment Contracts and the Rome Convention: The *Koelzsch* Ruling of the European Court of Justice' (2011) 3 *Cuadernos de Derecho Transnacional* 338, 355-357; *Koelzsch* (n46), Opinion of AG Trstenjak, [82]-[83].

country would be able to commence proceedings in the courts for each place of work that has a sufficiently close connection with the dispute. On the contrary, the rules of Rome I would always designate only one objectively applicable law. The following text firstly examines the connecting factors used in Art.8, then the escape clause.

3.1. Habitual place of work

Art.8(2) prescribes that the employment contract is objectively 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. It further stipulates that the country where the work is habitually carried out will not be deemed to have changed if the employee is temporarily employed in another country.⁷³

The main problem is the determination of the habitual place of work where the employee works in more than one country. The CJEU addressed this problem, in the context of the Brussels regime, in *Mulox*,⁷⁴ *Rutten*⁷⁵ and *Weber*.⁷⁶ The wording ‘country *in which or, failing that, from which* the employee habitually carries out his work’ in Art.8(2) incorporates this case-law into Rome I.⁷⁷

Whereas the examination of the connecting factors in the previous chapter focused on the CJEU case-law under the Brussels regime, the following text investigates how Art.8(2) applies to some of the factual patterns under which international employment relations arise. It explores the habitual place of work in cases of sending abroad, intra-group transfer and ‘international occupations’. Cases of

⁷³ The wording of the Rome Convention, Art.6(2)(a) is slightly different. It refers to ‘the country in which the employee habitually carries out his work in performance of the contract, even if he is temporarily employed in another country’.

⁷⁴ Case C-125/92 [1993] ECR I-4075.

⁷⁵ Case C-383/95 [1997] ECR I-57.

⁷⁶ Case C-37/00 [2002] ECR I-2013.

⁷⁷ European Commission, ‘Proposal for a Regulation of the European Parliament and the Council on the law applicable to contractual obligations (Rome I)’, COM(2005) 650 final, 7.

migrant workers, frontier workers and workers employed by foreign employers are not discussed, since such workers typically perform their work in one country and, consequently, the problem of determining the habitual place of work usually does not arise.

3.1.1. Sendings abroad

Employers often send their employees abroad, either temporarily, i.e. for the completion of a specific task or for a certain period of time, or permanently. Employees may be posted to an employer's foreign place of business, branch, subsidiary or affiliate. Similarly, employers may send their employees to foreign companies with which they have a cooperation agreement, a contract of 'hiring-out' of workers or a similar arrangement. The sending may occur under an existing employment contract, which may contain a 'mobility clause' entitling the employer to send the employee abroad. Alternatively, the parties may amend the existing contract or conclude a new contract to set out the details of the sending abroad.

The second sentence of Art.8(2) prescribes that the country where the work is habitually carried out will not be deemed to have changed if the employee is temporarily employed elsewhere. Furthermore, the second sentence of Recital 36 states that the conclusion of a new employment contract with the original employer should not preclude the employee from being regarded as carrying out his work in another country temporarily. The applicable law is therefore stable. It does not change when the employee is temporarily sent abroad. Four issues arise in this respect. How to distinguish a temporary sending from a permanent one? If there is a change of the habitual place of work, does the law of the country of the new habitual place of work also apply to disputes concerning previously performed work? What about employment

beginning or ending with a sending abroad? What about employees who are frequently sent from one country to another?

There are two possible approaches to the first issue. First, sendings shorter than a certain fixed time period may be regarded as temporary, whereas all other sendings may be regarded as permanent. For example, Art.12(1) of the Regulation 883/2004 on the coordination of social security systems⁷⁸ provides that postings of anticipated duration of up to 24 months are deemed temporary and do not lead to the change of the applicable social security legislation. The drafters of Rome I have decided not to follow this approach.⁷⁹ Instead, all relevant circumstances should be evaluated to determine whether a sending is temporary for the purposes of Rome I. This approach is better, since it allows the most appropriate solution in each individual case, albeit at the expense of a degree of legal uncertainty and difficulty of application.⁸⁰

Are all the circumstances of the case of equal weight, or are some more important than the others? Rome I accords particular importance to the parties' intentions. According to the first sentence of Recital 36, 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. If the parties intend the sending to be temporary (i.e. if there is *animus revertendi* on the employee's part and *animus retrahendi* on the employer's part)⁸¹ there is, in principle, no change of the

⁷⁸ [2004] OJ L166/1.

⁷⁹ European Commission, 'Green Paper on the conversion of the Rome Convention of 1980 on the law applicable to contractual obligations into a Community instrument and its modernisation' COM(2002) 654 final, 37.

⁸⁰ EGPIL (European Group for PIL), 'Troisième commentaire consolidé des propositions de modification des articles 1er, 3, 4, 5, 6, 7, 9, 10bis, 12 et 13 de la Convention de Rome du 19 juin 1980 sur la loi applicable aux obligations contractuelles, et de l'article 15 du Règlement 44/2001/CE (Règlement "Bruxelles I")', available at <http://www.gedip-egpil.eu/documents/gedip-documents-13cc.html> (last accessed 26/9/2012) [23](1); Max Planck Institute, 'Comments on the European Commission's Proposal for a Regulation of the European Parliament and the Council on the law applicable to contractual obligations ("Rome I")' (2007) 71 RabelZ 225, 288; cf Polak (n54) [12-14] (in favour of a one year period).

⁸¹ Mankowski (n69) 185-186.

habitual place of work. Otherwise there is.⁸² The parties' intentions may be ascertained from the terms of the contract and other circumstances of the case. Art.4 of the Directive 91/533/EEC on an employer's obligation to inform employees of the conditions applicable to the contract or employment relationship⁸³ obliges employers to provide information regarding the posting to posted employees. This information may be particularly useful for determining whether the posting is temporary. But the parties' intentions are not the only relevant factor. In particular, the duration of the sending abroad must be considered. Thus, if the employee has been working in a foreign country for a significant amount of time, he should be regarded as habitually working in that country even though he used to habitually work in the country of origin and the parties intended him to return there. What amount of time is (in)significant in this respect depends on the circumstances of the case and is left to the courts to decide.⁸⁴

A difficulty arises where a dispute, brought after the habitual place of work has changed, concerns previously performed work. Does the law of the country of the current or of the previous habitual place of work apply? The best solution seems to be the application of the law of the country where the employee habitually worked when the facts giving rise to the dispute occurred.⁸⁵ An employer who has fully complied with the applicable law should not be adversely affected by a change of the habitual place of work and the consequent change of the governing law.

⁸² In *Hessisches LAG*, 1 September 2008 [2008] IPRspr No 48, a Turkish employee worked for a Turkish bank in Turkey for 5 years. He was posted first to the Netherlands for 7 years and then to Germany for 3 years. The postings were held to be temporary. The fact that the employee had lost his *animus revertendi* was disregarded, since this had never been communicated to the employer.

⁸³ [1991] OJ L288/32.

⁸⁴ *Cour de cassation, Olivia Campos v Société Banco de la Nation Argentina*, 9 October 2001 [2002] *Droit social* 121, note M-A. Moreau (a posting of 15 years cannot be regarded as temporary); *Cour de cassation, Royal Air Maroc v Jalal*, 17 December 1997 [1998] *Droit social* 185, note M-A. Moreau (a posting of 12 years was regarded as permanent); *Cour de cassation*, 17 October 2000 (n26) (a posting of 4 years was regarded as temporary); *Hessisches LAG*, 1 September 2008 (n82) (a posting of 3 years did not in itself lead to the change of the habitual place of work).

⁸⁵ *Dicey, Morris and Collins* (n35) [33-076]; P. Mankowski, 'Europäisches Internationales Arbeitprozessrecht: Weiteres zum gewöhnlichen Arbeitsort' (2003) 23 IPRax 21, 25; Morse (n35) 17; similarly, Plender and Wilderspin (n54) [11-051].

Sometimes, employment begins or ends with a sending abroad. According to Recital 36, work performed in another country is deemed temporary if the employee is expected to *resume* working in the country of origin after carrying out his tasks abroad. This wording suggests that the employee must have already worked in the country of origin before being sent abroad, and that he is expected to continue working there. Where employment begins with a temporary sending abroad, the first requirement is not met; where employment is expected to end with a temporary sending abroad, the second requirement is not met. Nonetheless, Art.8(2) should be interpreted broadly and enable the application of the law of the country of origin in these situations.⁸⁶

Some employees are frequently sent from one country to another. Construction workers, for example, may be sent from a building site in one country to a building site in another country immediately after the completion of the construction project. Managerial, advisory and specialist staff may be moved between countries where their employer is doing business. *Weber*⁸⁷ provides guidance. The CJEU held that the relevant criterion for determining the habitual place of work in this type of case ‘is, *in principle*, the place where [the employee] spends most of his working time engaged on his employer’s business.’⁸⁸ Therefore, an employee who is frequently sent from one country to another is habitually working in the country where he spends most of his working time, unless the circumstances of the case indicate otherwise.

3.1.2. Intra-group transfers

Workers employed by a member of a corporate group are often transferred within the group, especially if they are managerial, advisory or specialist staff. Such transfers,

⁸⁶ U. Magnus, ‘Die Rom I-Verordnung’ [2010] IPRax 27, 40; Mankowski (n69) 188-189; Max Planck Institute (n80) 289.

⁸⁷ (n76).

⁸⁸ *ibid* [50] (emphasis added).

generally speaking, take three forms.⁸⁹ First, the employee may be transferred to a foreign group member without entering into employment with that member. This is merely a type of sending abroad discussed above. Second, the employee may be transferred to, and enter into employment with, a foreign group member, while terminating his employment with the original employer. Given that there is no overlap between the two employment relations, the habitual place of work under each should be determined separately and independently.⁹⁰ Third, the employee may be transferred to, and enter into employment with, a foreign group member, while retaining his employment with the original employer. The conclusion of the employment contract with the foreign group member may be mandated by the host country's immigration and other legislation. Such employment is usually limited in time or to a specific task. The original employer frequently retains the right to revoke the employee.

The third type of transfer raises the question of the relevance of the 'local' employment contract for establishing the habitual place of work under the 'original' employment contract and vice versa. It will be remembered that the CJEU dealt with this kind of case in *Pugliese*⁹¹ in the context of the Brussels regime. With regard to the choice-of-law rules, the second sentence of Recital 36 Rome I addresses this problem of 'double employment'.⁹² It states that the conclusion of a new contract with an employer belonging to the same group of companies as the original employer should not preclude the employee from being regarded as carrying out his work in another country temporarily. Therefore, the habitual place of work under the 'original' and the 'local' contracts should be determined separately, by considering all the relevant circumstances. Typically, a transfer to a foreign group member represents a temporary

⁸⁹ G.P. Moreno, 'Multinational Group of Companies and Individual Employment Contracts in Spanish and European Private International Law' (2002) 4 YPIL 303, 326.

⁹⁰ See *Chunilal v Merrill Lynch International Incorporated* [2010] EWHC 1467 (Comm).

⁹¹ Case C-437/00 [2003] ECR I-3573.

⁹² Mankowski (n69) 190.

sending abroad under the ‘original’ contract not resulting in the change of the habitual place of work. The work under the ‘local’ contract is usually entirely performed in the host country, which should therefore be regarded as the country of the habitual place of work under that contract. Exceptionally, the two contracts may have the same habitual place of work, for example when the transfer to a foreign group member represents a permanent sending abroad under the ‘original’ contract or when the ‘local’ contract is made solely for administrative purposes (e.g. obtaining a work permit).⁹³

Art.8(2)’s flexibility allows the most appropriate solution in each individual case of intra-group transfer of employees.⁹⁴ Moreover, the solution laid down in Recital 36 can be applied by analogy to other cases of ‘double employment’, such as where the employee concludes a ‘local’ employment contract with a company to which he was ‘hired out’ by his employer.⁹⁵

3.1.3. ‘International occupations’

Some occupations are international by their very nature. Commercial representatives covering territories of several countries normally maintain an office in one country from which they travel abroad and to which they return after each business trip. International transport workers routinely cross national borders. Offshore workers sometimes perform their work outside any country’s territorial waters. Do such workers have a habitual place of work?

The CJEU addressed the problem of determining the habitual place of work of commercial representatives in *Mulox*⁹⁶ and *Rutten*.⁹⁷ The Court held in *Mulox* that the habitual place of work was ‘the place where or from which the employee principally

⁹³ European Commission (n79) 36.

⁹⁴ EGPIL (n80) [23](2); Max Planck Institute (n80) 289-291.

⁹⁵ Mankowski (n69) 191-193; Max Planck Institute *ibid* 291.

⁹⁶ (n74).

⁹⁷ (n75).

discharges his obligations towards his employer’⁹⁸ and in *Rutten* that the habitual place of work was ‘the place where the employee has established the effective centre of his working activities and where, or from which, he in fact performs the essential part of his duties *vis-à-vis* his employer.’⁹⁹ In both cases, the location of the employee’s office was the crucial factor for determining the habitual place of work. Since Art.8(2) incorporates this case-law,¹⁰⁰ the law of the country where the commercial representative maintains his office typically governs his employment contract.

The CJEU has dealt in two recent cases with the determination of the habitual place of work of international transport workers under the Rome Convention. In *Koelzsch*¹⁰¹ the employee brought a dispute in Luxembourg against that Member State for the alleged breach of Art.6 of the Rome Convention by its judicial authorities. Mr Koelzsch was a lorry driver domiciled in Germany who worked, under an employment contract subject to Luxembourg law, for a Luxembourg company. The employer’s business consisted in transporting goods from Denmark to destinations situated mostly in Germany by means of lorries stationed in Germany. Following his dismissal, Mr Koelzsch commenced proceedings in Luxembourg arguing that his dismissal was unlawful under the objectively applicable German law. The Luxembourg courts disagreed and held that Mr Koelzsch’s employment was subject exclusively to Luxembourg law, under which the dismissal was lawful. The employee then claimed damages against Luxembourg for maladministration on the part of its judicial authorities. The *Cour d’appel de Luxembourg* asked the CJEU whether the Luxembourg courts’ interpretation of Art.6(2)(a) of the Rome Convention was correct.

After endorsing its case-law under the Brussels regime, the CJEU held that the rule of the habitual place of work applied whenever ‘it is possible...to determine the

⁹⁸ *Mulox*, [24].

⁹⁹ *Rutten*, [23].

¹⁰⁰ (n77).

¹⁰¹ (n46).

State with which the work has a significant connection', and that this rule referred to 'the place in which or from which the employee actually carries out his activities and, in the absence of a centre of activities, to the place where he carries out the majority of his activities.'¹⁰² The Court gave a strong hint that Mr Koelzsch had his habitual place of work in Germany by listing the following factors as relevant for determining the habitual place of work: the place from which the employee carries out his transport tasks, receives instructions concerning his tasks and organises his work; the place where his work tools are situated; the places where the transport is principally carried out, where the goods are unloaded and the place to which the employee returns after completion of his tasks.¹⁰³

It will be remembered that *Voogsgeerd*¹⁰⁴ concerned a seaman who concluded an employment contract with a Luxembourg company (Navimer) at the headquarters of the employer's Belgian subsidiary (Naviglobe). The contract was expressly subject to the law of Luxembourg. Mr Voogsgeerd worked on board ships belonging to Navimer and received his salary from that company. But he reported to, and received briefings and instructions from, Naviglobe in Belgium, where all of his voyages commenced and terminated. Almost a year after his dismissal, Mr Voogsgeerd commenced proceedings in Belgium for payment in lieu of notice invoking Belgian employment law as the objectively applicable law under the rule of the habitual place of work. Contrary to this, the defendants argued that Luxembourg law was solely applicable to the contract, since Mr Voogsgeerd had had no habitual place of work and the engaging place of business, Navimer, had been situated in Luxembourg. The claim was time-barred under Luxembourg law. After the lower instance courts had rejected his claims, Mr Voogsgeerd appealed to the Belgian Court of Cassation. He claimed that Naviglobe

¹⁰² *ibid* [44]-[45].

¹⁰³ *ibid* [49].

¹⁰⁴ (n52).

was the engaging place of business and that Belgian law was objectively applicable under the fall-back rule of the engaging place of business. The court made a reference for preliminary ruling to the CJEU.

The CJEU confirmed the preceding case-law and a very wide interpretation of the rule of the habitual place of work. In particular, it stated that the country in which the employee habitually performed his work was the country where he ‘principally carries out his work’,¹⁰⁵ i.e. the country ‘with which the work has a significant connection’¹⁰⁶ or ‘in which or from which the employee actually carries out his working activities and, in the absence of a centre of activities...where he carries out the majority of his activities’.¹⁰⁷ The Court suggested that the facts of the case indicated that Belgian law was objectively applicable under the rule of the habitual place of work.¹⁰⁸ Moreover, and more importantly, the Court arguably laid down a general rule for international transport cases that whenever the place from which the employee carried out his transport tasks or where he was obliged to report coincided with the place where he received instructions, that place had to be regarded as the habitual place of work.¹⁰⁹

Voogsgeerd put an end to the longstanding debate on whether a seaman’s employment contract is governed by the law of the flag or whether other criteria are more appropriate. Many argued that, since seamen worked on ships which fell under the jurisdiction of the country whose flag they flew, employment contracts of seamen were, in principle, governed by the law of the flag.¹¹⁰ Others argued in favour of other

¹⁰⁵ *ibid* [33].

¹⁰⁶ *ibid* [36].

¹⁰⁷ *ibid* [37]; see also [41].

¹⁰⁸ See in particular *ibid* [31], [39]-[41], [44].

¹⁰⁹ *ibid* [39], [44]; cf [40].

¹¹⁰ M. Bogdan, *Concise Introduction to EU Private International Law* (Groningen, 2006) 132, fn47; A. Junker, ‘Arbeitsverträge’ in F. Ferrari and S. Leible (eds), *Ein neues Internationales Vertragsrecht für Europa: Der Vorschlag für eine Rom I-Verordnung* (Munich, 2007) 111, 124-125; Magnus (n86) 41; Mankowski (n69) 199-200; Polak (n54) [12-19]; Zanobetti (n72) 351-353; Max Planck Institute (n80) 294-297.

criteria, primarily the engaging place of business.¹¹¹ The former solution seems inappropriate. Saying that a British seaman who works on a ferry registered in the Bahamas and plying from a base in Portsmouth to the Channel Islands and Northern France habitually works in the Bahamas is clearly wrong.¹¹² In other words, there is no guarantee that the country of the flag of the ship will be sufficiently closely connected with, and interested in regulating, the employment contract. Moreover, this connecting factor is determined unilaterally by the employer. In any event, this debate has now been resolved. A seaman's employment contract is, in principle, governed by the law of the country of the seaman's permanent base, provided there is a significant connection between the work and the base. Otherwise, the fall-back rule applies.

A parallel debate existed with regard to employment contracts of air crew members. Many academics, particularly those favouring the ship's flag as the relevant connecting factor for employment contracts of seamen, argued in favour of the law of the aircraft's registration.¹¹³ Others supported the immediate application of the fall-back rule.¹¹⁴ The drafters of Rome I put an end to this particular debate. According to the European Commission, the wording '*country in which or, failing that, from which*' in Art.8(2) covers 'personnel working on board aircraft, if there is a fixed base from which work is organised and where the personnel perform other obligations in relation to the employer (registration, safety checks).'¹¹⁵

¹¹¹ Beaumont and McEahey (n43) [10.366]; *Dicey, Morris and Collins* (n35) [33-077]; Hill and Chong (n72) [14.5.34]; Jault-Seseke (n27) 624; Kaye (n35) 235; P. Lagarde, 'Le nouveau droit international privé des contrats après l'entrée en vigueur de la Convention de Rome du 19 juin 1980' (1991) 80 *Revue critique DIP* 287, 319; Merrett (n40) [6.61]; Morse (n35) 18-19; Plender and Wilderspin (n54) [11-042]; also tentatively European Commission (n79) 37; cf S. Francq, 'Le règlement "Rome I" sur la loi applicable aux obligations contractuelles' (2009) 136 *Clunet* 41, 65-66 (in favour of the connecting factor of the fixed base).

¹¹² See *Diggins v Condor Marine Crewing Services Ltd* [2009] EWCA Civ 1133.

¹¹³ Junker (n111) 126; Mankowski (n69) 178-179; Polak (n54) [12-19].

¹¹⁴ Jault-Seseke (n27) 624; Kaye (n35) 235; Lagarde (n112) 319; Max Planck Institute (n80) 287-288; *Cour de cassation, Mme Arsac v United Airlines*, 27 May 2009 (n24); *Bundesarbeitsgericht*, 13 November 2007 (n24).

¹¹⁵ (n77) 7.

Offshore workers usually work within a country's territorial waters, although offshore installations may be positioned outside these waters, e.g. above a country's continental shelf or even on the high seas. *Weber*¹¹⁶ concerned an employee who worked on vessels and installations positioned above Dutch and Danish continental shelves. The CJEU held that work performed on fixed or floating installations positioned on or above the part of the continental shelf adjacent to a Member State for the purposes of prospecting and exploiting its natural resources was regarded as work in the territory of that Member State. With regard to work performed on installations on the high seas, there are essentially two possibilities. The first is to regard the country of the flag or of the registration of the installation as the country of the habitual place of work. The second is to regard such work as not being habitually performed in any country and to apply the fall-back rule. Since the first solution is unlikely to meet the objectives of employee protection, the fall-back rule should apply.¹¹⁷

3.2. Engaging place of business

Art.8(3) prescribes that, absent a habitual place of work, the employment contract is governed by the law of the country where the place of business through which the employee was engaged is situated.¹¹⁸ In light of the CJEU case-law, it is clear that not many situations fall under Art.8(3). One example is where the employee's work is not carried out from a permanent base (e.g. an office), and the distribution of the working time spent in various places and the parties' intentions do not establish a habitual place of work. Another example is the case of an employee who maintains two or more permanent bases of equal importance in different countries. Employees working

¹¹⁶ (n76).

¹¹⁷ Giuliano/Lagarde Report (n30) 26.

¹¹⁸ Rome Convention, Art.6(2)(b) is essentially the same.

outside the territory of any country also come to mind,¹¹⁹ as do international transport workers who have a base in a particular country but not a significant connection with it. Cases of this kind are rare.

In order to understand the rule of the engaging place of business, one has to determine what is meant, first, by the term ‘engaged’ and, second, by the term ‘place of business’. The CJEU examined these issues in detail in *Voogsgeerd*.¹²⁰

There were two strands of academic opinion regarding the interpretation of the term ‘engaged’. According to MANKOWSKI,¹²¹ this term relates to ‘organisational integration, internal structuring and internal directives’.¹²²

‘Employment relations ordinarily are long-term agreements. Hence, it would be very much preferable to employ a connecting factor that is linked with the living relation as such, not merely its starting point. Organisational integration reflects this perfectly. Its elements might be e.g. the monthly payment of wages and salaries, the accountancy work and the tax business, supervision and giving directives.’¹²³

However, national courts, supported by the majority of academics, have interpreted the term ‘engaged’ as referring to the conclusion of the employment contract or recruitment of employees.¹²⁴ *Voogsgeerd* demonstrates why the former interpretation is inappropriate. Here, the employee concluded the employment contract with, and

¹¹⁹ Art.6(2)(b) of the proposal for Rome I expressly stated that the rule of the engaging place of business covered cases where the employee ‘habitually carries out his work in or from a territory subject to no national sovereignty’: European Commission (n77).

¹²⁰ (n52).

¹²¹ (n69) 193-197. Also W. Däubler, ‘Das Neue Internationale Arbeitsrecht’ (1987) 33 RIW 249, 251; Zanobetti (n72) 350; also tentatively van Eeckhoutte (n58) 171.

¹²² Mankowski *ibid* 195.

¹²³ *ibid* 195.

¹²⁴ *Booth v Phillips* [2004] EWHC 1437 (Comm), [25]; *Chunilal v Merrill Lynch International Inc* (n90), [20]; *Cour d'appel de Lyon*, 18 February 2004, No. 2003/00993, unreported; *LAG Niedersachsen*, 20 November 1998, AR-Blattei ES 920 Nr 6; *Hessisches LAG*, 16 November 1999, NZA-RR 2000, 401; *Hessisches LAG*, 25 August 2008 [2008] IPRspr No 47; Garcimartin Alférez (n61), [73]; Krebber (n55) 525-526; Merrett (n40) [4.85], [4.87]; Moreno (n89) 322-323; Plender and Wilderspin (n54) [11-053].

received salary from, the employer established in one country, but reported to, and received briefings and instructions from, a company from another country. It would be hard, if not impossible, to find one place of business within which the employee was organisationally integrated in accordance with the criteria set out in the quotation above.

It comes as no surprise that the CJEU held that the term ‘engaged’ referred to ‘the conclusion of the contract or, in the case of a *de facto* employment relationship, to the creation of the employment relationship and not to the way in which the employee’s actual employment is carried out.’¹²⁵ But it is not entirely clear whether the Court referred to the conclusion of the employment contract *by* a particular place of business or *at* a particular place of business. The CJEU judgment and the Advocate General’s opinion provide support for both views. In order to reduce the risk of abuse, it was stated that a place of business could be regarded as the ‘engaging’ place of business if it ‘has been actively involved in the conclusion of the employment contract on the instructions of the employer, for example by taking part in contractual negotiations with the employee’.¹²⁶ A place of business that has not been actively involved in the conclusion of the contract should be disregarded, and the rule of the engaging place of business should point to the place of business of the undertaking in whose name and on whose behalf the contract was concluded.¹²⁷

With regard to the interpretation of the term ‘place of business’, there were also several strands of opinion. According to some, this term should be equated with the term ‘branch, agency or other establishment’ of Art.5(5) Brussels I.¹²⁸ But according to MANKOWSKI, the term ‘place of business’ should have different meanings in different

¹²⁵ *Voogsgeerd*, [46].

¹²⁶ *ibid*, Opinion of AG Trstenjak, [70]. Other examples of active involvement were given at *ibid* [72]. See also *ibid*, CJEU judgment, [50].

¹²⁷ *ibid*, CJEU judgment, [49].

¹²⁸ Cruz/Real/Jenard Report [1990] OJ C189/36, 45, fn1; A. Layton and H. Mercer (eds), *European Civil Practice* (London, 2004) [18-023], fn50.

contexts.¹²⁹ ‘The main difficulty with instrumentalising the very same notion [i.e. the term ‘branch, agency or other establishment’] in the context of employment relations is that the notion has been developed for *external* business relations and not for the *internal* feature of employment agreements’.¹³⁰ The majority of authors, however, have not taken a clear position in this regard.¹³¹

While the Advocate General’s position in *Voogsgeerd* was clear, that of the CJEU was not. The Advocate General expressly endorsed a parallel interpretation.¹³² In her view, the term ‘place of business’ referred to an employer’s establishment, regardless of whether it possessed legal personality,¹³³ over which the employer exercised actual control so that its actions were attributable to the employer,¹³⁴ which possessed a sufficient degree of permanence,¹³⁵ and which had been set up in accordance with the relevant provisions of the country in which it had been established.¹³⁶ The Court did not expressly endorse a parallel interpretation. But it did arguably refer to the same four requirements laid down by the Advocate General by holding that the term ‘place of business’ covered every stable structure, including a subsidiary, branch or an office, regardless of whether it possessed legal personality,¹³⁷ provided that it had a sufficient degree of permanence,¹³⁸ and that, in principle, it belonged to the undertaking which engaged the employee, i.e. formed an integral part of its structure.¹³⁹ Assuming that the Advocate General was right in holding that the requirements she laid down mirrored the definition of the ancillary establishment of

¹²⁹ (n69) 196-197.

¹³⁰ *ibid* 197.

¹³¹ *Dicey, Morris and Collins* (n35) [33-077]; *Kaye* (n35) 235-236; *Lagarde* (n112) 318-319; *Merrett* (n40) [4.85], [4.102]; *Moreno* (n89) 322-323; *Morse* (n35) 19. See also the *Jenard/Möller Report* [1990] OJ C189/7, [43].

¹³² *Voogsgeerd*, Opinion of AG Trstenjak, [83].

¹³³ *ibid* [78]-[79].

¹³⁴ *ibid* [80].

¹³⁵ *ibid* [81].

¹³⁶ *ibid* [85].

¹³⁷ *ibid*, CJEU judgment, [54].

¹³⁸ *ibid* [55].

¹³⁹ *ibid* [57].

Art.5(5) Brussels I, it can be concluded that the Court effectively also equated the definition of the term ‘place of business’ with that of ‘branch, agency or other establishment’.

It will be examined now how the rule of the engaging place of business applies to the factual scenario furnished by *Voogsgeerd* itself. Similar facts are provided by the famous *Sayers* case.¹⁴⁰ The employer in *Voogsgeerd* was a Luxembourg company (Navimer). The employment contract was concluded at the premises of a Belgian subsidiary (Naviglobe). It is not known whether the subsidiary concluded the contract on behalf of the employer or whether it merely made its premises available for the conclusion of the contract by a representative of the employer. It is also not known whether the subsidiary was involved in any other way (apart from making its premises available) in the conclusion of the contract.

Both Navimer’s place of business in Luxembourg and Naviglobe’s place of business in Belgium meet the requirements of the term ‘place of business’. Whether Navimer or Naviglobe is to be regarded as the engaging place of business thus depends on the interpretation of the term ‘engaged’. As mentioned, it is not clear whether this term refers to the conclusion of the employment contract *by* or *at* a place of business. In any event, it is necessary that the place of business was actively involved in the conclusion of the contract. If Naviglobe concluded the employment contract on behalf of Navimer at its premises, it seems that the requirements of the term ‘engaged’ would clearly be met. But if Naviglobe made its premises available for the conclusion of the contract by a representative of Navimer, the legal position is not as clear. The former interpretation of the term ‘engaged’ (conclusion of the contract *by* a place of business) would point to Navimer as the ‘engaging’ place of business. The latter interpretation

¹⁴⁰ (n22). Here, the plaintiff was engaged by a Dutch subsidiary of a Texan company to work on an oil rig in Nigerian territorial waters. The contract had been negotiated in England with a representative of the Dutch company at the office of an English subsidiary of the Texan company. At this office the Dutch company had an English representative who did not participate in the negotiation of the contract.

(conclusion of the contract *at* a place of business) would point to Naviglobe, provided it was actively involved in the conclusion of the contract. The fact that Naviglobe made its premises available for the conclusion of the contract could, under some conditions, be enough for regarding it as being actively involved. As the Court said:

‘the purely transitory presence in a State of an agent of an undertaking from another State for the purpose of engaging employees cannot be regarded as constituting a place of business which connects the contract to that State...’

If, however, the same representative travels to a country in which the employer maintains a permanent establishment of his undertaking, it would be perfectly reasonable to suppose that that establishment constitutes [the engaging place of business].¹⁴¹

However, it is not entirely clear whether, for an establishment to constitute the ‘engaging’ place of business, the representative of the employer must *regularly* present himself at that establishment or whether a one-off recruitment would be enough. The Advocate General stated that:

‘The fact that *a representative of a foreign employer regularly presents himself* at that place in order to recruit workers for employment abroad could not...be regarded as sufficient. If, however, *the same representative* travels to a country in which the employer maintains a permanent establishment of his undertaking, it would be perfectly reasonable to suppose that that establishment constitutes [the engaging place of business].’¹⁴²

One could argue that the Advocate General’s Opinion supports the proposition that the representative of the employer must *regularly* present himself at a place of business which made its premises available for the conclusion of the employment contract, in

¹⁴¹ *Voogsgeerd*, CJEU judgment, [55]-[56].

¹⁴² *ibid*, AG Opinion, [81] (emphasis added).

order for that place of business to be regarded as the ‘engaging’ place of business. But it seems that the requirement of regularity should not be introduced. Its introduction would increase legal uncertainty and unforeseeability as it would open the question of what regular is. Furthermore, it would contribute nothing to the achievement of the objective of employee protection. The employer can always structure its business so as to regularly present itself at a particular place of business for the purpose of entering into employment contracts.

Given the ambiguities of the CJEU judgment and the Advocate General’s Opinion, it is uncertain whether the employer (Navimer) or the subsidiary (Naviglobe), or even both, should be regarded as the engaging place(s) of business. In case the term ‘engaged’ covers both the conclusion of the employment contract *by* and *at* a place of business, and assuming that the contract was concluded by a representative of Navimer at the premises of Naviglobe, and that Naviglobe was actively involved in the conclusion of the contract, the term ‘engaged’ would be satisfied in relation to both Navimer and Naviglobe. Since there can be only one engaging place of business for the purposes of Rome I, the court would have to give preference to either Naviglobe or Navimer. It is uncertain and unforeseeable which place of business would be given preference. The objective of employee protection would have nothing to say in this regard. The employer can always structure its business so as to conclude its employment contracts either by or at a particular place of business.

In conclusion, the CJEU has deprived the rule of the engaging place of business of almost any effect. Yet the existence of this rule creates considerable legal uncertainty and unforeseeability. The relationship between the primary rule of the habitual place of business and the fall-back rule is not entirely clear. The meaning of the terms ‘engaged’ and ‘place of business’ is obscure. Furthermore, there is no guarantee that the fall-back rule will point to the law of a country that is sufficiently

closely connected with, and interested in regulating, the employment contract. Since engagement is within the employer's sphere of control, this rule effectively enables the employer to unilaterally choose the applicable law. These conclusions inevitably raise the question of whether the rule of the engaging place of business should be abolished in Rome I.

If the analogous rule were abolished in Brussels I, as argued in the previous chapter, there would be an *a priori* reason for doing the same in Rome I for the sake of achieving and maintaining consistency between the two instruments. There are also self-standing reasons for abolishing this rule. Since it is particularly amenable to being displaced through the application of the escape clause,¹⁴³ in cases where there is not a habitual place of work, the parties will often be in dispute not only over the interpretation of the connecting factor of the engaging place of business but also over the application of the escape clause. The abolition of the fall-back rule would advance the goals of legal certainty and foreseeability, since the parties would not have to enter into dispute over its interpretation. Furthermore, the number of appeals would be reduced and the efficiency of proceedings would be increased. Whether a place of business is the 'engaging place of business' is a legal question. Since the exact meaning of this concept is unclear, the trial court is likely to answer it wrongly, at least from the point of view of one of the parties. The possibility of such an error of law often gives the losing party sufficient reason to lodge an appeal. On the other hand, direct application of the principle of the closest connection would give the trial court a degree of discretion over the determination of the applicable law. Unless the trial court committed a manifest error when determining the applicable law by direct application of the principle of the closest connection, the appeal court would be unlikely to intervene.¹⁴⁴ Finally, the objective of employee protection would be advanced, since

¹⁴³ *ibid*, CJEU judgment, [51].

¹⁴⁴ See Jault-Seseke (n65).

employers could not (ab)use this connecting factor to evade protective legislation, and the courts would always have to determine and apply the law of the country with which the employment contract is most closely connected, and which is legitimately interested in regulating it.

From a technical point of view, nothing precludes the abolition of the rule of the engaging place of business. If it were abolished, the applicable law would be determined, absent a habitual place of work, by direct application of the principle of the closest connection. This technique would not be much different from that used in the general rules of Rome I. Many of these rules are based on the theory of the characteristic performance.¹⁴⁵ But if the characteristic performance of a contract cannot be established, the applicable law is determined by direct application of the principle of the closest connection.¹⁴⁶ If the fall-back rule were abolished, the location of the engaging place of business would still retain relevance as one of the factors to be considered under the principle of the closest connection.

3.3. Escape clause

Art.8(4) provides that where it appears from the circumstances as a whole that the contract is more closely connected with a country other than that indicated by Art.8(2) and 8(3), the law of that other country applies.

The wording of this escape clause differs from that of Art.4(3), which allows departure from the general choice-of-law rules of Art.4(1) and 4(2) ‘where it is *clear* from all the circumstances of the case that the contract is *manifestly* more closely connected with [another country]’. Does the different wording imply that the rules of Art.8(2) and 8(3) can be departed from more easily than the general choice-of-law rules? A highly contentious issue under the Rome Convention was the relationship

¹⁴⁵ Art.4(1), 4(2).

¹⁴⁶ Art.4(4).

between the presumption of characteristic performance of Art.4(2) and the escape clause of Art.4(5), which is worded identically as Art.8(4) Rome I. Two approaches were identified. The first, ‘strong presumption’ approach, was pursued in the Netherlands and Scotland; the second, ‘weak presumption’ approach, was adopted in England and France.¹⁴⁷ Faced with the lack of uniform interpretation and application, the drafters of Rome I have clarified, in Art.4(3), that the general choice-of-law rules can be departed from only exceptionally. Although the escape clause of Art.8(4) retains the old wording, it should be applied in the same manner as that of Art.4(3).

All the circumstances of the case should be considered under Art.8(4). The case-law indicates that the relevant factors are, apart from the place of work and the engaging place of business, the nationality, domicile and residence of the parties, and, less importantly, the language of the contract, and the place and currency of payment of salary.¹⁴⁸ The registration of the aircraft and the flag of the ship can also be taken into account, as well as the applicable tax and social security legislation or collective agreements.

There is no guarantee that the law designated by Art.8(2) and 8(3) will contain high employment standards. Can the escape clause be used to ensure the application of the law which, among the laws of the countries connected with an employment relation, affords the employee the best protection? The answer must be negative.¹⁴⁹ As discussed in section 3.2 of Chapter II, the protective task of PIL should not be to favour the employee over the employer. It should consist in upholding the law of the country that is both sufficiently closely connected with, and legitimately interested in regulating,

¹⁴⁷ S. Atril, ‘Choice of Law in Contract: The Missing Pieces of the Article 4 Jigsaw?’ (2004) 53 ICLQ 549; J. Hill, ‘Choice of Law in Contract under the Rome Convention: the Approach of the UK Courts’ (2004) 53 ICLQ 352; see also Case C-133/08 *Intercontainer v Balkenende* [2009] ECR I-9687.

¹⁴⁸ *Voogsgeerd* (n52), Opinion of AG Trstenjak, [74]; *Booth v Phillips* (n125), [25]-[31]; *Cour d'appel d'Angers*, 18 May 1989, *Soc. Minéo v Albert* (1990) 117 *Clunet* 616, note P. Fieschi-Vivet; (1990) 79 *Revue critique DIP* 501, note V. Heuzé; *Bundesarbeitsgericht*, 11 December 2003 [2003] IPRspr No 46.

¹⁴⁹ Cf *Dicey, Morris and Collins* (n35) [33-078].

the employment contract in question, and whose application the parties can reasonably foresee. Can then these three factors be taken into account under the escape clause? Indisputably, the closeness of the connections between the employment contract and various countries, and thereby the foreseeability of applying their laws, are relevant factors. What about the states' legitimate interests in having their employment laws applied?

The states' legitimate interests also seem to be a relevant factor under the escape clause. The wording of Art.8(4), which refers to 'the circumstances as a whole', is wide enough to allow taking those interests into consideration. As discussed in section 1.4 of Chapter II, the states' legitimate interests represent a reason for the existence of the special choice-of-law rules for employment contracts. It would be unusual if those interests, although central to the idea of employee protection in PIL, were disregarded in the practical operation of the special choice-of-law rules. Indeed, in *Koelzsch* the CJEU stated that, 'Article 6 of the Rome Convention...must be understood as guaranteeing the applicability of the law of the State in which...the employee performs his *economic and social duties* and [where] the *business and political environment* affects employment activities.'¹⁵⁰ The CJEU thereby indicated that employment law of the country in whose labour market the employee partakes, and which is presumably interested in regulating the employment contract, should be safeguarded. The escape clause should enable this where Art.8(2) and 8(3) do not.

3.4. Conclusion

The choice-of-law rules for determining the objectively applicable law are flexible enough to accommodate various factual patterns under which international employment relations arise. They take into account not only the connections of the contract with

¹⁵⁰ (n46) [42] (emphasis added); also *Voogsgeerd* (n53) [52].

various countries but also the states' legitimate interests in the application of their employment laws. But the rule of the engaging place of business leads to excessive legal uncertainty and unforeseeability, and does not support the objective of employee protection.

Conclusions

By and large, the rules of Rome I accord with the relevant considerations identified in section 3 of Chapter II. The parties to an employment contract are free to agree on any law to the extent that the agreement improves upon the mandatory standard of protection set by the objectively applicable law. The rules for determining the objectively applicable law are flexible enough and enable the application of the law of the country that is sufficiently closely connected with the employment contract in question, legitimately interested in regulating it, and whose application the parties can reasonably foresee. However, the CJEU has deprived the rule of the engaging place of business of almost any effect. For this reason, and because it leads to excessive legal uncertainty and unforeseeability and undermines the objective of employee protection, this rule should be abolished. If that were done, the law applicable to the employment contract, absent a habitual place of work, would be determined by direct application of the principle of the closest connection.

This chapter has examined in detail the operation of Art.8 Rome I which lays down choice-of-law rules for employment contracts, which determine the law applicable to contractual claims. But the majority of employment disputes concern statutory claims. The following chapter explores the law applicable to statutory claims and, in particular, the relevance of Art.8 and Rome I in general in this respect.

VI STATUTORY CLAIMS*

‘[Employment Rights Act 1996]

contains no geographical limitation.

Read literally, it applies to any individual who works anywhere in the world... Nevertheless...some territorial limitations must be implied.’

LORD HOFFMANN¹

If an employee brings a claim based on the employer’s breach of a right granted to him by a statute forming part of English law and the employment relation involves a foreign element, the question arises whether the statute applies. The traditional approach to this question was to look exclusively at the statute’s express or implied territorial scope. Only contractual and tortious claims traditionally triggered the application of choice-of-law rules. Statutory claims raised the problem of statutory construction. But today the choice-of-law rules for all obligations in English law are of European origin and are contained (excluded matters aside) in Rome I and Rome II. It is clear that if the employee advances a claim in contract or tort, the applicable law is determined by the choice-of-law rules of one of the two Regulations. But what happens if the employee brings a statutory claim? Must one be guided solely by what the statute says regarding its territorial reach? Or does the application of the statute depend, at least partly, on the choice-of-law rules?

*An earlier version of this chapter was published in (2012) 75 MLR 722.

¹ *Lawson v Serco* [2006] UKHL 3, [1].

English courts still adhere to the traditional approach, as evidenced by the leading House of Lords decision of *Lawson v Serco*² and two recent Supreme Court cases.³ The conventional view is also upheld in academic literature.⁴ This chapter argues that the question of whether an employee can invoke a statutory right must not be treated exclusively as a matter of statutory construction, but should be answered primarily by reference to the choice-of-law rules. The two Regulations lay down the choice-of-law rules for all obligations, and require a different approach to the application of statutory employment rights. If the question is approached in this manner, there are two issues to be resolved. The first is whether English law applies pursuant to the ‘European’ choice-of-law rules. The second is whether there is a good reason not to apply the statute despite the fact that English law is applicable or whether there is a good reason to apply the statute despite the fact that English law is not applicable. Arguably, such reasons rarely exist and the statute must normally be applied within the boundaries determined by the choice-of-law rules. In other words, contractual and statutory claims seem to have been largely merged into a single category for the purposes of choice of law.

The following section presents, drawing upon the work by MERRETT and SCOTT,⁵ the current state of the law with regard to the territorial scope of British

² *ibid.*

³ *Duncombe and others v Secretary of State for Children, Schools and Families (No 2)* [2011] UKSC 36 (*Duncombe (No2)*); *Ravat v Halliburton Manufacturing and Services Ltd* [2012] UKSC 1 (*Ravat*).

⁴ H.G. Beale (gen ed), *Chitty on Contracts* Vol 1 (London, 30th ed, 2008) [30-114]-[30-116]; L. Collins (gen ed), *Dicey, Morris and Collins on the Conflict of Laws* (London, 14th ed, 2006) and the 4th *Supplement to the 14th ed* (London, 2010) [1-049]-[1-063], [33-086]-[33-103]; S.F. Deakin and G.S. Morris, *Labour Law* (Oxford, 5th ed, 2009) 98-107; B. Hepple, *Labour Laws and Global Trade* (Oxford, 2005) 156-157; L. Merrett, *Employment Contracts in Private International Law* (Oxford, 2011) [1.02], [1.05]-[1.06], Ch 7, [8.38]-[8.42]; C.G.J. Morse, ‘Choice of Law, Territoriality and National Law: the Case of Employment’ in *Vers de nouveaux équilibres entre ordres juridiques: liber amicorum Hélène Gaudemet-Tallon* (Paris, 2008) 763; R. Plender and M. Wilderspin, *The European Private International Law of Obligations* (London, 3rd ed, 2009) [11-059]-[11-072], [12-003]-[12-017]; A. Scott ‘The Territorial Scope of British Employment Legislation’ [2010] LMCLQ 640. See also A. Briggs, ‘A Note on the Application of the Statute Law of Singapore within its Private International Law’ [2005] *Singapore Journal of Legal Studies* 189.

⁵ Merrett *ibid* [7.50]-[7.75]; L. Merrett, ‘The Extra-Territorial Reach of Employment Legislation’ (2010) 39 *ILJ* 355; Scott *ibid*.

employment legislation. It reveals the complex and often confusing nature of the traditional approach. The second section proposes a different approach towards the statutory employment rights that gives priority to the choice-of-law rules for employment contracts for the determination of the territorial scope of employment legislation.

1. Territorial scope of British employment legislation

For the purpose of addressing the problem of territoriality, the rights that employment legislation confers upon employees may be divided into three types: statutory rights, contractual rights and EU-law derived rights. The territorial scope of these different types of right is determined pursuant to different rules and principles.

1.1. Statutory rights

The most frequently invoked statutory rights are the right not to be unfairly dismissed conferred by s.94(1) ERA 1996 and the right not to be discriminated against conferred by the Equality Act 2010. The determination of the territorial scope of these rights is problematic, since both ERA 1996 and EqA 2010 are silent on this issue. On the other hand, there are statutes which express the territorial scope of the employment rights they confer, namely the National Minimum Wage Act 1998, the Trade Union and Labour Relations (Consolidation) Act 1992 and the Patents Act 1977. The following text firstly examines the territorial scope of the right not to be unfairly dismissed and of the other rights conferred by ERA 1996, then of the employment rights conferred by EqA 2010, and finally presents the relevant provisions of the latter three statutes.

1.1.1. Employment Rights Act 1996

ERA 1996 does not express its territorial scope. S.204 provides: 'For the purposes of this Act, it is immaterial whether the law which...governs any person's employment is the law of the UK, or of a part of the UK, or not'. The meaning of this provision is held to be that the determination of the territorial scope of ERA 1996 is entirely disconnected from the choice-of-law process. This disconnection is well illustrated by two appellate decisions. In *Financial Times Ltd v Bishop*⁶ the claimant argued that, as a corollary of the principle that a UK statute does not normally apply to a contract not governed by the law of some part of the UK, ERA 1996 should apply to an employment contract governed by English law. The Employment Appeal Tribunal rejected this argument on the ground that the rights given by ERA 1996 were not contractual but statutory rights, and that s.204 provided that 'for the purposes of ERA, whether the proper law of the contract is or is not the law of the UK or part of it is immaterial.'⁷ In *Bleuse v MBT Transport Ltd*⁸ the parties chose English law to govern their employment contract. The Employment Appeal Tribunal confirmed that 's. 204...makes it plain that the proper law of the contract is of no materiality when considering the reach of the statutory rights.'⁹ In other words, English courts regard the determination of the territorial scope of ERA 1996 exclusively as a matter of statutory construction.

Originally, ERA 1996 did express, in s.196, its territorial scope. Most rights, including the right not to be unfairly dismissed, did not apply to employees who, under their employment contracts, ordinarily worked outside Britain.¹⁰ Certain rights had a different territorial reach. The right to a statement of employment particulars and minimum period of notice applied whenever the contract was governed by English or

⁶ UKEAT/0147/03/ZT, 25 November 2003, unreported.

⁷ *ibid* [55].

⁸ [2008] ICR 488 (EAT) (*Bleuse*).

⁹ *ibid* [43].

¹⁰ s.196(2), 196(3).

Scottish law.¹¹ Certain rights concerning maternity and childbirth had no express territorial limitations.¹² The rights on insolvency of a British employer did not apply to employees ordinarily working outside the European Communities, Norway or Iceland.¹³ S.196 was repealed by s.32 of the Employment Relations Act 1999. The purpose of the repeal was to extend ERA 1996 to employees temporarily working in Britain, thus implementing the Posted Workers Directive, and to employees who had been working for some years in Britain but were excluded from ERA 1996 because of the way the courts had interpreted s.196.¹⁴ In the ministerial view, for the Act to apply there had to be a ‘proper connection’ with the UK.¹⁵ The result of the repeal was considerable legal uncertainty which necessitated the intervention of the House of Lords in *Lawson v Serco*.¹⁶

Lawson v Serco was comprised of three combined appeals. The first case concerned Mr Lawson, a British national employed by a British company to work as a security supervisor on Ascension Island, a dependency of the British Overseas Territory of St Helena, where the employer provided services to a British military base. The second case concerned Mr Botham, a British national employed by the Ministry of Defence to work at various military bases in Germany. He was part of the civil components of British Forces in Germany and treated as resident in the UK for various purposes. The third case concerned Mr Crofts who was employed as a pilot by a Hong Kong company which was a wholly owned subsidiary of, and provided aircrew to, a Hong Kong airline. He was based at Heathrow and lived in the UK under the airline’s ‘permanent basings policy’. All three employees claimed they had been unfairly

¹¹ s.196(1).

¹² s.196(4), 196(5).

¹³ s.196(7).

¹⁴ HC Debates Vol 336 col 32, 26 July 1999. The decision referred to was *Carver v Saudi Arabian Airlines* [1999] 3 All ER 61 (CA) (*Carver*).

¹⁵ HC Debates *ibid*.

¹⁶ (n1).

dismissed. The question before the House of Lords was whether they fell within the territorial scope of s.94(1) ERA 1996.

LORD HOFFMANN, who gave the only substantive speech, stated that some territorial limitations had to be implied into ERA 1996, for otherwise this Act would have world-wide application.¹⁷ In his Lordship's view, 'the standard, normal or paradigm case' of the application of s.94(1) was the employee working in Britain at the time of the dismissal, regardless of what the contemplated place of work was when the employment contract was made.¹⁸ With regard to peripatetic employees (e.g. airline pilots, international management consultants or salesmen), their work was considered to be performed in Britain if the employee was based in Britain at the time of the dismissal.¹⁹ This covered Mr Crofts' case.²⁰ With regard to expatriate employees, s.94(1) was, in principle, inapplicable.²¹ The fact that someone worked for a British-based employer was not enough; nor was the fact that the employee was a British national recruited in Britain: 'Something more is necessary.'²² LORD HOFFMANN gave two examples of when that something more would be present: 1) an employee posted abroad for the purposes of a business carried on in Britain, such as a foreign correspondent on the staff of a British newspaper;²³ and 2) an employee posted to an

¹⁷ *ibid* [1].

¹⁸ *ibid* [25]-[27]. For examples of employees sent to Britain by foreign employers who fell in this category of employees see: *Shekar v Satyam Computer Services Ltd* [2005] ICR 737 (ET); *Pervez v Macquarie Bank Ltd* [2011] ICR 266 (EAT). For cases where the performance of the employment contract took precedence over its terms see: *Williams v University of Nottingham* [2007] IRLR 660 (EAT); *Hunt v United Airlines Inc* [2008] ICR 934 (EAT); *Bullen v Club Cantabrica Coach & Air Holidays Ltd*, ET, case number 3303362/2009, 21 April 2010, unreported; *YKK Europe Ltd v Heneghan* [2010] ICR 611 (EAT).

¹⁹ *ibid* [28]-[33], approving Lord Denning MR in *Todd v British Midland Airways Ltd* [1978] ICR 959 (CA), and disapproving *Carver* (n14). Lord Hoffmann also referred to *Wilson v Maynard Shipbuilding Consultants AB* [1978] QB 665, 677, where Megaw LJ gave a non-exhaustive list of factors relevant for establishing the employee's base in Britain: the location of the employee's headquarters, where the travels involved in his employment begin and end, where the employee resides or is expected to reside, the place and currency of payment of salary, and whether he pays national insurance contributions in Britain.

²⁰ See also *Diggins v Condor* [2009] EWCA Civ 1133 (s.94(1) applied to an officer on a ferry registered in the Bahamas plying from Portsmouth to the Channel Islands and Northern France).

²¹ (n3) [36].

²² *ibid* [37].

²³ *ibid* [38]. Lord Hoffmann referred to *Financial Times Ltd v Bishop* (n6), and said that s.94(1) would not apply to an employee selling advertising space in San Francisco for the American edition of FT. See

extra-territorial British enclave abroad.²⁴ The latter example covered Mr Lawson's and Mr Botham's cases.²⁵ Moreover, LORD HOFFMANN admitted the possibility of other exceptional cases of expatriate employees with equally strong connections with Britain and British employment law.

The Supreme Court recently held that *Duncombe (No 2)*²⁶ was such an exceptional case. This case concerned the employment, by the Secretary of State for Children, Schools and Families, of teachers to work in the European Schools. These schools are established under a treaty between the EU and Member States to provide a distinctly European education to children of EU officials and employees. Most of the teachers at the Schools are employed by Member States. By virtue of regulations in force at the Schools, the teaching posts are subject to a maximum duration of 9 years (or exceptionally 10). In the UK, it is the Secretary of State that employs teachers for the Schools under a series of fixed-term contracts. After the completion of the 9-year period, the teachers are dismissed. Mr Duncombe was a teacher employed to work at the School in Karlsruhe, Germany. After having worked there for 9 years, he was dismissed. His case was a test case for unfair dismissal and wrongful dismissal and for a declaration as to permanent status as an employee brought by the teachers against the Secretary of State. With regard to the unfair dismissal claim, the teachers were held to fall into the residual group of expatriate employees covered by s.94(1). This depended on a combination of factors.²⁷ First, the employer was not just British-based but the Government of the UK. Second, the employment contracts were governed by English

Williams v University of Nottingham (n18) (s.94(1) did not apply to an academic employed by the University of Nottingham to work at the University of Nottingham in Malaysia).

²⁴ *ibid* [39].

²⁵ Lord Hoffmann distinguished *Bryant v Foreign and Commonwealth Office*, EAT/174/02/RN, 10 March 2003, unreported, where s.94(1) did not apply to a British national *locally* engaged to work in the British Embassy in Rome.

²⁶ (n3). The *Duncombe* litigation gave rise to another decision of the Supreme Court, *Duncombe and others v Secretary of State for Children, Schools and Families (No 1)* [2011] UKSC 14 (*Duncombe (No 1)*), which dealt *obiter* with the territorial scope of employment legislation.

²⁷ *ibid* [16].

law. Third, the teachers were employed in international enclaves, having no particular connection with the countries where they happened to be situated and governed by an international treaty. Fourth, it would be anomalous if the teachers employed to work in the European Schools in England enjoyed different protection from the teachers employed to work in the Schools outside the UK.²⁸

It is important to note that the Supreme Court in *Duncombe (No 2)* departed from the traditional view that the determination of the territorial scope of ERA 1996 was entirely disconnected from the choice-of-law process. It held that the law governing the employment contract was a relevant consideration for establishing the territorial scope of the statutory right not to be unfairly dismissed. According to LADY HALE, who delivered the only substantive judgment, '[the claimants] were employed under contracts governed by English law... Although this factor is not mentioned in *Lawson v Serco*, it must be relevant to the expectation of each party as to the protection which the employee would enjoy.'²⁹ Furthermore, LADY HALE stated that '[t]his very special combination of factors, and *in particular the second* [the fact that English law governed the employment contract] *and third* [the fact that the employees had virtually no connection with the place of work], distinguished these employees from "the directly employed labour".'³⁰ The potential implications of LADY HALE's view regarding the importance of the governing law for the determination of the territorial scope of employment legislation will be examined in the second section of this chapter.

In any event, *Lawson v Serco* left two questions open. Were LORD HOFFMANN's three categories (employees working in Britain, peripatetic employees, expatriate

²⁸ *Ministry of Defence v Wallis* [2011] EWCA Civ 231 (*Wallis*) is another case where the claimant employees were held to fall into the residual group of expatriate employees covered by s.94(1) (the claimants worked as support staff in British sections of schools which were part of NATO headquarters in Belgium and the Netherlands; they got their jobs as wives of British soldiers posted to NATO). In *Duncombe (No 2)* (n3), the Supreme Court dismissed the application of the Ministry of Defence for permission to appeal.

²⁹ *Duncombe (No 2)* ibid [16].

³⁰ ibid (emphasis added).

employees) exhaustive? Were the *Lawson v Serco* principles relevant for determining the territorial scope of rights other than the right not to be unfairly dismissed?

The Supreme Court addressed the first question in *Ravat*.³¹ Mr Ravat, a British national and resident, was employed by a British company, but worked in Libya for a German affiliate. He worked on ‘a commuter or rotational basis’, i.e. continued to live in Britain and travelled to and from his home to work for short periods overseas. He worked for 28 consecutive days in Libya, followed by 28 consecutive days at home. In effect he was job sharing, working back-to-back with another employee on the same arrangement. A feature of Mr Ravat’s commuter status, so he was told by the employer, was that the terms and conditions of employment were such as they would have been had he worked in Britain. The employer assured him that he would continue to have the full protection of the UK law while working abroad. Indeed, following his dismissal, Mr Ravat invoked the employer’s UK grievance procedure. He also received a redundancy payment which was stated to have been paid in accordance with ERA 1996. But when Mr Ravat complained of unfair dismissal, the employer fought tooth and nail to show that he fell outside the territorial scope of employment legislation.

The appellate history of this case will be considered, since it reveals the complexities and uncertainties surrounding the application of the *Lawson v Serco* principles. Instead of starting with LORD HOFFMANN’s categories, the Employment Tribunal examined all the circumstances of the case to determine whether there was a ‘substantial connection’ with Britain and British employment law. It found that such a connection existed and that s.94(1) applied. The Employment Appeal Tribunal held that LORD HOFFMANN’s categories were exhaustive. In its view, Mr Ravat fell into the ‘expatriate employees’ category but, as he was neither working for the purposes of a British business nor in a British enclave abroad, s.94(1) was inapplicable. The Inner

³¹ (n3).

House of the Court of Session, by a majority, reinstated the Employment Tribunal’s decision. LORD BRODIE, dissenting, approved the Employment Appeal Tribunal’s reasoning. The majority disagreed but for different reasons. LORD OSBORNE held that LORD HOFFMANN’s categories were not exhaustive and that Mr Ravat did not fall into any of them because the ‘expatriate employees’ category was intended to cover someone who not only worked but also lived abroad, and accordingly could not include Mr Ravat. In LORD OSBORNE’s opinion, the question was whether there was a ‘strong connection’ with Britain and British employment law. He found that such a connection existed and that s.94(1) applied. LORD CARLOWAY agreed with LORD BRODIE that LORD HOFFMANN’s categories were exhaustive. But he held, like LORD OSBORNE, that Mr Ravat did not fall into the ‘expatriate employees’ category, since he lived in Britain. In LORD CARLOWAY’s opinion, Mr Ravat was more peripatetic than expatriate, and s.94(1) applied because his base was in Britain.³² Finally, the Supreme Court held that LORD HOFFMANN’s categories were not exhaustive and that Mr Ravat did not fall into any of them. According to LORD HOPE, who gave the only substantive speech, ‘the starting point needs to be more precisely identified. It is that the employment relationship must have a stronger connection with Great Britain than with the foreign country where the employee works.’³³ But ‘[t]he case of those who are truly expatriate because they not only work but also live outside Great Britain requires an exceptionally strong connection with Great Britain and British employment law before an exception can be made for them.’³⁴ Since the Supreme Court found that Mr Ravat’s employment had closer connection with Britain than with any other country, the appeal was

³² For a tentative suggestion that Lord Carloway applied ‘in substance, though not in form,’ the ‘substantial connections’ test and that there was a majority in the Court of Session in favour of such a test see Scott (n4) 659-660.

³³ *Ravat* (n3) [27].

³⁴ *ibid* [28]. See also *Duncombe (No 2)* (n3) [8], [16].

dismissed. In particular, LORD HOPE confirmed LADY HALE's view in *Duncombe* (No 2) that the law governing the employment contract was a relevant consideration.³⁵

Lawson v Serco concerned the right not to be unfairly dismissed. LORD HOFFMANN said there was no reason why all the rights conferred by ERA 1996 should have the same territorial scope.³⁶ Undoubtedly, the *Lawson v Serco* principles will be relevant for most rights. Thus, in *Shekar v Satyam Computer Services Ltd*³⁷ and *Bleuse*³⁸ the provisions concerning unlawful deductions from wages were held to have the same territorial scope as those concerning unfair dismissal. The reason was that these provisions had the same express territorial scope under the repealed s.196. Similarly, the Employment Tribunal held in *Van Winkelhof*³⁹ that the territorial scope of the provisions concerning whistleblowing should not be construed more narrowly than that of the provisions concerning unfair dismissal. However, as mentioned above, certain rights under ERA 1996 had a different express territorial scope under the repealed s.196. In the case of those rights, the courts are likely to modify the *Lawson v Serco* principles.⁴⁰

1.1.2. Equality Act 2010

The main question regarding the territorial scope of the employment rights conferred by EqA 2010 is the relevance of *Lawson v Serco*. The previous anti-discrimination legislation, which was consolidated, repealed and replaced by EqA 2010, applied in relation to employment 'at an establishment in Great Britain'. Employment was regarded as such if 1) the employee worked wholly or partly in Britain, or 2) the employee worked wholly outside Britain and the following three criteria were

³⁵ *ibid* [32].

³⁶ (n1) [14].

³⁷ (n18).

³⁸ (n8).

³⁹ ET, Case number 2200549/2011, 16 May 2011, unreported, affirmed in [2012] EWCA Civ 1207.

⁴⁰ *Dicey, Morris and Collins* (n4) [33-092]-[33-094]; Merrett (n4) [7.66]; Morse (n4) 772-773.

cumulatively fulfilled: a) the employer had a place of business at an establishment in Britain, b) the work was for the purposes of the business carried on at that establishment and c) the employee was ordinarily resident in Britain either at the time when he applied for or was offered employment or at any time during the course of the employment.⁴¹

The courts have interpreted this test on several occasions. The fulfilment of the prescribed criteria was to be determined on the basis of the facts existing at the time of the alleged discrimination, by taking into account the whole period of employment.⁴²

This was in line with *Lawson v Serco*. Furthermore, the ‘work for the purposes of a British business’ criterion was held to be identical to the equivalent criterion for expatriate employees in *Lawson v Serco*.⁴³ Finally, employees could claim under anti-discrimination legislation if their work in Britain was not *de minimis*, even if they were not British-based.⁴⁴ But according to *Lawson v Serco*, s.94(1) ERA 1996, in principle, does not apply to foreign-based employees. Given that historically the rights conferred by anti-discrimination legislation and ERA 1996 had had somewhat different territorial scopes, it is to be expected that the *Lawson v Serco* principles will be modified in cases concerning EqA 2010. Indeed, in *Van Winkelhof*⁴⁵ the Employment Tribunal regarded *Lawson v Serco* as the leading authority for determining the territorial scope of EqA 2010. But it also noted that, ‘If the Tribunal was deciding this under the Sex Discrimination Act 1975 the Tribunal would have had territorial jurisdiction as the Claimant satisfied s10(1)(a) of the Sex Discrimination Act as she worked partly in

⁴¹ See e.g. SDA 1975, s.10(1), 10(1A).

⁴² *Carver* (n14); *Saggar v Ministry of Defence* [2005] EWCA Civ 413; see also *Tradition Securities and Futures SA v X* [2009] ICR 88 (EAT) (an employee who worked firstly in Paris and then in London could bring a claim of sex discrimination only in respect of the employment in Britain); *Stevenson v Atos Origin IT Services UK Ltd*, UKEAT/0212/11/CEA, 4 April 2012, unreported (an employee who had been working in Britain was temporarily assigned to manage a foreign business; he was not appointed to a permanent position that required residence abroad and the undertaking of business not for the purposes of the employer’s business; he could not bring a claim of race discrimination).

⁴³ *Williams v University of Nottingham* (n18).

⁴⁴ *British Airways Plc v Mak* [2011] EWCA Civ 184 (appeal pending) (Hong Kong-based cabin crew employed on flights from Hong Kong to London worked ‘partly’ in Britain and came within the scope of anti-discrimination legislation); cf *Ministry of Defence v Gandhiya* [2004] EWCA Civ 1171 (the employee, a soldier stationed in Germany who had spent one day working in Britain, could not bring a claim of racial discrimination).

⁴⁵ (n39).

Britain. The principle behind the Equality Act cannot be to regress from this position.⁴⁶

1.1.3. Other statutes

NMWA 1998 applies to a worker who ‘is working, or ordinarily works, in the United Kingdom’.⁴⁷ LORD HOFFMANN’s categories seem to largely correspond to the employees falling within the territorial scope of this Act.⁴⁸

Certain provisions of TULR(C)A 1992, principally concerning rights in relation to trade union membership and activities, do not apply where ‘under his contract of employment an employee works, or in the case of a prospective employee would ordinarily work, outside Great Britain’.⁴⁹ Since the repealed s.196(2) ERA 1996 contained an essentially identical test, the cases interpreting that section are relevant under TULR(C)A 1992. The leading case is *Wilson v Maynard Shipbuilding Consultants AB*⁵⁰ where the Court of Appeal introduced *inter alia* a rule that, to determine whether an employee ordinarily worked inside or outside Britain, the court had to consider where the parties had contemplated that the employee’s base would be at the time of contracting. This focus on the terms of the contract, rather than its actual performance, led to the highly criticised decision in *Carver*,⁵¹ which precipitated the repeal of s.196 ERA 1996. This case concerned an employee recruited in Saudi Arabia as a flight attendant. After training in Jeddah, she was transferred to India for 4 years and then to London, which remained her base until she resigned from the employment 6 years later. The Court of Appeal found that the employee fell outside the territorial

⁴⁶ *ibid* [67].

⁴⁷ s.1(2)(b).

⁴⁸ Cf Merrett (n4) [7.70] (the test under this Act is the same as under the previous anti-discrimination legislation).

⁴⁹ s.285(1). Similarly, the Right to Time Off for Study or Training Regulations 2001 apply to employees who ordinarily work in England and Wales: reg.1(2).

⁵⁰ (n19).

⁵¹ (n14).

reach of the right not to be unfairly dismissed because her contract had contemplated that she would be based in Saudi Arabia.

The provisions of the Patents Act 1977 concerning employees' inventions apply to an invention made by an employee if, at the time he made the invention, he was mainly employed in the UK; even if the employee was not mainly employed anywhere at the relevant time, or if his place of employment could not be determined, the Act applies if the employer had a place of business in the UK to which the employee was attached.⁵²

Finally, it should be mentioned that some employment statutes lay down special provisions concerning employment on ships. For example, s.199(7) ERA 1996 prescribes the conditions under which certain provisions of the Act apply to employment on board British registered ships.⁵³ With regard to employment on board non-British registered ships, the Act applies in accordance with the *Lawson v Serco* principles.⁵⁴ Furthermore, the territorial reach of the rights conferred by some employment statutes is extended to offshore workers working on the UK and foreign sectors of the continental shelf.⁵⁵

1.2. Contractual rights

Certain rights conferred by employment legislation are classified as contractual. The employee can invoke those rights if English law governs the employment contract. Two questions need to be considered. First, why are the rules and principles concerning the territorial scope of the statutory rights and contractual rights conferred by

⁵² s.43(2).

⁵³ See also EqA 2010, s.81; NMWA 1998, s.40; TULR(C)A 1992, s.285(2).

⁵⁴ *Diggins v Condor* (n20).

⁵⁵ National Minimum Wage (Offshore Employment) Order 1999; Employment Relations (Offshore Employment) Order 2000; Equality Act 2010 (Offshore Workers) Order 2010.

employment legislation different? Second, how are the statutory rights to be distinguished from the contractual rights?

The English common law of conflict of laws of obligations, which was partially repealed and replaced by the Rome Convention, and is nowadays completely superseded by Rome I and Rome II, provides an answer to the first question. In the common law of conflict of laws, the choice-of-law rules, in principle, did not apply to statutory rights. As BRIGGS explains,⁵⁶ statutes are made by Parliament whereas the common law choice-of-law rules were made by judges. In a parliamentary democracy, Parliament's power to legislate could not be bound by such judge-made rules, nor could it be Parliament's intention for its legislation to be bound by such rules. Consequently, legislation applied whenever Parliament intended it to apply. Sometimes, Parliament's intention was expressed in the statute itself. This was the case, for instance, with the repealed s.196 ERA 1996. Where it was not, it was the courts' task to find out 'what Parliament may reasonably be supposed to have intended and attributing to Parliament a rational scheme.'⁵⁷ If a right conferred by employment legislation was classified as contractual, it might reasonably be supposed that Parliament intended that right to be available whenever English law governed the employment contract. But if a right was classified as statutory, *Lawson v Serco* shows that different considerations applied. Although the English choice-of-law rules for obligations are no longer judge-made, but rather come from the legislator sitting in Brussels, the old view is still very much alive.

The differentiation between the statutory rights and contractual rights conferred by employment legislation is not a straightforward task. Generally speaking, the rights enacted in the form of compulsory terms in contracts, enforceable in ordinary contractual disputes, apply whenever English law governs the employment contract,

⁵⁶ (n4) 194-197.

⁵⁷ *Lawson v Serco* (n1) [23]. See also S. Dutson, 'The Conflict of Laws and Statutes: The International Operation of Legislation Dealing with Matters of Civil Law in the United Kingdom and Australia' (1997) 60 MLR 668.

unless the legislation prescribes otherwise. On the other hand, the rights enacted as free-standing claims apply only if the employee falls within their scope pursuant to the principles described in the previous section.

For example, the common law gave employers, by virtue of the defence of common employment, a shield against vicarious liability for the torts committed against the claimant employee by his fellow employees in the course of employment. S.1 of the Law Reform (Personal Injuries) Act 1948 abolished such a defence and also rendered void any term in an employment contract giving such a defence. As COLLINS convincingly argued,⁵⁸ this section applies to all employment contracts governed by English law:

‘The place where the work is done and the place of the accident must be irrelevant, because the section strikes at clauses in employment contracts *ab initio* and the place of employment, and *a fortiori* the place of the accident, may be matters only for speculation when the contract is made.’⁵⁹

Further support for this proposition may be found in the words of DENNING LJ (as he then was):⁶⁰ ‘The doctrine of common employment was an irrational exception to the liability of an employer... It has now been abolished by statute, and should be disregarded in the same way as if it had never been enunciated. Statute law and common law should be integrated into one law.’ If s.1 of the 1948 Act and the common law are indeed integrated into one law, this section applies whenever English law governs the employment contract.

The leading decision concerning the differentiation between the statutory rights and contractual rights conferred by employment legislation for the purpose of

⁵⁸ L. Collins, ‘Exemption Clauses, Employment Contracts and the Conflict of Laws’ (1972) 21 ICLQ 320, 329-330.

⁵⁹ *ibid* 330.

⁶⁰ *Broom v Morgan* [1953] 1 QB 597, 608-609.

establishing the legislation's territorial reach is the decision of the Court of Appeal in *Duncombe v Secretary of State for Children, Schools and Families*.⁶¹ A question raised by this case was whether the rights granted by the Fixed-Term Employees (Prevention of Less Favourable Treatment) Regulations 2002 should be classified as statutory or contractual. The defendant argued that these rights were statutory and that the claimant could invoke them only if the *Lawson v Serco* principles were satisfied. In contrast, the claimant argued that the 2002 Regulations were a statutory part of English employment law, applicable to all contracts governed by English law. In the claimant's view, the 2002 Regulations changed employment law by providing that, in the prescribed circumstances, a fixed-term contract transmuted into a permanent contract. The performance of the contract abroad did not prevent that change in the law and that change in the contract from taking place. The claimant found further support for his argument in the fact that the 2002 Regulations did not contain an express territorial limitation or a provision such as that contained in s.204 ERA 1996. MUMMERY LJ accepted the claimant's argument. In his view,

‘this is simply a case of an employment contract affected by a change in the law applying to all employment contracts that satisfy the prescribed conditions. Working in Great Britain is not one of the conditions. This result does not infringe any territoriality principle, if what is sought to be enforced is a common law claim for breach of a contract governed by English law...’⁶²

Although the Supreme Court did not have to rule on this issue (because it found that the *Lawson v Serco* principles were satisfied), LADY HALE confirmed *obiter* this view by stating that ‘[t]he rights which workers have [under the 2002 Regulations] are

⁶¹ [2009] EWCA Civ 1355.

⁶² *ibid* [117].

enforceable as part of the contractual arrangements between them and their employers'.⁶³

Further guidance for drawing the line between the rights conferred by employment legislation which apply whenever English law governs the employment contract and those which apply only if the *Lawson v Serco* principles are satisfied may be found in the repealed s.196 ERA 1996. The right to a statement of employment particulars and minimum period of notice applied whenever the contract was governed by English or Scottish law.⁶⁴ Arguably, this was because Parliament perceived these as contractual rights. One may also refer to cases concerning domestic (as opposed to international) employment. For example, in *Barber v RJB Mining (UK) Ltd*⁶⁵ the Working Time Regulations 1998 were held to have imposed into employment contracts a right not to work more than 48 hours a week. There is therefore a good argument that the 1998 Regulations affect a change in employment law applicable to all employment contracts governed by English law.

1.3. EU law-derived rights

*Bleuse*⁶⁶ established a principle that the employment rights derived from EU law have a different territorial scope than purely domestic rights. Mr Bleuse, a German national and resident, was employed by a UK company to work in mainland Europe. The employment contract was expressly governed by English law. Mr Bleuse invoked several rights, including the right not to be unfairly dismissed under ERA 1996 and the right to holiday pay under WTR 1998 which implemented the Working Time

⁶³ *Duncombe (No 1)* (n26) [30].

⁶⁴ s.196(1).

⁶⁵ [1999] ICR 679 (QB).

⁶⁶ (n8).

Directive.⁶⁷ Following *Lawson v Serco*, however, Mr Bleuse fell outside the territorial scope of the purely domestic right not to be unfairly dismissed. With regard to the right to holiday pay, the Employment Appeal Tribunal referred to the fact that the CJEU had confirmed that the rights conferred by the Working Time Directive were sufficiently precise and clear to be capable of having direct effect. Although directly effective EU law rights could not be pleaded against private defendants, the principle of harmonious interpretation gave indirect effect to such rights. Consequently, the Employment Appeal Tribunal had to construe the 1998 Regulations in a manner which gave effect to the directly effective EU law rights. The implied territorial limitations laid down in *Lawson v Serco* were disregarded and Mr Bleuse was held to fall within the territorial scope of the right to holiday pay.

The Court of Appeal extended the *Bleuse* principle in two later decisions, although it should be noted that the defendant in these decisions was the State, not a private defendant. In *Wallis*⁶⁸ the court held that the directly effective EU law rights had to be given effect even if the employee fell outside the express territorial scope of the implementing legislation (Sex Discrimination Act 1975, implementing the Equal Treatment Directive,⁶⁹ in this case). In *Duncombe v Secretary of State for Children, Schools and Families*⁷⁰ the Court of Appeal decided that the *Bleuse* principle applied even with regard to the rights derived from EU law which had no direct effect. LADY HALE approved this decision *obiter* in the following words:

⁶⁷ Directive 2003/88/EC concerning certain aspects of the organisation of working time [2003] OJ L299/9.

⁶⁸ (n28).

⁶⁹ Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions [1976] OJ L39/40 amended by Directive 2002/73/EC [2002] OJ L269/15 and repealed by Directive 2006/54/EC on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast) [2006] OJ L204/23.

⁷⁰ (n61).

‘it would seem unlikely that, if the protection of European employment law is to be extended to workers wherever they are working in the area covered by European law, that protection should depend upon whether or not it gives rise to directly effective rights against organs of the state. A way would have to be found of extending it to private as well as public employment.’⁷¹

Furthermore, the Court of Appeal in *Duncombe* held that the principle of effectiveness in EU law required that even the territorial limitations of purely domestic rights, such as the right not to be unfairly dismissed, should be modified if necessary for the effective vindication of the directly effective EU law rights. Thus, if a claim for unfair dismissal is the only effective remedy for the vindication of the right granted by the Fixed-Term Employees (Prevention of Less Favourable Treatment) Regulations 2002, which implemented the Directive on Fixed-Term Contracts,⁷² the employee should be accorded that remedy. LADY HALE, however, did not address this issue.⁷³

In *Bleuse, Wallis* and *Duncombe* the employment contracts were governed by English law and contained no non-EU elements. The situation is more complex if the employment contract is governed by a foreign law and particularly if it contains non-EU elements. The fact that another Member State’s law governs the contract does not make a substantial difference. English courts are obliged to construe the laws of other Member States in a manner which gives effect to EU law rights in appropriate circumstances.⁷⁴ The crucial question is when those circumstances exist, i.e. when the employee falls within the territorial scope of EU law rights. Clearly, if the contract contains no non-EU elements, the employee falls within the territorial scope of EU law

⁷¹ *Duncombe (No 1)* (n26) [34]. Lord Mance agreed with Lady Hale. Lord Collins and Lord Clarke expressed no view on this issue.

⁷² Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work [1999] OJ L 175/43.

⁷³ The Supreme Court reserved its judgment on this issue to a later date in *Duncombe (No 1)* (n26) [38]. In *Duncombe (No 2)* (n3) the Supreme Court did not have to address this issue because it held that the claimants fell into the residual group of expatriate employees covered by s.94(1) ERA 1996.

⁷⁴ See *Wallis* (n28) [52].

rights.⁷⁵ But if the contract contains some non-EU elements, the answer is not straightforward. The CJEU dealt, in *Ingmar*,⁷⁶ with an analogous issue of the territorial scope of the Commercial Agents Directive.⁷⁷ Here, the claimant, a UK-based commercial agent, operated in the UK and Ireland for the defendant, a Californian principal. Californian law was expressly chosen by the parties. The CJEU held that, in order ‘to protect, for all commercial agents, freedom of establishment and the operation of undistorted competition in the internal market’, the mandatory provisions of the Directive had to be applied ‘where the situation is *closely connected with the Community*, in particular where the commercial agent carries on his activity in the territory of a Member State’.⁷⁸ It should be noted that, had Rome I been applied to determine the objectively applicable law, the law of the agent’s country, i.e. the law of a Member State, would have been applicable.⁷⁹ There is no reason why an analogous test should not apply to EU law rights concerning employment. Whether an employment situation is closely connected with the EU should primarily be determined pursuant to Art.8 Rome I. Whenever the law of a Member State is the objectively applicable law, the employment situation should be regarded as having a strong enough connection with the EU, and English courts should construe the applicable law in a manner which gives effect to EU law rights. But even if the objectively applicable law is not the law of a Member State, there may be circumstances, such as the performance of some of the work in a Member State, which establish a strong enough connection with the EU.⁸⁰ In this situation, English courts should give effect to EU law rights regardless of whether the applicable law is the law of a Member State.

⁷⁵ See also Rome I, Art.3(4).

⁷⁶ Case C-381/98 [2000] ECR I-9305.

⁷⁷ Directive 86/653/EEC on the coordination of the laws of the Member States relating to self-employed commercial agents [1986] OJ L382/17.

⁷⁸ *Ingmar* (n76) [24]-[25] (emphasis added).

⁷⁹ Art.4(2) in connection with Art.4(1)(e), 4(1)(f).

⁸⁰ Case 36-74 *Walrave and Koch* [1974] ECR 1405, [28]-[29].

In conclusion, the determination of the territorial scope of the rights conferred by employment legislation is a difficult task. The rules and principles for establishing the territorial scope differ depending on the nature and the source of the right and, moreover, are in the state of flux.

2. The importance of choice of law

The decision of the Court of Appeal in *Duncombe v Secretary of State for Children, Schools and Families*⁸¹ raised two issues that will surely occupy the courts of this country in the future, namely the differentiation between the statutory and contractual rights conferred by employment legislation and the impact of EU law on the territorial scope of employment legislation. In comparison, the Supreme Court's decision addressing the problem of territoriality⁸² seems, at least at first sight, to be less interesting. It only dealt with the application of the *Lawson v Serco* principles to an unusual factual scenario. Although this decision departs from the traditional view that the determination of the territorial scope of the statutory rights conferred by employment legislation is entirely disconnected from the choice-of-law process, the immediate impact of this change of view should not be overestimated. The fact that English law governs the employment contract is as of now only one of the factors relevant for the application of the *Lawson v Serco* principles.⁸³ But the Supreme Court's decision raises an important question. Should the choice-of-law process have an even greater importance for determining the territorial scope of the statutory employment rights? To answer this question, we must take a closer look at *Lawson v Serco*.

⁸¹ (n61).

⁸² *Duncombe (No 2)* (n3).

⁸³ Confirmed in *Ravat* (n3) [32].

2.1. *Lawson v Serco: a closer look*

LORD HOFFMANN commenced his speech in *Lawson v Serco* by stating that ‘[r]ead literally, [ERA 1996] applies to any individual who works under a contract of employment anywhere in the world’ and that ‘some territorial limitations must be implied’ because ‘[i]t is inconceivable that Parliament was intending to confer rights upon employees working in foreign countries and having no connection with Great Britain’.⁸⁴ Clearly, *Lawson v Serco* was based on the assumption that ERA 1996 would have world-wide application unless some territorial limitations were implied into it. However, this assumption was erroneous. It disregarded a basic principle of PIL of contract that ‘a statute does not normally apply to a contract unless it forms part of the governing law of the contract’.⁸⁵ Therefore, ERA 1996 could have never claimed world-wide application, but rather applied, in principle, to employment contracts governed by English (or Scottish) law.

One might point out that the Employment Appeal Tribunal in *Financial Times Ltd v Bishop*⁸⁶ and *Bleuse*⁸⁷ rejected this very argument for two reasons. First, because s.204 ERA 1996 prescribes that, ‘For the purposes of this Act it is immaterial whether the law which (apart from this Act) governs any person’s employment is the law of the United Kingdom, or a part of the United Kingdom, or not.’ Second, because the choice-of-law rules for employment contracts do not apply to statutory, but only to contractual rights. However, neither of these counter-arguments can withstand closer scrutiny.

A provision such as that contained in s.204 ERA 1996 was first introduced in s.9(2) of the Contracts of Employment Act 1963. At that time, employment contracts were subject to the common law choice-of-law rules for contract. Under those rules, if

⁸⁴ (n1) [1].

⁸⁵ *Dicey, Morris and Collins* (n4) [1-053].

⁸⁶ (n6) [53]-[55].

⁸⁷ (n8) [43]-[45]. See also *Lawson v Serco* EAT/0018/02TM, 11 March 2003, unreported, [23].

an employment contract was governed by a foreign law, English law, including statute-law, was inapplicable. The purpose of s.9(2) of the 1963 Act was to give this Act ‘the character of a statute embodying a principle of public policy so as to exclude the application of foreign law...whenever this would infringe the policy of the Act’.⁸⁸ This purpose could not have been achieved otherwise because English courts had been reluctant to derive public policy from statute-law, as opposed to case-law, unless expressly compelled to do so.⁸⁹ In the same vein, the purpose of s.204 ERA 1996 is to impose the application of the Act where the application of a foreign law would infringe the Act’s policy. One might argue that s.204 is also intended to preclude the application of the Act where English (or Scottish) law applies only by virtue of the parties’ agreement and there is no other relevant connection with Britain. In other words, one might argue that the purpose of s.204 is to make ERA 1996 not only an ‘overriding’ but also a ‘self-limiting’ (or possibly a ‘self-denying’) statute.⁹⁰ However, regardless of the purpose which s.204 seeks to achieve, one thing is certain. ERA 1996 was never intended to have, and indeed has never had, world-wide application.

Lawson v Serco concerned the territorial scope of the statutory right not to be unfairly dismissed. One might argue that the choice-of-law rules for contract, including the mentioned principle of PIL, do not apply to statutory rights, i.e. that it is exclusively the statute which defines the situations where the rights conferred by it apply. Indeed, this was the position under the common law of conflict of laws.⁹¹ This view also formed the basis of the House of Lords decision in *Lawson v Serco*, as evidenced by the fact that LORD HOFFMAN’s speech made no reference to the choice-of-law rules, which at the time were contained in the Rome Convention. In other words, LORD HOFFMAN

⁸⁸ J. Unger, ‘Use and Abuse of Statutes in the Conflict of Laws’ (1967) 83 LQR 427, 430. See also F.A. Mann, ‘Statutes and the Conflict of Laws’ (1972-1973) 46 BYBIL 117, 137.

⁸⁹ Unger *ibid* 431, referring to O. Kahn-Freund, ‘Reflections on Public Policy in the English Conflict of Laws’ (1953) 39 *Transactions of the Grotius Society* 39.

⁹⁰ This rather clumsy terminology is adopted in *Dicey, Morris and Collins* (n4) [1-049]-[1-063].

⁹¹ See text to nn56 and 57.

was of the view that the choice-of-law rules of the Rome Convention merely took the place of the preceding common law choice-of-law rules for contract and therefore applied only to contractual claims, without affecting the other two types of claims, namely statutory and tortious claims. But this view could not have been correct, since the Rome Convention covered not only contractual but also statutory claims, and is undoubtedly incorrect nowadays when the choice-of-law rules for *all* obligations are contained in Rome I and Rome II.⁹²

The following text demonstrates that the choice-of-law rules of both the Rome Convention and Rome I cover statutory claims. The Rome Convention applies ‘to contractual obligations in any situation involving a choice between the laws of different countries.’⁹³ Rome I applies ‘in situations involving a conflict of laws, to contractual obligations in civil and commercial matters.’⁹⁴ Rome II applies ‘in situations involving a conflict of laws, to non-contractual obligations in civil and commercial matters.’⁹⁵ Employment matters are undoubtedly ‘civil and commercial matters’.⁹⁶ The respective scopes of the Rome Convention and the two Regulations depend on the classification of the relevant obligation, i.e. the defendant’s obligation forming the basis of the claim. Where the basis of the employee’s claim is the employer’s breach of statutory duty, it is the classification of this duty that is crucial. Under the Rome Convention and the two Regulations, (non)contractual obligations are autonomous concepts, independent of any national law.⁹⁷ The fact that a breach of statutory duty normally gives rise to tortious

⁹² Rome I superseded the Rome Convention on 17 December 2009 in relation to all contracts concluded after this date: Arts.28, 29(2). Rome II repealed and replaced, in matters falling within its scope, national choice-of-law rules on 11 January 2009 in relation to events giving rise to damage which occurred after its entry into force: Arts.31, 32.

⁹³ Art.1(1).

⁹⁴ Art.1(1).

⁹⁵ Art.1(1).

⁹⁶ Case 25/79 *Sanicentral* [1979] ECR 3423.

⁹⁷ This is unambiguously stated in Rome II, Recital 11. See also Rome Convention, Art.18; Rome I, Recital 7.

liability in English substantive law⁹⁸ is consequently not determinative. At least until the CJEU has had the chance to rule on these concepts for the purposes of the choice-of-law instruments, the classification of an obligation as (non)contractual should be done by reference to the CJEU case-law on the interpretation of Art.5(1) (special jurisdiction in ‘matters relating to a contract’) and 5(3) (special jurisdiction in ‘matters relating to tort, delict or quasi-delict’) of the Brussels Convention and Brussels I.⁹⁹ In *Kalfelis v Schröder*¹⁰⁰ the CJEU held that Art.5(3) of the Brussels Convention covered ‘all actions which seek to establish the liability of a defendant and which are not related to a “contract” within the meaning of Article 5(1)’.¹⁰¹ The concepts of ‘contract’ and ‘tort, delict or quasi-delict’ in the Brussels Convention and Brussels I are therefore mutually exclusive. By analogy, if an obligation is classified as contractual for the purposes of the Rome Convention or Rome I, it cannot be concurrently classified as non-contractual for choice-of-law purposes. The CJEU has broadly interpreted the concept of ‘contract’ within the meaning of Art.5(1) of the Brussels Convention and Brussels I. Importantly for the present discussion, in *Jakob Handte v TMCS*¹⁰² the CJEU held that ‘the phrase “matters relating to a contract”...is not to be understood as covering a situation in which there is no obligation freely assumed by one party towards another.’¹⁰³ Similarly, the Rome Convention and Rome I should not apply to obligations that are not freely assumed by one party towards another. By entering into an employment contract, the parties freely assume obligations arising under the applicable employment legislation as legal incidents of the contract. Such obligations should, therefore, be classified as contractual for the purposes of the Rome Convention and Rome I, and it is these

⁹⁸ M. Lunney and K. Oliphant, *Tort Law: Text and Materials* (Oxford, 4th ed, 2010) Ch 15.

⁹⁹ Both Rome I, Recital 7 and Rome II, Recital 7 provide that, ‘The substantive scope and the provisions of this Regulation should be consistent with [Brussels I].’ In its preamble, the Rome Convention refers to ‘the work of unification of law which has already been done...in the field of jurisdiction and enforcement of judgments’.

¹⁰⁰ Case 189/87 [1988] ECR 5565.

¹⁰¹ *ibid* [17].

¹⁰² Case C-26/91 [1992] ECR I-3967.

¹⁰³ *ibid* [15].

instruments that determine the applicable law whenever the basis of the employee's claim is the employer's breach of statutory duty.

A recent CJEU decision in *Koelzsch*¹⁰⁴ provides further support for this proposition. Following his dismissal, Mr Koelzsch commenced proceedings against the employer for, among other things, breach of the provisions of the German statute concerning dismissal (*Kündigungsschutzgesetz*). The CJEU had no doubts that the obligations imposed by the German statute were contractual for the purposes of the Rome Convention.

In *Lawson v Serco*, therefore, LORD HOFFMANN started off with a wrong assumption that ERA 1996 would have world-wide application unless some territorial limitations were implied into it. ERA 1996 could have never claimed world-wide application, since it applies, in principle, to employment contracts governed by English (or Scottish) law. What his Lordship should have asked was whether there was a good reason to imply territorial limitations into ERA 1996 where this Act applied as part of the applicable English law or whether there was a good reason to apply ERA 1996 where English law was not the applicable law. Had the right question been asked, his Lordship would have had to lay down different principles for determining the territorial reach of ERA 1996, which principles would have had to take into account the governing law of the employment contract. Before further dealing with these issues, the boundaries that the 'European' choice-of-law rules set for the application of employment legislation must be considered more closely.

¹⁰⁴ Case C-29/10 [2011] ECR 00000. See also Case C-384/10 *Voogsgeerd* [2011] ECR 00000.

2.2. ‘European’ choice-of-law rules and the boundaries within which British employment legislation applies

With regard to the determination of the objectively applicable law, an English lawyer will find it hard to object to the connecting factors used by Rome I. The rules for determining the objectively applicable law of Art.8 are based on essentially the same principles that LORD HOFFMANN expounded in *Lawson v Serco* and LADY HALE and LORD HOPE refined in *Duncombe (No 2)* and *Ravat*. Art.8(2) lays down the rule that the applicable law is the law of the country ‘in which or, failing that, from which’ the employee habitually works. According to LORD HOFFMANN, the standard case for the application of ERA 1996 is the employee working in Britain at the time of the dismissal. ERA 1996 also applies to peripatetic employees based in Britain. These two categories of employees are the same as those contemplated by Art.8(2). Furthermore, LORD HOFFMANN held that, exceptionally, ERA 1996 could also apply to employees who neither worked nor were based in Britain provided there was a sufficiently strong connection between them and Britain and British employment law. LORD HOPE confirmed that the relevant test was one of (exceptionally) strong connection. Similarly, Art.8(4) allows, by way of exception, departure from the choice-of-law rules of Art.8(2) and 8(3) in favour of the law of the country with which the employment contract is more closely connected. One might argue that there is not such a close fit between Art.8 and the *Lawson v Serco* principles after all because Art.8(3) allows, where Art.8(2) is inapplicable, the application of the law of the country of the engaging place of business, whereas *Lawson v Serco* gives no significance to this connecting factor.¹⁰⁵ But the CJEU has interpreted the connecting factor used in Art.8(2) so widely

¹⁰⁵ However, it should be noted that Lord Hoffmann stated in *Lawson v Serco*, at [11], that ‘the original exclusion of cases in which the employee ordinarily “works outside Great Britain” shows that when Parliament created the new remedy in 1971, it thought that the sole criterion delimiting its territorial scope should be the place where the employee worked... It attached no significance to such matters as *the place where he was engaged*, from which he was managed or his employer resided. The repeal of section

that there are almost no situations falling under Art.8(3). Consequently, whenever English law is objectively applicable, the employee will normally fall within the territorial scope of employment legislation.

Art.9(2) Rome I allows the courts to apply domestic overriding mandatory provisions. Overriding mandatory provisions are defined in Art.9(1) 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 extent that they are applicable to any situation falling within their scope, irrespective of the law otherwise applicable to the contract.’¹⁰⁶

As mentioned, s.204 ERA 1996 prescribes that, for the purposes of this Act, it is immaterial whether the proper law of the employment contract is or is not the law of the UK or part of it. Some authors argue, and the courts implicitly accept, that the effect of this section is to turn all provisions of the Act into overriding mandatory provisions that apply to all situations falling within their scope regardless of the applicable law. Indeed, this is the position adopted by the authors of *Dicey, Morris & Collins on the Conflict of Laws*¹⁰⁷ and by PLENDER and WILDERSPIN.¹⁰⁸ They argue that Art.9(1) Rome I gives a country the freedom to decide for itself which provisions of its law are overridingly mandatory. In their view, s.204 ERA 1996 establishes that all provisions of the Act are of this nature. They go even further and argue that the provisions of all other pieces of employment legislation, even if they do not contain a provision such as that contained in s.204, are overriding mandatory provisions that apply to all situations falling within their express or implied territorial scope. But this argument blurs the

¹⁰⁶ means that the courts are no longer rigidly confined to this single litmus test.’ (emphasis added). If the courts are indeed no longer rigidly confined to this ‘single litmus test’, the location of the engaging place of business is a relevant factor for the application of the *Lawson v Serco* principles.

¹⁰⁷ Rome Convention, Art.7 does not contain an analogous definition. Consequently, the following discussion concerning Art.9(1) Rome I is not relevant for the Rome Convention apart from the discussion of the effect of PWD.

¹⁰⁸ (n4) [33-086]-[33-103].

¹⁰⁸ (n4) [11-059]-[11-068], [12-004]-[12-017].

difference between a provision's overriding effect and its territorial scope. It is possible that a provision is overridingly mandatory, but an employee falls outside its territorial scope. Conversely, it is also possible that an employee falls within a provision's territorial scope, but cannot rely on it, since it does not override the applicable law.

British employment statutes cannot, in their entirety, be regarded as overriding mandatory provisions. The CJEU decision in *Commission v Luxembourg*¹⁰⁹ supports this proposition with regard to the situations falling within the scope of PWD. Under Art.3(1) PWD, Member States must apply, regardless of the applicable law, provisions concerning 7 listed matters to undertakings established in other Member States which, in the framework of the transnational provision of services, post workers to their territory. The following are the listed matters: maximum work periods and minimum rest periods, minimum paid annual holidays, minimum rates of pay, conditions of hiring-out of workers, health, safety and hygiene at work, protection of pregnant women, women who have recently given birth, children and young people, non-discrimination. Under Art.3(10) PWD, Member States may also apply 'public policy provisions' concerning non-listed matters. *Commission v Luxembourg* dealt with a provision of a Luxembourg statute which provided that all laws, regulations and administrative provisions etc. concerning certain matters, some of which were not listed in Art.3(1), were 'mandatory provisions falling under national public policy'. The CJEU noted that:

'the classification of national provisions by a Member State as public-order legislation applies to 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

¹⁰⁹ Case C-319/06 [2008] ECR I-4232. This case and its implications are further examined in Chapter VIII, section 3.1.

persons present on the national territory of that Member State and all legal relationships within that State.¹¹⁰

Furthermore, the CJEU stated that Art.3(10), as a derogation from the fundamental freedom to provide services and from the ‘exhaustive’ list of Art.3(1), had to be interpreted strictly and its scope could not be determined unilaterally by Member States.¹¹¹ The Court then found that the provisions of Luxembourg law concerning non-listed matters, despite the express statutory wording to the contrary, did not satisfy the Art.3(10) ‘public policy provisions’ test. This decision shows that the provisions contained in Member States’ employment legislation concerning non-listed matters are highly unlikely to satisfy the Art.3(10) test, even if there is a provision which expressly prescribes that they are overridingly mandatory. There is no other way in which such provisions can override the applicable law in situations falling within the scope of PWD.¹¹²

Another question is whether the provisions contained in British employment legislation can override the applicable law in situations falling outside the scope of PWD. It is possible (although far from certain), for three reasons, that the CJEU will impose limitations on the concept of ‘overriding mandatory provisions’ of Art.9(1) Rome I, which will make the provisions contained in employment legislation concerning matters not listed in Art.3(1) PWD highly unlikely to be regarded as overriding mandatory provisions. First, in the view of the European Commission, PWD is an implementation of Art.9 Rome I.¹¹³ If so, provisions concerning 7 listed matters will be regarded as overridingly mandatory in the sense of Art.9(1). Provisions

¹¹⁰ *ibid* [29].

¹¹¹ *ibid* [30]-[31].

¹¹² C. Barnard, ‘The UK and Posted Workers: The Effect of *Commission v Luxembourg* on the Territorial Application of British Labour Law’ (2009) 38 ILJ 122, 127-132; also Merrett (n4) [8.18]-[8.23].

¹¹³ PWD, Recital 34; European Commission, ‘Green Paper on the conversion of the Rome Convention of 1980 on the law applicable to contractual obligations into a Community instrument and its modernisation’ COM(2002) 654 final, 36.

concerning other matters will be regarded as overridingly mandatory only if they satisfy the test of Art.9(1), i.e. if they are ‘crucial...for safeguarding...political, social or economic organisation’, which is the same test as the one of Art.3(10) PWD. This position seems to be further supported by the wording of Recital 37 Rome I which states that ‘[c]onsiderations of public interest justify giving the courts of the Member States the possibility, *in exceptional circumstances*, of applying *exceptions* based on...overriding mandatory provisions’. Second, the definition of ‘overriding mandatory provisions’ in Art.9(1) is derived from the CJEU decision in *Arblade and Leloup*¹¹⁴ which concerned derogations from the fundamental freedom to provide services. One might argue that the almost word-by-word transposition of the relevant part of the *Arblade and Leloup* decision into Art.9(1) suggests that the concept of ‘overriding mandatory provisions’ is indeed narrow.¹¹⁵ Finally, an employee needs to invoke the concept of overriding mandatory provisions of Art.9(1) only when he falls within the territorial scope of a right conferred by British employment legislation, but neither English nor Scottish law is applicable. This is presumably a rare occurrence given that the principles for determining the territorial scope of statutory rights conferred by employment legislation are essentially the same as those underlying Art.8 Rome I. Presumably, all such occurrences concern postings of workers to Britain. But the vast majority of postings of workers to Britain fall within the scope of PWD and the

¹¹⁴ Joined Cases C-369/96 and C-376/96 [1999] ECR I-8453, [30]-[31]; European Commission, ‘Proposal for a Regulation of the European Parliament and the Council on the law applicable to contractual obligations (Rome I)’ COM(2005) 650 final, 7.

¹¹⁵ A. Bonomi, ‘Overriding Mandatory Provisions in the Rome I Regulation on the Law Applicable to Contracts’ (2008) 10 YPIL 285, 289-290 (but cf 291-295); Deakin and Morris (n4) 104, 106; A. Dickinson, *The Rome II Regulation: The Law Applicable to Non-contractual Obligations* (Oxford, 2008) [15.16]-[15.18]; R. Fentiman, *International Commercial Litigation* (Oxford, 2010) [3.51]-[3.52]; F.J. Garcimartin Alférez, ‘The Rome I Regulation: Much ado about Nothing?’ (2008) 8(2) *The European Legal Forum* I-61, [75]; U. Magnus, ‘Die Rom I-Verordnung’ [2010] IPRax 27, 41; Merrett (n4) [7.44]-[7.47] and [8.38]-[8.42]; Max Planck Institute, ‘Comments on the European Commission’s Green paper on the Conversion of the Rome Convention of 1980 on the law Applicable to Contractual Obligations into a Community Instrument and its Modernisation’, available at <http://www.mppriva.de/shared/data/pdf/commentsgreenpaper.pdf> (last accessed 26/9/2012), answer to question 16, [4]; cf J. Harris, ‘Mandatory Rules and Public Policy under the Rome I Regulation’ in F. Ferrari and S. Leible (eds), *Rome I Regulation: The Law Applicable to Contractual Obligations in Europe* (Munich, 2009) 269, 292-297; M. Hellner, ‘Third Country Overriding Mandatory Rules in the Rome I Regulation: Old Wine in New Bottles?’ (2009) 5 JPIL 447, 457-461.

provisions contained in employment legislation concerning non-listed matters can then apply only if the test of Art.3(10) PWD is satisfied. One might argue that allowing unrestricted application of such provisions in situations concerning other postings of workers to Britain would undermine the choice-of-law process, as well as run counter to the goals of legal certainty, predictability, uniformity of result and discouragement of forum shopping which underlie Rome I.

So how likely are the provisions contained in British employment legislation concerning matters not listed in Art.3(1) PWD to satisfy the test of Art.9(1) Rome I? For example, unfair dismissal is not a listed matter although its importance for the political, social and economic organisation of a country is, without a doubt, great. But it is not certain that the provisions concerning unfair dismissal of ERA 1996 rise to the standard of Art.9(1). Until 6 April 2012, these provisions applied to the dismissal of employees who had been continuously employed for more than a year.¹¹⁶ But the qualifying period of employment has now been raised to two years. The Office for National Statistics figures suggest that an extra 12% of employees have been denied the chance to claim unfair dismissal as a result of the change.¹¹⁷ Provisions which exclude such a large number of working population from their scope seem unlikely to be *crucial* for safeguarding political, social or economic organisation.

Furthermore, one might argue that there is a link between the breadth of the personal scope of employment legislation and its overriding effect. Many provisions contained in British employment legislation concerning matters listed in Art.3(1) PWD extend beyond ‘employees’, i.e. persons working under employment contracts, to encompass wider categories of persons. Thus, provisions concerning working time and

¹¹⁶ s.108(1); Unfair Dismissal and Statement of Reasons for Dismissal (Variation of Qualifying Period) Order 2012/989, Art.3.

¹¹⁷ ‘Employees will pay to bring unfair dismissal claims, government proposes’, *The Guardian*, 3 October 2011.

minimum wage also cover ‘workers’.¹¹⁸ Provisions concerning anti-discrimination apply to ‘employment under a contract of employment, a contract of apprenticeship or a contract personally to do work’.¹¹⁹ Provisions concerning health and safety have the widest personal scope; they also extend to independent contractors.¹²⁰ On the other hand, almost all of the provisions concerning non-listed matters apply only to ‘employees’. An explanation for this difference in personal scope is that the legal regulation primarily directed at the possible misuse of managerial authority is confined to contracts of employment because those contracts contain the implied terms of the requirement of loyalty and performance in good faith.¹²¹ But when legal regulation is directed primarily at the operation of the labour market, as in the case of working time, wages and anti-discrimination legislation, the personal scope is broader.¹²² A similar argument could be advanced with regard to the overriding effect of employment legislation. If a provision primarily concerns the possible misuse of managerial authority, it should apply only if English (or Scottish) law governs the contract. But if a provision is primarily concerned with the operation of the labour market, it could have an overriding effect.¹²³ By way of comparison, the German *Bundesarbeitsgericht* has expressly held that the German provisions concerning unfair dismissal are not

¹¹⁸ See ERA 1996, s.45A(1) (right not to suffer detriment in employment in working time cases); WTR 1998, s.2(1); NMWA 1998, s.1(2)(a).

¹¹⁹ EqA 2010, s.83(2); cf *Jivraj v Hashwani* [2011] UKSC 40.

¹²⁰ HSWA 1974, ss.3, 4.

¹²¹ H. Collins, K.D. Ewing and A. McColgan, *Labour Law: Text and Materials* (Oxford, 2nd ed, 2005) 180.

¹²² *ibid.*

¹²³ See *Van Winkelhof* (n39) in which the Employment Tribunal acknowledged, at [72], the link between the personal and territorial scope of employment legislation. But it should be noted that the provisions concerning whistleblowing had the same territorial scope as those concerning unfair dismissal under the repealed s.196 ERA 1996, which is an argument for submitting the provisions concerning whistleblowing to the *Lawson v Serco* principles. It will be interesting to see if the courts will confirm the link between the personal and territorial scope, and whether they will be tempted to extend the territorial scope of the provisions concerning whistleblowing in light of their wide personal scope.

overridingly mandatory, since they do not have the protection of public interests as their primary purpose, but rather the balancing out of the parties' individual interests.¹²⁴

If the provisions concerning unfair dismissal of ERA 1996 do not satisfy the test of Art.9(1) Rome I, it will be difficult to find any provision contained in ERA 1996 or in any other piece of employment legislation concerning a non-listed matter which can do so. Therefore, if the concept of 'overriding mandatory provisions' of Art.9(1) Rome I is limited to provisions which are 'crucial...for safeguarding...political, social or economic organisation' of a country, it is possible that the provisions contained in British employment legislation concerning matters not listed in Art.3(1) PWD, including unfair dismissal, will apply only if English (or Scottish law) governs the employment contract.

2.3. Should the *Lawson v Serco* approach be abandoned?

Had LORD HOFFMANN not started off with a wrong assumption in *Lawson v Serco*, namely that ERA 1996 would have world-wide application unless some territorial limitations were implied into it, his Lordship would have found it difficult to imply any territorial limitations into this Act. The question before his Lordship would have been whether there was a good reason to imply territorial limitations where ERA 1996 applied as part of the applicable English law. Two types of cases should have been distinguished: those where English law was objectively applicable and those where English law was the chosen law.

Before proceeding further, a preliminary issue must be addressed. One might argue that the rules limiting the territorial scope of British employment legislation are to

¹²⁴ *Bundesarbeitsgericht*, 24 August 1989 [1989] IPRspr 1989 No 146. Dutch courts have adopted a similar approach: *Hoge Raad, Sorensen v Aramco Overseas Company*, 23 October 1987, NJ 1988, 842, cited in H.L.E. Verhagen, 'The Tension between Party Autonomy and European Union Law: Some Observations on *Igmar GB Ltd v Eaton Leonard Technologies Inc*' (2002) 51 ICLQ 135, 144.

be regarded as choice-of-law rules. Their application would then be precluded whenever English law is applicable either because the Rome Convention and Rome I displace national choice-of-law rules in situations falling within their scope or because they exclude *renvoi*.¹²⁵ The nature of such self-limiting rules was discussed in the past. Some saw them as choice-of-law rules,¹²⁶ others as substantive law rules which prescribe a condition for the application of a right.¹²⁷ Suffice it to say that nowadays in England the latter view is unanimously, and correctly, accepted.¹²⁸ The rules limiting the territorial scope of employment legislation are therefore a creature of statutory construction and apply, like any other rule limiting the scope of employment legislation (e.g. qualifying period of employment), even when English law is the applicable law.

So would there have been a good reason to imply territorial limitations into ERA 1996 when the Act applied as part of the objectively applicable English law? Given that the rules for determining the objectively applicable law for employment contracts of the Rome Convention and Rome I are based on essentially the same principles that the House of Lords laid down in *Lawson v Serco* and the Supreme Court refined in *Duncombe (No 2)* and *Ravat*, any implication of territorial limitations when English law was objectively applicable would have been hard to justify. This would have been particularly so where the parties did not choose a law that was different from the objectively applicable English law. The implication of territorial limitations in such situations could lead to a legal vacuum, i.e. to English law being the only applicable law, but the employee being unable to invoke any protective provisions of that law.

¹²⁵ Rome Convention, Art.15; Rome I, Art.20. See S. Krebber, ‘Conflict of Laws in Employment in Europe’ (2000) 21 CLLPJ 501, 520-521.

¹²⁶ J.H.C. Morris, ‘The Choice of Law Clauses in Statutes’ (1946) 62 LQR 170.

¹²⁷ Mann (n88) 136-137; Unger (n88) 428-433.

¹²⁸ Dicey, Morris and Collins (n4) [1-049]-[1-052], [33-086]-[33-103]; Collins, Ewing and McColgan (n121) 47; Deakin and Morris (n4) 99, 404; Merrett (n4); Plender and Wilderspin (n4) [11-060], [11-063]-[11-065], [11-068]; Scott (n4).

However, one might argue that ‘the general principle of construction...that legislation is *prima facie* territorial’¹²⁹ at least precludes the application of ERA 1996 where English law is only the chosen law and not also the objectively applicable law. But according to *Dicey, Morris & Collins on the Conflict of Laws*, if the ‘presumption that Parliament does not design its statutes to operate beyond the territorial limits of the United Kingdom...still exists, it is one which is easily rebutted.’¹³⁰ There are good reasons why this ‘presumption’ should be rebutted in cases concerning employment legislation. S.2(1) of the European Communities Act 1972 expresses Parliament’s intention that all its legislation, past, present and future, must be ‘construed and have effect’ in accordance with EU law. Since the territorial limitations of employment legislation are contrary to three objectives of Rome I, namely party autonomy, employee protection and legal certainty, Parliament must be presumed to have intended its employment legislation to apply, in principle, within the boundaries determined by the choice-of-law rules of Rome I. Furthermore, one must bear in mind that the provisions of Rome I have direct effect in EU law. The principle of effectiveness in EU law requires that all national provisions which preclude their effectiveness be modified or disregarded. With regard to the Rome Convention, admittedly this instrument is not part of EU law and does not have direct effect. Nevertheless, an English court mindful of its international character and of the desirability of achieving uniformity in its interpretation and application¹³¹ would have to take into consideration the objectives pursued by this instrument and refrain from implying the territorial limitations into employment legislation.

¹²⁹ *Lawson v Serco* (n1) [6].

¹³⁰ (n4) [1-038]. Also Dutson (n57) 675.

¹³¹ Rome Convention, Art.18.

First, party autonomy is the ‘cornerstone’ of the Rome Convention and Rome I.¹³² English law allows the parties to incorporate the provisions of ERA 1996 concerning say unfair dismissal into their employment contract, which provisions are then enforceable in ordinary contractual disputes. There does not seem to be a good reason why the parties should not be allowed to achieve the same result by means of a choice-of-law clause in favour of English law. The Employment Appeal Tribunal tried to counter this argument in *Financial Times Ltd v Bishop*¹³³ by holding that a ‘Senegalese employee working in Peru for a Wisconsin corporation [should] not be enabled to bring proceedings in the Tribunals here to assert the right not to be unfairly dismissed simply because his contract of employment happened to provide that English law was the proper law of his contract.’ Leaving aside the point that English courts might not have international jurisdiction to hear the claim in such a case, it should be noted that no rational employee from Senegal working in Peru would agree with a rational employer from Wisconsin on the application of English law. The more likely scenario is a choice-of-law clause in an employment contract between an Englishman and an English or a foreign company or between a foreigner and an English company. When such parties choose English law, they expect the whole of English law, including statute-law, to apply. In particular, the legitimate expectations of English employees are not upheld if the choice of English law does not lead to the application of the statutory employment rights, which are the primary means of employee protection in this country. Even the Supreme Court recognised this by stating, in *Duncombe (No 2)*, that the fact that English law was chosen by the parties:

‘must be relevant to the expectation of each party as to the protection which the employee would enjoy. The law of unfair dismissal does not form part of the contractual terms and conditions of employment, but it was devised by

¹³² Rome I, Recital 11.

¹³³ (n6) [55].

Parliament in order to fill a well-known gap in the protection offered by the common law to those whose contracts were ended.¹³⁴

Moreover, a typical feature of the employment relation is the asymmetry of information. The employer is more likely than the employee to know the law. The employer may use this knowledge to its advantage when drafting standard form contract of employment. As the law stands, the employer who is knowledgeable of the territorial limitations of the statutory employment rights and who employs employees to work abroad can, almost without any adverse consequences on its part, insert a choice-of-law clause in favour of English law. On the other hand, the employee is unlikely to be knowledgeable of the problem of territoriality. If he sees an English choice-of-law clause, he will assume that he is entitled to the protection of the whole of English law, including statute-law. He might even be told so by his employer, as the employee in *Ravat* was. Furthermore, an English employee might even accept a somewhat lower salary in return for the application of 'his' law. In order to eradicate such adverse consequences of asymmetry of information, the whole of English law, including statute-law, should, in principle, be applied whenever English law is chosen by the parties.

Second, the territorial limitations preclude the operation of the protective mechanism of the Rome Convention and Rome I whenever English law is only the chosen law. A way in which these instruments seek to achieve employee protection is by allowing the parties to choose a law that provides better protection than the objectively applicable law. If English law is only the chosen law, the *Lawson v Serco* principles preclude the application of the statutory employment rights, the primary means of employee protection in this country. Therefore, the territorial limitations undermine the objective of employee protection.

¹³⁴ (n3) [16]. See also *Ravat* (n3) [32].

Third, the territorial limitations run afoul of the objective of legal certainty. *Duncombe v Secretary of State for Children, Schools and Families*¹³⁵ is the best proof of how uncertain it is to foresee the exact territorial scope of the rights conferred by employment legislation and the outcome of litigation. It is expected that the questions of differentiation between statutory and contractual rights conferred by employment legislation and of impact of EU law on the territorial scope of employment legislation will continue to cause considerable legal uncertainty in the future.

Finally, employment legislation of mainland European Member States is not, in principle, of strictly territorial application like most of British employment legislation. Thus, if the parties choose French or German law, employment legislation of these countries, in principle, applies even if French or German law is only the chosen law.¹³⁶ In these cases, employees are accorded the protection of the most favourable provisions found in French or German law and in the objectively applicable law. The territorial limitations of the statutory rights conferred by British employment legislation, however, mean that these rights do not apply in analogous situations, i.e. when English (or Scottish) law is only the chosen law. These territorial limitations thereby put British employers, who are more likely than employers from other Member States to agree on the application of English (or Scottish) law, in an unjustifiably better position in relation

¹³⁵ (n3) and (n61).

¹³⁶ See e.g. *Cour de cassation, SA CIEC v Piriou*, 28 October 1997 [1998] *Droit social* 186, note M.-A. Moreau; *Bundesarbeitsgericht*, 21 January 1999 [1999] IPRspr No 46. One might note that in *Sayers v International Drilling Co NV* [1971] 1 WLR 1176 the Court of Appeal found that a provision of Dutch law invalidating a clause in the contract of employment exempting the employer from liability for injury to the employee had a limited territorial scope. However, this finding is controversial. As Salmon LJ noted at 1182, 'according to the evidence called before the judge, there is in Dutch law a distinction between an ordinary contract and what is called an international contract of employment. As far as an international contract is concerned the clause excluding the master's liability for negligence is effective. There was no explanation in the evidence of the Dutch lawyer as to what constitutes an international contract; nor any authority cited as to the effect of such a contract. However, there was no cross-examination and no evidence called on the part of the plaintiff on this issue. The judge accordingly had no alternative other than to accept as he did the evidence of the Dutch lawyer.' But according to P.M. North this was an erroneous conclusion as to Dutch law: 'Reform, but not Revolution' (1990-I) 220 *Recueil des Cours* 9, 226, fn743, citing T.M. de Boer, *Beyond Lex Loci Delicti: Conflicts Methodology and Multistate Torts in American Case Law* (The Hague, 1987) 186.

to comparable employers from other Member States. One wonders if this is in accordance with EU law.

In conclusion, the *Lawson v Serco* approach should be abandoned for two reasons. First, the principles that this case lays down are the same as those underlying the rules for determining the objectively applicable law for employment contracts of the Rome Convention and Rome I. Second, the limitations of the territorial scope of employment legislation are contrary to the objectives pursued by these instruments, especially when English law is the chosen law. It is not suggested here that the territorial limitations should be completely abolished. If there are good reasons to limit the application of the provisions of a particular piece of employment legislation, e.g. health and safety legislation, to a particular territory, Parliament is free to do so. However, the territorial limitations should not be routinely implied into employment legislation.

Conclusions

In the common law of conflict of laws of employment, statutory claims were regarded as a different category from contractual and tortious claims. The determination of the territorial scope of the statutory rights conferred by employment legislation forming part of English law was regarded as an issue entirely disconnected from the choice-of-law process. The conventional view has been upheld by the House of Lords in *Lawson v Serco* and by the Supreme Court in recent cases.

But Rome I, and to a certain extent the Rome Convention, have radically changed the law in this field. First, since both of these instruments apply to statutory claims, employment legislation does not have world-wide application because it applies, in principle, to employment contracts governed by English (or Scottish) law. Second,

there are no reasons to routinely impose territorial limitations into the statutory employment rights when English law is objectively applicable, since the rules for determining the objectively applicable law for employment contracts of the Rome Convention and Rome I are based on essentially the same principles that the House of Lords laid down in *Lawson v Serco* and the Supreme Court later refined. Third, the territorial limitations of the statutory employment rights should be avoided as far as possible when English law is the chosen law. Such territorial limitations are not only contrary to the objectives of party autonomy, employee protection and legal certainty pursued by the Rome Convention and Rome I but also put British employers who employ employees to work abroad in an unjustifiably better position in relation to comparable employers from other Member States. Finally, it is possible that the concept of 'overriding mandatory provisions' of Art.9(1) Rome I will be limited to provisions which are 'crucial...for safeguarding...political, social or economic organisation' of a country, in which case the provisions contained in employment legislation will have overriding effect, i.e. apply when English law is not the law governing the employment contract, only if the stringent requirements of Art.9(1) are satisfied. If so, it is possible that the provisions concerning unfair dismissal of ERA 1996 will not be regarded as overriding mandatory provisions and will apply only if English (or Scottish) law governs the employment contract. In other words, Rome I, and to a certain extent even the Rome Convention, seem to have in effect largely merged contractual and statutory claims into a single category for the purposes of PIL. Consequently, the approach pursued in *Lawson v Serco* is no longer correct, if it ever was, and should not be followed in the future. The following chapter examines whether, and to what extent, Rome I impacts tortious claims.

VII TORTIOUS CLAIMS

‘The plaintiff can advance his claim, as he wishes, either in contract or in tort; and no doubt he will, acting on advice, advance his claim on the basis which is most advantageous to him.’

GOFF LJ¹

In English employment law, employees can sometimes commence proceedings in tort. An employee may bring a claim for breach of the employer’s personal and non-delegable duty of care or on the basis of the employer’s vicarious liability for the torts of employees committed in the course of employment. In addition to being able to sue in tort in these two types of case, employees may also proceed in contract for breach of the employer’s implied duty to take reasonable care of their employees’ health and safety.² Employees are not only free to choose the legal basis on which to advance their claims but also to frame them in both tort and contract and get the best of both worlds,³ subject to the rule against double recovery. Employers can also sometimes sue their employees on multiple bases. For example, an employee owes duties in relation to the employer’s intangible assets, in particular its intellectual property including commercial know-how and goodwill; these duties are both implied in the contract and form part of a

¹ [1983] 1 WLR 1136 (CA), 1153.

² *Lister v Romford Ice and Cold Storage Co Ltd* [1957] AC 555 (HL), 573 (‘It is trite law that a single act of negligence may give rise to a claim either in tort or for breach of a term express or implied in a contract’, *per* Lord Simmonds).

³ *Henderson v Merrett Syndicates Ltd (No 1)* [1995] 2 AC 145 (HL), 193-194 (‘the common law is not antipathetic to concurrent liability, and...there is no sound basis for a rule which automatically restricts the claimant to either a tortious or a contractual remedy’, *per* Lord Goff).

general set of obligations to refrain from breach of confidence.⁴ Similarly, during employment an employee owes duties not to compete with the employer's interests or act negatively in relation to them.⁵ Breach of such duties can be conceptualised either as a breach of an implied contractual term or as a tort of conspiracy.

Do the parties to an international employment contract have an analogous freedom in PIL and, if so, under what conditions? In other words, can a party advance his claim *either* on a tortious *or* a contractual basis depending on whether he finds the law governing the tort (the *lex delicti*) or the law governing the contract (the *lex contractus*) more advantageous? Can a party proceed on *both* bases and win the case if his claim succeeds under one of the governing laws? This chapter first explores these and related questions and discusses the choice-of-law rules of Rome II. It then examines the choice-of-law problems concerning contractual exemption clauses.

1. Concurrent causes of action in choice of law

The crux of the problem is best described by BRIGGS: does a claimant have, and should he have, 'the freedom...to choose the choice of law rule which will dictate the result of the claim he advances against a defendant'?⁶ This question opens a host of other questions. Which law decides whether such freedom is allowed? Is this a matter of procedure, governed by the *lex fori*, or substance, governed by the law applicable to the merits (the *lex causae*)? If it is a matter of substance, is it governed by the *lex delicti* or the *lex contractus*? What if the *lex delicti* and the *lex contractus* are different laws that are in disagreement on whether the claimant is free to advance his claim on more than one basis or to frame the claim on multiple bases simultaneously? Or do Rome II and

⁴ M. Freedland, *The Personal Employment Contract* (Oxford, 2003) 173-174.

⁵ *ibid* 174.

⁶ A. Briggs, 'Choice of Choice of Law' [2003] LMCLQ 12.

Rome I provide an autonomous solution? Before answering these questions, the way in which the English common law of conflict of laws dealt with concurrence is sketched.

1.1. The common law

In relation to concurrence, the common law of conflict of laws mirrored substantive law. The claimant was free to formulate his claim on any basis for which there was a separate choice-of-law category (contract, tort, equity etc.), plead only the facts necessary to establish the cause of action and, consequently, trigger the application of the corresponding choice-of-law rules. This is supported by *Matthews v Kuwait Bechtel Corp*,⁷ *Coupland v Arabian Gulf Oil Co*,⁸ and *Johnson v Coventry Churchill International Ltd*.⁹ The claimants in these cases suffered injuries at work abroad and sued their employers in England. According to SELLERS LJ in *Matthews*, ‘It is at the election of the workman in circumstances such as these whether...he will sue in contract or sue in tort.’¹⁰ The statement of GOFF LJ in *Coupland* cited in the introduction to this chapter is to the same effect. The reason for pursuing the claim on one or the other basis may lie, for example, in the differences between the substantive rules of the *lex delicti* and the *lex contractus* (different limitation periods, different rules concerning damages etc.) or in the possibility of invoking different heads of jurisdiction under the English traditional rules.¹¹ The claimant in *Matthews* was allowed to frame his claim in contract, whereas the claimants in *Johnson* and *Coupland* advanced their claims in tort.

The claimant was also free to accumulate causes of action, i.e. to advance his claim on as many bases for which there was a separate choice-of-law category for

⁷ [1959] 2 QB 57.

⁸ (n1).

⁹ [1992] 3 All ER 14 (QB).

¹⁰ (n7) 67.

¹¹ Civil Procedure Rules, Practice Direction 6B, para.3.1 does not contain a special head of jurisdiction for employment matters. Consequently, the basis on which the employment claim is advanced is crucial as it allows the claimant to rely on different heads of jurisdiction where the permission of the court is needed to serve the claim form on the defendant out of the jurisdiction.

breach of essentially one duty. In *Base Metal Trading Ltd v Shamurin*¹² the claimant company sued its director, who was also one of its corporators and employed by it as a trader, for causing it loss by performing his trading activities negligently or incompetently. The claim was advanced on three bases: 1) for breach of the employment contract, 2) for breach of the common law duty of care, 3) for breach of the director's equitable duty of care. The court examined each cause of action independent of the others and found that the contractual and tortious causes of action were governed by a different law from that governing the equitable one. The claim, however, failed under both governing laws. *Shamurin* shows that the common law of conflict of laws permitted the claimant to advance his claim on multiple bases and to win the entire case if he was successful under at least one of them.

With this background in mind, the following text explores how the European choice-of-law instruments deal with concurrence.

1.2. Is concurrence a procedural issue?

The question whether the claimant is free to choose the choice-of-law rule(s) in European PIL is one of classification. Should it be regarded as a matter of procedure or substance? Rome II and Rome I prescribe that they do not apply to evidence and procedure,¹³ but provide no guidance on how evidentiary or procedural matters are to be distinguished from substantive ones. If the question were one of procedure, as some suggest,¹⁴ English courts could simply continue to follow the common law approach. To resolve this problem of classification, one must look into the origin of that approach.

¹² [2002] CLC 322 (QB); [2003] EWHC 2419; [2004] EWCA Civ 1316 (*Shamurin*).

¹³ Rome II, Art.1(3); Rome I, Art.1(3).

¹⁴ R. Fentiman, *International Commercial Litigation* (Oxford, 2010) [5.34]-[5.35]; J. Hill and A. Chong, *International Commercial Disputes: Commercial Conflict of Laws in English Courts* (Oxford, 4th ed, 2010) [15.4.5]. See also European Commission, Explanatory Memorandum accompanying the Proposal of Rome II COM(2003) 427 final, 12-13.

According to WEIR,¹⁵ English law permits concurrence because the categories of contract and tort are not intrinsic to the common law. Historically, English law was categorised by reference to *procedural forms of action* through which liability could be asserted. '[T]he whole development of English law may be traced through decisions where the judges finally allowed another and better remedy alongside an existing one.'¹⁶ The procedural forms were abolished in the mid-19th century and replaced with *substantive categories* such as contract and tort. Since it was not easy to reallocate to the categories of contract and tort the liabilities which had existed under the procedural forms, English lawyers struggled to classify various obligations that had been recognised. Concurrent liability (i.e. the existence of essentially one duty in different branches of the law) was permitted, since the law had already been accustomed to concurrence of procedural forms.

The common law of conflict of laws, presumably under the influence of the old thinking, continued to regard the nature and extent of remedies as procedural matters.¹⁷ One might assume that, from the English viewpoint, the question whether concurrence is permitted in choice of law should, by analogy with the closely related issue of remedies, also be regarded as one of procedure. However, Rome II expressly provides that 'the existence, the nature, and the assessment of damage or the *remedy* claimed' are matters of substance, governed by the *lex causae*.¹⁸ Consequently, the view that, for classification purposes, the issue of concurrence should be treated in the same way as the issue of remedies actually leads to the former being classified as substantive for the purposes of Rome II and Rome I.

¹⁵ T. Weir, 'Complex Liabilities' in A. Tunc (ed), *International Encyclopedia of Comparative Law* Vol 11 (Tübingen, 1983-) Ch 12, [67]-[68].

¹⁶ *ibid* [67].

¹⁷ L. Collins (gen ed), *Dicey, Morris and Collins on the Conflict of Laws* (London, 14th ed, 2006) [7-006]-[7-009]; J.J. Fawcett and J.M. Carruthers, *Cheshire, North & Fawcett: Private International Law* (Oxford, 14th ed, 2008) 94-95.

¹⁸ Art.15(c). See also Rome I, Art.12(1)(c).

Anyway, the issue of concurrence must be treated as substantive on its own merit. Two Commonwealth authorities are useful for drawing the line between substance and procedure in PIL. In *John Pfeiffer Pty v Rogerson*¹⁹ the High Court of Australia stated that ‘matters that affect the existence, extent or enforceability of the rights or duties of the parties to an action are matters that, on their face, appear to be concerned with issues of substance.’ In *Tolofson v Jensen*²⁰ the Supreme Court of Canada stated that ‘the purpose of the substantive/procedural classification is to determine which rules will make the machinery of the forum court run smoothly as distinguished from those determinative of the rights of both parties.’ Rules concerning concurrence do not deal with ‘the running of the machinery of the forum court’. The ‘machinery’ will ‘run’ the same regardless of whether the claimant advances his claim in tort, contract, or on both bases. But the ‘existence, extent or enforceability of rights or duties of the parties’ may differ depending on which path the claimant follows.

By way of comparison, the issue of concurrence is regarded as substantive in mainland Europe. For example, concurrence is not allowed in France where the rule of *non cumul des responsabilités* is adopted.²¹ Contractual liability prevails primarily for two reasons.²² First, Arts.1382 and 1383 of the Civil Code provide for delictual liability in the event that any fault causes damage of any kind; if concurrence were allowed, almost all breaches of contract would also be treated as delict. Second, Art.1384(1) of the Civil Code would then introduce strict liability into the law of contract every time a contractor or his property was damaged by a thing under his counter-party’s control. In

¹⁹ (2000) 203 CLR 503, [104], cited with approval in *Dicey, Morris and Collins* (n17) [7-003] and A. Dickinson, *The Rome II Regulation: The Law Applicable to Non-Contractual Obligations* (Oxford, 2008) [14.59]–[14.60].

²⁰ [1994] 3 SCR 1022, 1071-1072, *per* La Forest J, cited with approval in *Dicey, Morris and Collins* ibid [7-041] and R. Plender and M. Wilderspin, *The European Private International Law of Obligations* (London, 3rd ed, 2009) [17-067].

²¹ H.G. Beale and others, *Cases, Materials and Text on Contract Law* (Oxford, 2nd ed, 2010) 112-114; Weir (n15) [52]-[57].

²² Weir ibid [54].

Germany, concurrence is, in principle, allowed.²³ Its introduction was actually necessary:²⁴ damages for pain and suffering were not available in contract suit and it would have been intolerable to give such damages to a pedestrian and not to a passenger; the absence of any provision for positive breach of contract made it necessary for contractors to be able to sue each other in delict. It is clear that the French and German rules concerning concurrence reflect the balance struck between the constituent parts of the law of obligations in these countries. They do not concern procedure.

Furthermore, the objectives of legal certainty, predictability, uniformity of result and discouragement of forum shopping which underlie Rome II and Rome I also require a substantive classification. Suppose an Englishman, habitually working for an English employer in Belgium where he is also habitually resident, suffers injury at work in France and commences proceedings in England. If English courts always followed the English view on concurrence as a rule of the *lex fori*, the employee would be permitted to advance his claim in either contract or tort, or both. It is likely that, on these facts, the *lex delicti* would be French and the *lex contractus* Belgian law.²⁵ If the employee's claim succeeded under one of the governing laws, he would win the case. But the problem is that neither Belgian nor French law allows concurrence. The application of the English rules on concurrence in English proceedings would undermine the mentioned objectives of the two Regulations given that Belgian and French courts would allow the claimant to sue only in contract. Furthermore, as *Shamurin*²⁶ shows, a procedural classification could put defendant employees in a precarious position. Employees should be protected from having to defend their cases under several applicable laws for the alleged breach of essentially one duty.

²³ Beale and others (n21) 114-115; Weir *ibid* [58]-[66].

²⁴ Weir *ibid* [63].

²⁵ See text accompanying n69 below.

²⁶ (n12).

Therefore, the issue of concurrence should be classified as substantive, and the rules concerning concurrence should apply only as part of the *lex causae*. This is in accordance with the broad sphere of application that the two Regulations give to the law governing the merits²⁷ and the trend of limiting the category of procedure by broadening the scope of the *lex causae*.

1.3. Rome II and Rome I: an autonomous solution?

Choice-of-law rules for *all* obligations in England are today of EU law origin, contained in Rome II and Rome I. The reluctance of the CJEU to allow the application of the rules of the English common law of conflict of laws in matters covered by EU PIL is notorious.²⁸ The CJEU would certainly not allow the application of the English rules concerning concurrence in situations falling within the scope of the two Regulations. As BRIGGS puts it, ‘it is though a metric choice of law rule has replaced one calibrated in imperial units of measurement’.²⁹

Do Rome II and Rome I permit concurrence? The answer depends on whether a claim for compensation (or other remedies) for damage caused either by an event or an act of the defendant or a person for whom the defendant is vicariously liable that gives rise to the defendant’s concurrent liability in more than one branch of *substantive* law can simultaneously trigger the application of the *choice-of-law* rules of both Regulations. If so, concurrence is permitted.

The scope of application of Rome II and Rome I was examined in section 2.1 of the previous chapter. It will be remembered that the respective scopes of the two

²⁷ Rome II, Art.15; Rome I, Art.12.

²⁸ Case C-281/02 *Owusu v Jackson* [2005] ECR I-1383 (the traditional English doctrine of *forum non conveniens* has no role to play under the Brussels regime); Case C-159/02 *Turner v Grovit* [2004] ECR I-3565 and Case C-185/07 *West Tankers* [2009] ECR I-663 (English courts cannot issue anti-suit injunctions to restrain proceedings in another Member State falling within the scope of the Brussels regime).

²⁹ (n6) 28.

Regulations depend on the classification of the defendant's obligation forming the basis of the claim. (Non)contractual obligations are autonomous concepts under the two Regulations. By analogy with the CJEU case-law under the Brussels regime, which may be used to interpret analogous concepts in the choice-of-law instruments, the concepts of contractual and non-contractual obligations are mutually exclusive. If an obligation is classified as contractual for the purposes of Rome I, it cannot be simultaneously classified as non-contractual for the purposes of Rome II.³⁰ The concept of 'contract' within the meaning of Art.5(1) of the Brussels Convention and Brussels I has been interpreted broadly: 'the phrase "matters relating to a contract"...is not to be understood as covering a situation in which there is no obligation freely assumed by one party towards another.'³¹ Similarly, Rome I should not apply to obligations that are not 'freely assumed' by one party towards another. Rome II applies in these situations.

What is the relevant obligation whose classification determines which set of choice-of-law rules applies? It must be stressed in this respect that the issue of concurrence arises where breach of essentially *one duty* (e.g. employer's duty to compensate the employee for certain injuries suffered in the course of employment or employee's duty to compensate the employer for performing his working activities negligently) gives rise to the defendant's concurrent liability in more than one branch of substantive law. In English employment law and in the common law of conflict of laws, unlike in some mainland European countries, the claimant can formulate his claim on any basis for which there is a separate substantive or choice-of-law category and plead only the facts necessary to establish the cause of action. Therefore, by pleading certain facts and by framing his claim in a certain way, the claimant can achieve the

³⁰ L. Collins (gen ed), *Dicey, Morris and Collins on the Conflict of Laws*, 4th Cumulative Supplement to the 14th Edition (London, 2010) [S35-177]; Dickinson (n19) [3.72], [3.104]; Fawcett and Carruthers (n17) 779; Hill and Chong (n14) [15.4.4]; L. Merrett, *Employment Contracts in Private International Law* (Oxford, 2011) [6.33]; Plender and Wilderspin (n20) [2-024]; A. Rushworth and A. Scott, 'Rome II: Choice of law for non-contractual obligations' [2008] LMCLQ 274, 299.

³¹ Case C-26/91 *Jakob Handte v TMCS* [1992] ECR I-3967, [15].

application of the desirable substantive law and choice-of-law rules. Can claimants do the same in European PIL?

In the context of the Brussels regime the answer is no. The special jurisdictional rules of Brussels I apply ‘in matters relating to individual contracts of employment’.³² Regardless of the facts the claimant pleads and the way he frames his claim, the special jurisdictional rules are engaged if the employment contract is legally relevant to the claim. Thus, a claim against an employee for conspiracy to harm the employer’s business by soliciting fellow employees is a matter relating to the employment contract.³³ But claims for breaches of copyright and misuse of confidential information against a former employee who obtained the employer’s design drawings by bribing a fellow employee for the purpose of facilitating unlawful competition against the employer are not.³⁴ A parallel can be made with the case-law concerning the application, in borderline cases, of Art.5(1) (special jurisdiction in ‘matters relating to a contract’) and 5(3) (special jurisdiction in ‘matters relating to tort, delict or quasi-delict’) of the Brussels Convention and Brussels I. Art.5(1) applies whenever a claim is based on an obligation which arises between contracting parties and which can be framed in contractual terms even if the claimant frames his claim in tort and pleads the facts accordingly.³⁵ One might therefore say that it is the essence of the defendant’s duty giving rise to concurrent liability in substantive law that is being classified, not the various expressions of that duty in substantive law. If the duty exists because there is a contract between the parties, if it is a corollary of the contract, the jurisdictional rules for tort do not apply.

³² Art.18(1).

³³ *CEF Holdings Ltd v Mundey* [2012] EWHC 1524 (QB), disapproving *Swithenbank Foods Ltd v Bowers* [2002] EWHC 2257 (QB).

³⁴ *Alpha Laval Tumba AB v Separator Spares International Ltd* [2012] EWHC 1155 (Ch) (appeal pending).

³⁵ Case C-334/00 *Tacconi* [2002] ECR I-7357, Opinion of AG Geelhoed, [67]; *Source Ltd v TUV Rheinland Holding AG* [1998] QB 54 (CA), affirmed in *Rayner v Davies* [2003] ILPr 14 (QB), [18]-[19] and *Barry v Bradshaw* [2000] ILPr 706 (CA), [10]; see also *Mazur Media Ltd v Mazur Media GmbH* [2004] EWHC 1566 (Ch), [30]; *Burke v Uvex Sports GmbH* [2005] ILPr 26 (Irish High Court).

Is there a parallelism in this respect between the jurisdictional and choice-of-law rules in employment cases? The leading authority is a pre-Rome II and Rome I case of *Shamurin*.³⁶ It will be remembered that the claimant advanced his claim on three grounds: for breach of contract and breach of the common law and equitable duties of care. Pursuant to the Rome Convention, the contract was governed by Russian law which imposed no liability on the defendant. The claimant attempted to circumvent this by advancing his claim on two additional bases and arguing that the tortious and equitable causes of action were governed by English law. The court therefore had to deal with the classification of the common law and equitable duties. The defendant argued that, although imposed *ex lege* in English substantive law, those duties should be regarded as contractual for the purposes of the Rome Convention because he, as a director and an employee of the claimant company, had voluntarily assumed responsibility. The court disagreed. According to TUCKEY LJ:

‘a contractual obligation is by its very nature one which is voluntarily assumed by agreement. Terms may be implied into that agreement, but that is because they are necessary to make what has been agreed work and so this does not undermine the fact that the agreement is consensual. There is nothing consensual about the imposition of a tortious or equitable duty of care. It arises from a voluntary assumption of responsibility, but that is a state of affairs which is not dependant on agreement.’³⁷

The Court of Appeal therefore chose not to follow at the level of choice of law the autonomous standards of classification relevant for the purposes of the European jurisdictional rules. Instead of determining whether the defendant’s duty was essentially of consensual or non-consensual nature, the court focused on classifying, for

³⁶ (n12).

³⁷ [2004] EWCA Civ 1316, [28]; similarly [2002] CLC 322 (QB), [8], *per* Moore-Bick J; cf [2003] EWHC 2419 (Comm), [35], *per* Tomlinson J.

choice-of-law purposes, the various expressions of that duty in English employment law, being the law under which the tortious and equitable causes of action were advanced. The court justified the application of different standards of classification under the jurisdictional and choice-of-law rules on the ground that the objectives of the Brussels regime and the Rome Convention are not identical.³⁸ The CJEU has striven, so far as possible, to avoid fragmentation of jurisdiction, i.e. situations where a number of courts have jurisdiction in respect of one and the same matter. Since this concern is absent in choice of law, the application of multiple laws in the case of breach of essentially one duty did not trouble the Court of Appeal.

The reasoning of the court is echoed in the manner some English academics approach the problem of classification. Although an autonomous classification of the concept of (non)contractual obligations for the purposes of Rome II and Rome I is beyond doubt,³⁹ an argument has nevertheless been advanced that the scene for classification is set by the law(s) under which the claim is made. According to RUSHWORTH and SCOTT:

‘[Rome II] looks to the events out of which [non-contractual] obligations arise...

Since the Regulation focuses on obligations and the events out of which they arise, these provide the data for characterization... [S]uch data must include an obligation’s nature, incidents and the constitutive elements of the event from which it arises. It is submitted that *the only law that can provide this data is the law by reference to which the claimant pleads his claim.*⁴⁰

Applied to the facts of *Shamurin*, this approach would lead to English law supplying the data for the choice-of-law classification of the alleged tortious and equitable duties and

³⁸ [2004] EWCA Civ 1316, [34]. Moore-Bick J also found that arguments derived from the Brussels regime ‘raise quite different considerations’: [2002] CLC 322 (QB), [9].

³⁹ Rome II, Recital 11; Rome I, Recital 7.

⁴⁰ (n30) 296 (emphasis added). Similarly, Dickinson (n19) [3.67]-[3.72], [3.121].

to Russian law doing the same in relation to the contractual cause of action. Since, according to TUCKEY LJ, ‘[t]here is nothing consensual about the imposition of a tortious or equitable duty of care’ in English law, the data provided by English law (i.e. non-contractual nature of tortious and equitable duties; irrelevance of consent) would lead to the employee’s alleged breach of essentially one duty not to perform his working activities negligently triggering the application of both Rome II and Rome I.⁴¹

But this line of reasoning is not compelling. Statutory employment duties, for example, are also neither express nor implied contract terms but are imposed by law and ordinarily cannot be derogated from. If the reasoning of TUCKEY LJ were followed, statutory employment duties would have to be classified as non-contractual obligations and, as such, fall within the scope of Rome II. But the preceding chapter shows that statutory employment duties are to be classified as contractual in European PIL. Furthermore, the claim in *Shamurin* was essentially based on breach of the defendant’s obligation to perform his trading activities with reasonable skill and care. It happened that that obligation existed in more than one branch of the law of obligations (contract, tort, equity) in one of the laws (English) closely connected with the parties’ relationship. But this obligation flowed directly from the contractual relationships (employee-employer and director-company) between the parties. Had there been no contractual relationships, the obligation would have never existed. By entering into the contracts, Mr Shamurin freely assumed liability for performing his trading activities negligently, regardless of the classification of this duty in the laws connected with the parties’ relationship. There is therefore a strong argument that the obligation was ‘freely assumed’ and should have been classified as contractual for the purposes of the Rome

⁴¹ Dickinson *ibid* [3.72], [3.128]-[3.139]; Merrett (n30) [6.29]-[6.30], [6.32]-[6.33] (but cf [6.33], fn66); see also Dicey, *Morris and Collins*, 4th *Cumulative Supplement to the 14th Edition* (n30) [S35-177]; Rushworth and Scott *ibid* 298.

Convention.⁴² If so, the claim should have been determined exclusively by reference to the *lex contractus*. It is only if that law had allowed concurrence that the claimant could have advanced his claim on multiple bases. But even then, only one law, the *lex contractus*, would have governed the entire claim. Finally, it is important to note that under Russian law, which as the *lex contractus* was another law closely connected with the parties' relationship, the defendant owed only a contractual duty to the claimant. But, following the way in which the claimant framed his claim, the Court of Appeal classified the alleged tortious and equitable duties exclusively on the basis of data provided by English law. If classification at choice of law level were to depend on the facts the claimant chooses to plead and the way he frames his claim, many objectives of Rome II and Rome I, e.g. legal certainty, predictability, uniformity of result and employee protection, would be undermined. The claimant, i.e. the way he presents the case, would be accorded an undue advantage over the defendant and his viewpoint. The better approach is to develop purely autonomous criteria for determining which set of choice-of-law rules applies in a situation giving rise to concurrent liability in substantive law.

How should other duties of the parties to an employment contract giving rise to concurrent liability in English substantive law be classified for choice-of-law purposes? It seems that the employer's personal and non-delegable duty of care should be classified as a contractual obligation. This duty flows directly from the employment relationship. If there is no employment relationship, this duty does not exist. By entering into an employment contract, the employer freely assumes liability for breach of this duty.⁴³ The employer's vicarious liability for the tort committed against the employee by a fellow employee in the course of employment sometimes does not

⁴² Briggs (n6); Plender and Wilderspin (n20) [2-036]–[2-038], [2-065]; see also T.M. Yeo, *Choice of Law for Equitable Doctrines* (Oxford, 2004) [7.10]–[7.11].

⁴³ Plender and Wilderspin *ibid* [2-039].

coincide with the employer's direct liability, but rather flows entirely from the relationship between the employer and the tortfeasor and would arise even if there was no pre-existing relationship between the injured employee and the employer. It seems that this duty should be classified as tortious for choice-of-law purposes.⁴⁴ Furthermore, it seems that a claim against an employee for conspiracy to harm the employer's business by soliciting fellow employees should be classified as contractual. But claims for breaches of copyright and misuse of confidential information against a former employee who obtained the employer's design drawings by bribing a fellow employee should not.

On the contrary, some authors who also accept that Rome II and Rome I are mutually exclusive reach the conclusion that situations giving rise to concurrent liability in substantive law always trigger the application of Rome II. According to *Cheshire, North & Fawcett: Private International Law*,⁴⁵ a tortious classification should be adopted as it fits in much better with the terms of Rome II. 'The Regulation envisages that there can be a tortious obligation where the parties have a pre-existing contractual relationship [Art.4(3)] and that there can be a tortious obligation to which there is a contractual defence [Art.15(b)].'⁴⁶ But this argument is not persuasive. It implies that, if it were not accepted, there would be little scope for the application of the provisions of Arts.4(3) and 15(b) Rome II. However, there are many situations where these provisions would be applicable if Rome I is accorded a wide field of application. The preceding paragraph provides two examples (employer's vicarious liability and employee's liability for breaches of copyright and misuse of confidential information for obtaining the employer's design drawings through bribe) where the first provision would apply. With regard to the second provision, it actually prescribes that the *lex*

⁴⁴ ibid (but cf [2-067]-[2-068]: this is a situation involving concurrent causes of action).

⁴⁵ (n17) 779. Also H.G. Beale (gen ed), *Chitty on Contracts* Vol 1 (London, 30th ed, 2008) [30-287].

⁴⁶ Fawcett and Carruthers (n17) 779 (footnotes omitted).

delicti governs ‘the grounds for exemption of liability, any limitation of liability and any division of liability’. Clearly, this provision has a wide field of application even if the majority of situations concerning concurrent causes of action fall within the scope of Rome I. Furthermore, there are many situations involving tortious obligations to which there is a contractual defence falling within the scope of Rome II, e.g. where the tortfeasor and the victim enter *ex post* into a contract constituting waiver or release from tortious liability.

In sum, there is a good argument that Rome II and Rome I do not permit concurrence in choice of law. Cases which in substantive law may be framed either in contract or in tort, or both, seem to fall within the scope of either one or the other Regulation. However, until it is definitely resolved by the CJEU, the issue of concurrence in PIL will remain a source of legal uncertainty. Apart from BRIGGS,⁴⁷ YEO⁴⁸ and the authors of *Cheshire, North & Fawcett: Private International Law*⁴⁹ and *Chitty on Contracts*,⁵⁰ the leading English authors are of the view that Rome II and Rome I permit concurrence. The following text examines the views in favour of concurrent causes of action in choice of law.

1.4. Views in favour of concurrence

If one were to accept that concurrence is permitted in choice of law, one would have to deal with situations where the *lex delicti* and the *lex contractus* are different laws holding conflicting views as to whether and when concurrence is permitted. Suppose a Frenchman, habitually working for a French employer in England, suffers injury at work in France. It is possible that, on these facts, the *lex delicti* would be French and

⁴⁷ (n6); A. Briggs, *Conflict of Laws* (Oxford, 2nd ed, 2008) 162-163.

⁴⁸ (n42) [3.32], [3.39], [7.10]-[7.11], [7.14].

⁴⁹ (n17) 779.

⁵⁰ (n45).

the *lex contractus* English law.⁵¹ Concurrence is allowed in England but not in France. Which law decides whether the claimant may advance his claim on multiple bases: the *lex delicti*, the *lex contractus*, or maybe both laws?

There are several possible solutions to this problem:⁵² to prefer the view of the *lex contractus*; to prefer the view of the *lex delicti*; a *sui generis* solution which consists in applying the view common to the *lex delicti* and the *lex contractus* or, if the views of the two laws differ, applying the view of the *lex fori*. If one were to accept that concurrence is permitted in choice of law, one should also accept that the various causes of action can lead to the application of two different laws to essentially one claim. The first two solutions should be rejected as they exclude *a priori* one of the governing laws.⁵³ The *sui generis* solution is also untenable for three reasons.⁵⁴ First, this solution is difficult to apply as it requires the determination of the governing laws and their views concerning concurrence. This is a very complex, time consuming and expensive exercise, particularly inappropriate for employment disputes. Second, this solution works well in easy cases, i.e. when the views of the two governing laws coincide. But in more complex cases this solution imposes the view of the *lex fori*. If the *lex fori* is a *lex causae*, this solution unjustifiably excludes *a priori* the other governing law. If the *lex fori* is not a *lex causae*, this solution imposes the application of the forum's substantive provisions. But the only situation where Rome II and Rome I allow the application of the forum's substantive provisions where the *lex fori* is not a *lex causae* is

⁵¹ See text accompanying n69 below.

⁵² See J.J. Fawcett, J.M. Harris and M. Bridge, *International Sale of Goods in the Conflict of Laws* (Oxford, 2005) [20.28]-[20.52]; P.E. Nygh, *Autonomy in International Contracts* (Oxford, 1999) 238-247; Yeo (n43) [3.32]-[3.40] (these books were written before the adoption of Rome II and Rome I, but after the adoption of the Rome Convention, and contain general discussions of the possible solutions to the problem of concurrence in choice of law).

⁵³ Fawcett, Harris and Bridge *ibid* [20.46].

⁵⁴ The *sui generis* solution is advocated by Fawcett, Harris and Bridge *ibid* [20.48]-[20.52], Merrett (n30) [6.33] and Plender and Wilderspin (n20) [2-063]-[2-070]. It is important to note that Fawcett, an author of the first book, now argues that Rome II and Rome I are mutually exclusive and that the issue of concurrence is always governed by the *lex delicti*: see n45 above and the accompanying text.

where those provisions are overidingly mandatory.⁵⁵ No one has ever suggested, nor would such a view be defensible, that the rules concerning concurrence are rules ‘the respect for which is regarded as crucial...for safeguarding public interests [of the forum].’⁵⁶ Third, the *sui generis* solution does not accord with the Regulations’ objectives of legal certainty, predictability, uniformity of result, discouragement of forum shopping and employee protection.⁵⁷

Finally, one might say that there is no reason not to allow concurrence in choice of law because the choice-of-law rules of Rome II anyway lead to the unity of the applicable law.⁵⁸ According to Art.4 the law applicable to a non-contractual obligation arising out of a tort is the law of the country in which the damage occurs irrespective of the country in which the event giving rise to the damage occurred and irrespective of the country or countries in which the indirect consequences of that event occurred.⁵⁹ There is also an exception to this rule. Where the person claimed to be liable and the person sustaining damage both have their habitual residence in the same country at the time when the damage occurs, the law of that country applies.⁶⁰ Both rules may be displaced by the operation of the escape clause which allows the application of the law of another country that is manifestly more closely connected with the tort. ‘A manifestly closer connection with another country might be based in particular on a *pre-existing relationship between the parties, such as a contract, that is closely connected with a tort/delict in question.*’⁶¹ Furthermore, the parties are free to choose the *lex delicti* after the event giving rise to the damage occurred.⁶² Presumably, *ex post* choices of law are very rare in employment cases and the law governing torts arising in the course of

⁵⁵ Rome II, Art.16; Rome I, Art.9(2).

⁵⁶ Rome I, Art.9(1).

⁵⁷ See text accompanying nn26-27 above.

⁵⁸ See M. Szepelak, ‘Concurrent Causes of Action in the Rome I and Rome II Regulations’ (2011) 7 JPIL 393.

⁵⁹ Art.4(1).

⁶⁰ Art.4(2).

⁶¹ Art.4(3).

⁶² Art.14(1).

employment is ordinarily determined by Art.4. It is also worth mentioning that, in assessing the conduct of the person claimed to be liable, account may be taken of the rules of safety and conduct in force at the place and time of the event giving rise to liability.⁶³ Thus, regardless of the *lex delicti*, the rules of safety and health at work of the country where the employee suffered injury may be referred to in order to determine the tortfeasor's negligence.⁶⁴

The escape clause of Art.4(3) contains a so-called accessory choice-of-law rule. The notion of the accessory choice-of-law rule was developed in German and Swiss academic opinion and jurisprudence, where it is referred to as *akzessorische Anknüpfung*.⁶⁵ According to NYGH,

‘It proceeds on the principle that where a specific relationship exists between the parties regulating their rights and obligations towards each other (such as one based on contract...), and in the course of carrying out the obligations of that relationship an obligation based on the general law (such as one arising out of the law of delict) is infringed, the claims arising out of the breach of the general duty should be subject to the same law as that which governs the existing relationship.’⁶⁶

It comes as no surprise that such a rule was devised in Germany and Switzerland given that concurrence is permitted in the substantive laws of those countries. Before the advent of the European choice-of-law instruments the problem of classification in Germany was, and in Switzerland still is, in principle, resolved by applying the *lex fori*. Consequently, if the claimant brought a claim in a German or Swiss court that could be

⁶³ Art.17.

⁶⁴ Rome I, Art.12(2) would also allow the court to take into account the rules of safety and health at work of the country where the employee suffered injury, regardless of the *lex contractus*.

⁶⁵ See Nygh (n52) 240-247. See also German Introductory Act to the Civil Code (*Einführungsgesetzes zum Bürgerlichen Gesetzbuche*), Art.41; Swiss Federal PIL Code, Art.133(3).

⁶⁶ *ibid* 240.

framed, alternatively or simultaneously, on multiple bases in the law of obligations of those countries, he was also permitted to advance his claim on multiple bases in PIL. This could have resulted in the claim being governed by different laws. The accessory choice-of-law rule was devised to avoid this highly undesirable outcome and to promote the unity of the applicable law, certainty and predictability, meet the reasonable expectations of the parties and avoid favouring claimants.⁶⁷ The following two conditions had to be met for this rule to apply: 1) there had to exist at the time of the commission of the tort a pre-existing legal relationship between the parties; 2) there had to be a close connection between the tort and the pre-existing relationship, and the conduct complained of had to be seen to operate in the legal setting of the pre-existing relationship.⁶⁸

Indeed, it may seem at first sight that the issue of concurrence need not be resolved at the stage of deciding whether Rome II or Rome I applies because Art.4 Rome II anyway leads to the application of one law, the *lex contractus*. This view, however, greatly undermines the complexity of both the relationship between the two Regulations and the problem of concurrence, especially in employment disputes, as the following three points demonstrate.

First, the determination of whether Rome II or Rome I applies is a mandatory first step in determining the applicable law. This step must be conducted by reference to the relevant CJEU case-law on the interpretation of the Brussels regime. As discussed, this case-law supports the view that concurrence is not permitted in European PIL.

Second, even if concurrence were permitted, the escape clause of Art.4(3) Rome II would not lead to the unity of the applicable law in all situations involving

⁶⁷ ibid 241.

⁶⁸ ibid 246-247.

concurrence where the application of a single law would be desirable. The choice-of-law rules of Art.4(1) and 4(2) may be displaced only if the tort is *manifestly* more closely connected with another country. The word ‘manifestly’ is there to ensure that the displacement occurs only exceptionally.⁶⁹ Not all situations involving concurrence would be exceptional. Suppose an Englishman, habitually working for an English employer in the Netherlands where he is also habitually resident, suffers injury at work in France. Furthermore, suppose the contract is solely governed by Dutch law. Which law would be the *lex delicti*? According to Art.4(1), the applicable law would be French. Art.4(2) applies only if the parties have their habitual residences in the same country. Would the escape clause of Art.4(3) lead to the application of Dutch law? The Netherlands would be *more closely connected* with the tort than France. But would it be *manifestly more closely connected*? This would be unlikely given that the tort would also have a close connection with England: both the employer and the employee are English; the employee might also be socially insured in the UK where he might suffer indirect consequences of his injury. If the tort were held not to be manifestly more closely connected with the Netherlands, the result would be that the *lex delicti* and the *lex contractus* would be two different laws holding conflicting views as to whether concurrence is permitted. Somewhat ironically, the *lex delicti*, French law, would not permit concurrence.

Third, Rome I prescribes that the parties to an employment contract are free to choose the applicable law and that the choice cannot deprive the employee of the protection afforded to him by mandatory provisions of the objectively applicable law.⁷⁰ The escape clause of Art.4(3) Rome II is incapable of dealing with situations where the tort is closely connected with an employment contract whose objectively applicable law and the chosen law differ. Suppose an Englishman, habitually working for an English

⁶⁹ European Commission (n14) 12.

⁷⁰ Art.8(1).

employer in the Netherlands under a contract governed by Dutch law as the objectively applicable law and by English law as the chosen law, suffers injury at work in France. According to Art.4(1), French law would govern the tort. Could the escape clause lead to the application of Dutch or English law? Arguably, the tort would be more closely connected with both the Netherlands and England than France, but would it be *manifestly* more closely connected with any of the former two countries? The European Commission seems to argue that, in this situation, the escape clause could lead to the tort being simultaneously governed by both *leges contracti*.⁷¹ But this interpretation is not supported by the wording of the escape clause which allows the application of the law of ‘a country’ (singular) that is manifestly more closely connected with the tort. Furthermore, since Rome II would not allow the parties to an employment contract to choose the *lex delicti* before the event giving rise to the damage has occurred,⁷² there is a good argument that the choice-of-law clause in an employment contract should not have any effect on the determination of the *lex delicti*.⁷³ If the tort were held not to be *manifestly* more closely connected with either the Netherlands or England, the result would be that essentially one claim for compensation (or other remedies) would have three different governing laws (two *leges contracti* and one *lex delicti*). This is unacceptable.

The existence of the accessory choice-of-law rule in Art.4(3) Rome II does not necessarily mean that concurrence is permitted in choice of law. Rather, that rule should be regarded as being there to deal with situations which, on a proper construction of Rome II and Rome I, fall within the scope of Rome II and which involve a pre-existing legal relationship between the parties that is closely connected with the tort.

⁷¹ (n14) 13; also Plender and Wilderspin (n20) [18-106], fn223; cf Fawcett and Carruthers (n17) 801 (only the subjectively applicable law should be taken into consideration); Merrett (n30) [6.90].

⁷² Art.14(1).

⁷³ Cf Dickinson (n19) [4.93] (‘the fact that the relationship between the parties is governed by a non-negotiable contract containing a choice of law provision may be taken into account as a factor diluting the strength of the connection to the law applicable to that contract’).

An example is where the employer is alleged to be vicariously liable for the tort committed against the employee by a fellow employee in the course of employment that does not coincide with the employer's direct liability. Where the claimant employee is one of several victims of the tort, the case for applying the *lex contractus* to the tort is relatively weak (i.e. the law of the place of injury is more likely to govern the claims of all the injured). But if the claimant employee is the only victim of the tort, the case for applying the escape clause is strong. If the employment contract is governed by two laws, there is a good argument that the chosen law should be disregarded, unless the law applicable to the employment contract is chosen after the event giving rise to the damage has occurred.⁷⁴ If both the objectively applicable law and the chosen law are to be taken into consideration and they differ, it is highly unlikely that the escape clause will be applied, since it is highly unlikely that the tort in this situation will be manifestly more closely connected to a country other than that to which the choice-of-law rules of Arts.4(1) and 4(2) Rome II point.

1.5. Conclusion

The application of one law in situations involving concurrent causes of action is a worthy objective and the two Regulations should be interpreted in a way which achieves that.

‘It is...important not to perceive concurrent liabilities as an isolated problem but rather as the outcome of the historical evolution of a legal system and part of the interplay between its numerous components... The way each legal order organises relations between various liability regimes intrinsically corresponds to

⁷⁴ Rome II, Art.14(1).

the way it organises these regimes. Preserving this integrity lies in the best interests of private international law and...in the interests of justice...⁷⁵

The unity of the applicable law can be consistently achieved only if Rome II and Rome I are regarded as not permitting concurrence in choice of law. But even if concurrence is permitted, the application of the escape clause of Art.4(3) Rome II will in many cases lead to the unity of the applicable law. The escape clause, however, inadequately deals with cases where the employment contract is simultaneously governed by two laws. An amendment of Art.4(3) catering for this possibility is necessary.

2. Contractual exemption clauses

Interaction between contract and tort in PIL causes considerable problems regarding exemption clauses. The following text shows how these problems were dealt with in the English common law of conflict of laws and how they are to be addressed today.

2.1. The common law

In the common law of conflict of laws, if the claimant advanced his claim in contract, both the claim and the exemption clause were governed by the *lex contractus*. What if the claimant advanced his claim in tort and the defendant relied on the exemption clause as a defence? A similar question arose where a contract was relied upon by the defendant as a tort defence⁷⁶ and where the parties entered *ex post* into a contract constituting waiver or release from tortious liability.

The leading case is *Sayers*.⁷⁷ After having suffered injury at work by the negligence of a fellow employee in Nigeria, Mr Sayers brought an action in tort against

⁷⁵ Szepelak (n58) 403.

⁷⁶ *Galaxias Steamship Co Ltd v Panagos Christofis* (1948) 81 Li L Rep 499 (KB).

⁷⁷ [1971] 1 WLR 1176 (CA).

his Dutch employer in England. The employer invoked a clause in the employment contract whereby Mr Sayers accepted the employer's compensation programme as his exclusive remedy in case of injury. The court had to decide whether this exemption clause represented a good defence to the claim. The majority, SALMON and STAMP LJ, disregarded the complexities of the issue before them and made a decision by reference to the *lex contractus* only.⁷⁸ LORD DENNING, on the other hand, held that the claim in tort was governed by 'the proper law of the tort' and that the exemption clause was governed by the proper law of the contract.⁷⁹ But, in his Lordship's view, two systems of law could not be applied to essentially one issue; one system of law, the so-called 'proper law of the issue', was to be applied to both claim and defence.⁸⁰ Although they employed different choice-of-law rules, all the members of the Court of Appeal decided the case by reference to the same law, Dutch, under which the exemption clause was a good defence. Consequently, the provisions of the English statute, the Law Reform (Personal Injuries) Act 1948, which abolished the defence of common employment and rendered void any term in an employment contract giving such a defence, was inapplicable.

Another important case is *Brodin v A/R Seljan*.⁸¹ The claimant's husband was a seaman, employed by a Norwegian employer under a contract governed by Norwegian law, who died after he had been injured at work by a fellow employee in Scotland. The claimant brought an action in tort in Scotland and the employer invoked an exemption clause. The claimant argued that the exemption clause was void by virtue of s.1(3) of the Law Reform (Personal Injuries) Act 1948. LORD KISSEN held that Scottish law applied as the *lex delicti* and furthermore that a contract was unenforceable in Scotland

⁷⁸ See also *Coupland v Arabian Gulf Oil Co* (n1) 1153 ('the contract is only relevant to the claim in tort in so far as it does, on its true construction in accordance with the proper law of the contract, have the effect of excluding or restricting the tortious claim', *per* Lord Goff LJ).

⁷⁹ (n77) 1180.

⁸⁰ *ibid* 1181.

⁸¹ 1973 SLT 198 (Court of Session).

if it required doing what was expressly forbidden by a statute which was binding on the Scottish courts.

The use of exemption clauses as a tort defence caused considerable legal uncertainty in the common law of conflict of laws. In *Sayers and Brodin*, four judges came up with three different solutions: two preferred the *lex contractus*, one preferred the *lex delicti* and one invented a *sui generis* solution which consisted in applying the proper law of the issue. Moreover, the majority of English academics rejected all of these solutions.⁸² It is the prevailing view among English academics that both the *lex contractus* and the *lex delicti* should have been applied, but each in its own sphere of application. The *lex delicti* governed the tort, including the issue of whether an exemption clause was available as a defence to a tortious claim; the *lex contractus* decided whether the exemption clause was valid.⁸³ But which choice-of-law rules determined the *lex contractus*: those of the forum or of the *lex delicti*? According to one view, the choice-of-law rules of the *lex delicti* should be applied because, to know whether an exemption clause was a good defence under the *lex delicti*, it was important to know whether under that country's law, including its PIL, the clause was a good defence.⁸⁴ A pragmatic view favoured the choice-of-law rules of the forum.⁸⁵ The solution favoured by English academics has been criticised for leading to the

⁸² L. Collins, 'Exemption Clauses, Employment Contracts and the Conflict of Laws' (1972) 21 ICLQ 320; *Dicey, Morris and Collins* (n17) [35-048]; Fawcett, Harris and Bridge (n52) [20.53]; Hill and Chong (n14) [15.4.11]-[15.4.14]; Merrett (n30) [6.91]; C.G.J. Morse, *Torts in Private International Law* (Oxford, 1978) 187-194; P.M. North, 'Contract as a Tort Defence in the Conflict of Laws' (1977) 26 ICLQ 914, 920-927; Plender and Wilderspin (n20) [2-074], [2-076]-[2-077]; R. Smith, 'International Employment Contract: Contracting Out' (1972) 21 ICLQ 164; cf in favour of the *lex contractus*: Briggs (n6), 33-34; P.B. Carter, 'Case Note: *Coupland v Arabian Gulf Oil Co.*' (1983) 54 BYBIL 301, 305-306; Nygh (n52) 244-249.

⁸³ This solution was first advanced by O. Kahn-Freund, 'Delictual Liability and the Conflict of Laws' (1968-II) 137 *Recueil des Cours* 5, 142-145.

⁸⁴ North (n82) 927.

⁸⁵ L. Collins, 'Interaction between Contract and Tort in the Conflict of Laws' (1967) 16 ICLQ 103, 115; Hill and Chong (n14) [15.4.15]; Morse (n82) 191; P.M. North, 'Reform, but not Revolution' (1990-I) 220 *Recueil des Cours* 9, 230-231.

application of two laws to essentially one issue of whether the exemption clause had the effect of limiting or excluding tortious liability.⁸⁶

2.2. Rome II and Rome I

If it is accepted, as suggested in section 1 of this chapter, that Rome II and Rome I do not permit concurrent causes of action, exemption clauses would rarely raise problems in choice of law. Since most employment claims would trigger the application of Rome I, the *lex contractus* would govern both the issue of whether an exemption clause is available as a defence to the claim and the issue of validity of the exemption clause. Furthermore, even in relation to claims which would trigger the application of Rome II, the escape clause of Art.4(3) would normally lead to the application of the *lex contractus* to the tortious claim. Problems would arise in the rare situations where the claimant advances a claim triggering the application of Rome II and where the *lex delicti* is not the law governing the employment contract. Such situations would occur much more frequently if it is accepted that Rome II and Rome I permit concurrence.

In all situations where the *lex delicti* and the *lex contractus* differ, the problem arises of determining the law that decides whether an exemption clause is a good defence to the tortious claim. Art.15(b) Rome II prescribes that the *lex delicti* governs ‘the grounds for exemption of liability any limitation of liability and any division of liability’. The issue of whether an exemption clause is available as a defence to a tortious claim therefore undoubtedly falls to be decided under the *lex delicti*. What

⁸⁶ Briggs (n6) 33-34: ‘if one understands an exclusion clause not as furnishing a defence to accrued liability, but as a provision by which the parties...modify the duty of care which might otherwise have arisen, it is...a definitional part of the underlying duty. For the indissociable components of a single duty to be governed by separate choice of law rules...denatures what is a single issue: whether there was a breach of duty of care by the defendant’ (footnote omitted); cf Kahn-Freund, (n83) 144: ‘There is all the difference in the world between inadmissibility [of an exemption clause] and [its] invalidity. Inadmissibility in our context is a rule designed to safeguard the application of the principles of delictual liability... Invalidity, however, has to do with some defect of the exceptions clause itself, not with its specific relation to the law of delict.’

about the issue of validity of the exemption clause? One might argue, relying on the prevailing view among English academics under the common law, that that issue must be decided under the law governing the contract in which the exemption clause is contained. But the better view which avoids the unwelcome result of having two laws governing the issue of whether the exemption clause has the effect of limiting or excluding tortious liability is to subject this issue in its entirety to the *lex delicti*. The support for this view can be found in the fact that this solution is adopted in Art.8(2) of the 1971 Hague Convention on the law applicable to traffic accidents which served as the template for Art.15 Rome II.⁸⁷

In any event, the two Regulations safeguard the application of the overriding mandatory provisions of the forum.⁸⁸ There is a good argument for applying s.1(3) of the Law Reform (Personal Injuries) Act 1948 whenever the injury occurs in the UK. According to Art.3(1) of the Posted Workers Directive, which is regarded as the implementation of Art.9 Rome I, the provisions concerning health, safety and hygiene at work are considered to be overriding mandatory provisions. Since the 1948 Act is concerned with health and safety at work, its provisions can override the applicable law whenever the injury occurs in England (or Scotland).⁸⁹

Conclusions

The borderland between contract and tort in PIL has traditionally been a field fraught with legal uncertainty. With regard to concurrent causes of action, English courts simply transposed the rules of domestic law into the common law of conflict of laws.

⁸⁷ See E.W. Esen, 'Convention on the Law Applicable to Traffic Accidents: Explanatory Report' available at www.hcch.net/upload/exp119e.pdf (last accessed 26/9/2012) 29, [5.1]; Fawcett and Carruthers (n17) 842-843, 865-867; Hill and Chong (n14) [15.4.21]; cf Dicey, Morris and Collins, 4th *Cumulative Supplement to the 14th Edition* (n30) [S35-256], fn12; Dickinson (n19) [14.15]; Fentiman (n14) [16.76]; Merrett (n30) [6.91]; Plender and Wilderspin (n20) [16-029].

⁸⁸ Rome II, Art.16; Rome I, Art.9(2).

⁸⁹ *Brodin v A/R Seljan* (n81).

Even after the advent of the Rome Convention, English courts continued to apply those rules. Today it is certain that the solution to the problem of concurrence is found exclusively in Rome II and Rome I, but it is less certain what the solution is. With regard to contractual exemption clauses, the common law of conflict of laws failed to produce a clear solution. Similarly, there are doubts with regard to the solution under Rome II and Rome I.

This chapter is premised on the idea that a claimant who brings a claim for compensation (or other remedies) for damage caused by an event or an act which give rise to the defendant's concurrent liability in more than one branch of substantive law brings essentially one claim which should be decided under one governing law. Concurrent liability which is accepted in many legal systems represents the outcome of the evolution of those systems and reflects the way in which they organise various liability regimes. Concurrent liability is therefore a category of substantive law, and should be confined to substantive law. The relationship between Rome II and Rome I is such that concurrence does not seem to be permitted in choice of law. But even if it is permitted, the unity of the applicable law will in many cases be achieved through the operation of the escape clause of Art.4(3) Rome II. Since the escape clause is an imperfect mechanism for achieving unity of the applicable law, it is preferable if the problem of concurrence is nipped in the bud at the stage of deciding which of the two Regulations applies. Moreover, the escape clause inadequately deals with cases where the employment contract is simultaneously governed by two laws. An amendment of Art.4(3) catering for this possibility is necessary. Whenever there is unity of the applicable law, contractual exemption clauses do not produce any particular problems in choice of law. Otherwise, the issue whether an exemption clause is a good defence to a tortious claim should be governed by the *lex delicti*.

The fact that the problem of concurrence is (largely) eliminated in choice of law either through the application of Rome I to many traditionally perceived tortious claims or through the operation of the escape clause of Art.4(3) Rome II is yet another example of the extent of the changes that European PIL of employment has introduced in English law. Just like statutory claims, the tortious claims have also been largely merged with contractual claims into one type of claim for choice-of-law purposes.

VIII POSTING OF WORKERS IN EUROPE

‘Jacques Chirac, the French president, has branded the proposal "unacceptable".

Gerhard Schröder, the German chancellor, wants to prevent it "under all circumstances". Even Charlie McCreevy, the European Union internal market commissioner whose officials drafted the initiative, warns it will "simply not fly". On Saturday, some 50,000 protesters are due to march through Brussels to vent their fury at what they describe as the "Frankenstein directive".’

Financial Times, 15 March 2005¹

Shortly before this Brussels march, a protest taking place in Sweden also filled the headlines.² Between November 2004 and February 2005, Swedish workers, holding banners proclaiming ‘Swedish law in Sweden’, blockaded a construction site in a Stockholm suburb. They demonstrated against the employment on the site of low-wage Latvian workers. The blockade was so effective that it caused the withdrawal from

¹ ‘Barriers to cross-border expansion are prohibitive to many companies yet the services directive drafted in Brussels is likely to be watered down’.

² The described events form the factual background of Case C-341/05 *Laval* [2007] ECR I-11767.

Sweden of the Latvian company supplying the workers and bankruptcy of its Swedish affiliate. Similar events occurred in the UK a few years later. In the early spring of 2009, at the time of deep recession and rising unemployment, hundreds of workers gathered at the Lindsey oil refinery in Lincolnshire.³ They staged a wildcat strike in response to the decision of an Italian firm performing construction work at the refinery to use around 300 of its Italian and Portuguese workforce to fulfil the construction contract. The slogan of the strike was ‘British jobs for British workers’. The protest spread quickly across the UK, with several thousand demonstrators gathering at other places in support of the striking refinery workers. At the height of the protest, the foreign workers had to be held on their floating accommodation in Grimsby harbour for their own safety. The dispute was resolved by reaching an agreement to hire 102 ‘British workers’ at the construction site.

One may wonder what the failure of the ‘Frankenstein directive’ and the protests held under the mottos ‘Swedish law in Sweden’ and ‘British jobs for British workers’ have to do with PIL? The answer is that European PIL of employment was in the centre of the legal background of these events.

In European PIL of employment, statutory and tortious claims are largely merged with contractual claims into a single category. Under Art.8 Rome I, the law applicable to an employment contract is stable. The governing law does not change when the employee is temporarily employed abroad. The chosen law changes only if the parties agree that it will. With regard to the objectively applicable law, Art.8(2), which lays down a choice-of-law rule based on the connecting factor of the habitual place of work, is explicit: ‘The country where the work is habitually carried out [and thus the objectively applicable law] shall not be deemed to have changed if [the

³ See C. Barnard, “British Jobs for British Workers”: The Lindsey Oil Refinery Dispute and the Future of Local Labour Clauses in an Integrated EU Market’ (2009) 38 ILJ 245.

employee] is temporarily employed in another country'. Recital 36 clarifies that '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.' Even if the objectively applicable law is the law of the country of the engaging place of business or the law of another country more closely connected with the employment contract, the applicable law does not change merely because the employee is temporarily employed abroad. In other words, Art.8 lays down a kind of a country of origin rule. The law of the *employee's* 'country of origin' (i.e. the law of the country of the habitual place of work or, if none, the law of the country of the engaging place of business or, by way of exception, the law of another more closely connected country) objectively applies even if the employee temporarily works abroad. Similarly, under Brussels I, a temporary posting abroad neither deprives the courts competent under this instrument of their jurisdiction nor confers jurisdiction on the courts of the country where the employee is temporarily posted.

Rome I and Brussels I complement Art.56(1) TFEU (ex Art.49(1) TEC) which guarantees the free movement of services within the EU. The freedom to provide services entails the right of a service provider established in one Member State to move freely with all its workers who it lawfully employs in that country to another Member State for the purpose of providing services there.⁴ Whenever an out-of-state service provider posts its workforce to the host Member State, the rules of the two Regulations support its freedom to provide services. The service provider is guaranteed that the law governing the employment contracts it has with its workers and the courts having jurisdiction over disputes concerning those contracts will not change with the temporary posting of workers abroad. Service providers are more likely to venture across borders

⁴ Case C-113/89 *Rush Portuguesa* [1990] ECR I-1417, [12]; Case C-43/93 *Vander Elst* [1994] ECR I-3803.

if they are accorded legal certainty, foreseeability and an assurance they will not have to bear the cost of adapting to the employment standards of each country to which they temporarily post workers. In addition to benefiting service providers, the rules of the two Regulations also benefit, to a certain extent, posted workers. Apart from granting them legal certainty and foreseeability, these rules guarantee the application of the law and jurisdiction of the courts of their country of origin, with which they are ordinarily most closely connected and familiar. The interests of that country are also protected because its law remains applicable and its courts retain jurisdiction notwithstanding temporary postings abroad.

Moreover, and perhaps most importantly, in practice the rules of the two Regulations especially benefit service providers from Member States with relatively low levels of terms and conditions of employment, in particular from the newly joined ex-Communist countries. Low cost per unit of labour is a comparative advantage that such service providers enjoy over service providers from Member States with relatively high employment standards. Since such service providers bear relatively low labour costs, they can undercut service providers from other Member States, especially in labour-intensive industries such as construction, transport and agency work. Workers from Member States with relatively low employment standards also indirectly benefit from the increased ability of their employers to win services contracts abroad. The interests of those countries are also advanced because the increased competitiveness of their service providers leads to more employment and revenue.

But the joint effect of the rules of Rome I and Brussels I and the Treaty provisions on the freedom to provide services, namely the ability of service providers from Member States with relatively low employment standards to profit from their comparative advantage, is often perceived as ‘unfair competition’ and ‘social dumping’

in Member States with relatively high employment standards. Workers, trade unions and service providers (but not service receivers) from the latter Member States often exert political pressure on their governments to impose local employment standards on out-of-state service providers, as seemingly permitted by Art.9 ('overriding mandatory provisions') Rome I, in order to achieve a level playing field between local and posted workers and local and out-of-state service providers. An example of such pressure is the Brussels march against the European Commission's proposal of the Directive on services in the internal market,⁵ also known as the 'Bolkestein' directive.⁶ The proposed Directive aimed at opening up the European market of services by eliminating the obstacles to the freedom of establishment of service providers and the free movement of services in the EU. The latter goal was to be achieved by strengthening the country of origin principle, according to which a service provider was subject only to the law of the country in which it was established. Although the proposed Directive contained a derogation from the country of origin principle, safeguarding the application of some of the host Member State employment standards to posted workers,⁷ the opponents of the proposal feared that it would lead to 'social dumping'. The controversies surrounding the proposed Directive were such that they contributed significantly to the negative outcomes of the French and Dutch referenda on the European Constitution.⁸ The Services Directive that was eventually adopted⁹ is a watered-down measure which expressly provides that it does not affect labour law and social security legislation of Member States.¹⁰ Furthermore, as the Laval and Lindsey oil refinery disputes demonstrate, workers and unions can exert pressure directly, by

⁵ COM(2004) 2 final/3.

⁶ Named after the former European commissioner for the internal market Frits Bolkenstein who ardently supported the proposed Services Directive.

⁷ Art.17.

⁸ Editorial comments, 'The Services Directive Proposal: Striking a Balance Between the Promotion of the Internal Market and Preserving the European Social Model?' (2006) 43 CMLR 307, 308.

⁹ Directive 2006/123 on services in the internal market [2006] OJ L376/36.

¹⁰ Art.1(6); see also Art.1(7).

means of industrial action, on out-of-state service providers to comply with local employment standards. Incidentally, the imposition of local employment standards can benefit posted workers as they can invoke the most favourable of the employment standards set by either the home or the host country.

But the imposition of the host Member State employment standards on service providers from other Member States represents a restriction or obstacle to their freedom to provide services. A service provider that has to comply with the employment standards of the home and each and every of the host countries is exposed to substantial compliance costs that might deter it from venturing abroad. That service provider is in a disadvantageous position in comparison to local service providers that have to comply only with local employment standards. Furthermore, although posted workers can sometimes benefit from the imposition of the host Member State employment standards, their position is ambiguous. If relatively low labour costs are behind their employers winning foreign contracts, the imposition of local employment standards could annul their employers' comparative advantage and lead to the loss of jobs.

The CJEU has on a number of occasions dealt with complicated issues concerning the compatibility with fundamental Treaty freedoms of the imposition of the host Member State employment standards on out-of-state service providers. PWD attempts to strike a proper balance between the competing interests involved. The question where the balance should lie has a prominent place in the contemporary academic debate.¹¹ The focus of this chapter is on the role that PIL plays in the context of posting of workers.

¹¹ The literature is immense. The majority view is that the interests of host Member States and host Member State actors (i.e. trade unions) should be better protected: Barnard (n3); A.C.L. Davies, 'One Step Forward, Two Steps Back? The *Viking* and *Laval* Cases in the ECJ' (2008) 37 ILJ 126; R. Eklund, 'A Swedish Perspective on *Laval*' (2008) 29 CLLPJ 551; S. Evju, 'Revisiting the Posted Workers Directive: Conflict of Laws and Laws in Contrast' (2009-2010) 12 CYELS 151; C. Joerges and F. Rödl, 'Informal Politics, Formalised Law and the "Social Deficit" of European Integration: Reflections after the

The following section outlines PWD and examines the balance that is currently struck between the competing interests. The way in which the CJEU has been tilting the balance in favour of the interests of the internal market over those of host Member States is described. Wherever the proper balance may be, the rules of PIL come into play when posted workers attempt to enforce, through labour litigation, the host Member State employment standards that can be imposed on out-of-state service providers. To assess the potential importance of ‘private’ enforcement of the relevant host Member State standards, and thereby of PIL in the context of posting of workers, the second section examines the current state of (in)effectiveness of the other two ways of enforcing the relevant standards, namely ‘public’ and ‘collective’ enforcement. Finally, the implementation of PWD in England is explored from a PIL perspective, in particular from the standpoint of posting of workers to England and posting of workers from England. The aim is to determine how European PIL of employment deals with one of the most pressing social issues of European integration.

1. Posted Workers Directive: at the crossroad of competing interests

Originally, the project of European integration was one of an economic nature, aimed at establishing a common market based on four fundamental economic freedoms and competition policy. Member States retained almost exclusive competence in the social

Judgments of the ECJ in *Viking* and *Laval* (2009) 15 ELJ 1; C. Kilpatrick, ‘British Jobs for British Workers? UK Industrial Action and Free Movement of Services in EU Law’ (LSE Law, Society and Economy Working Papers 16/2009), available at www.lse.ac.uk/collections/law/wps/WPS2009-16_Kilpatrick.pdf (last accessed 26/9/2012); J. Malmberg and T. Sigeman, ‘Industrial Action and EU Economic Freedoms – The Autonomous Collective Bargaining Model Curtailed by the European Court of Justice’ (2008) 45 CMLR 1115; F. Scharpf, ‘The Asymmetry of European Integration, or why the EU cannot be a “Social Market Economy”’ (2010) 8 *Socio-Economic Review* 211; P. Syrpis and T. Novitz, ‘Economic and Social Rights in Conflict: Political and Judicial Approaches to Their Reconciliation’ [2008] ELR 411; H. Verschueren, ‘Cross-Border Workers in the European Internal Market: Trojan Horses for Member States’ Labour and Social Security Law?’ (2008) 24 IJCLLR 167. The minority view is in favour of pushing the balance even further in favour of the interests of the internal market and home Member States: D. Kukovec, ‘Whose Social Europe? The *Laval/Viking* Judgments and the Prosperity Gap’ (Harvard Institute for Global Law & Policy Working Paper Series 2011/#3), available at <http://www.harvardiglp.org/category/all-resources/working-papers/> (last accessed 26/9/2012).

field.¹² This was reflected in the very name of the European *Economic* Community. Over time, the European institutions acquired a degree of competence in the social sphere. Nevertheless, social issues remain largely the concern of individual Member States. This is reflected in Art.153(5) TFEU (ex Art.137(5) TEC) which rules out EU legislation over some of the most important labour law issues such as pay, collective bargaining, strikes and lockouts, as well as in the lack of EU legislation concerning many important issues such as unfair dismissal.

The optimum rate of economic growth achieved by economic integration was to lead to the general improvement of living and working conditions in Europe.¹³ But economic liberalisation proved to possess a great potential for undermining national labour law systems. If service providers from Member States with relatively low levels of terms and conditions of employment could easily win contracts in Member States with relatively high employment standards by relying on the lower labour costs in their home countries, the latter Member States' employment standards would be put under strain. Whilst the project of European integration was confined to countries with similar levels of labour protection, this potential remained hidden. But with the accession of firstly Southern and then the former Communist countries to the EC, the potential of economic liberalisation for producing socially negative effects in the affluent countries came to light.

At first, the understanding was that a worker who moved from one Member State to another for the purpose of performing a services contract that his employer had won in the latter Member State exercised his own freedom of movement, today

¹² See C. Barnard, *EC Employment Law* (Oxford: OUP, 3rd ed, 2006) Ch 1.

¹³ See the Ohlin and Spaak reports, which preceded the Treaty establishing the EEC: International Labour Office, 'Social Aspects of European Economic Co-operation' (1956) 74 ILR 99; Intergovernmental Committee on European Integration, 'The Brussels Report on the General Common Market' (English translation, June 1956), available at http://aei.pitt.edu/995/1/Spaak_report.pdf (last accessed 26/9/2012).

guaranteed by Art.45 TFEU (ex Art.39 TEC).¹⁴ Since Art.45(2) TFEU provides that ‘Such freedom of movement shall entail the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment’, host Member States were thought to be able to apply their employment standards to foreign workers posted to their territory just as they applied those standards to local workers.

But in *Rush Portuguesa*¹⁵ the CJEU adopted a different view. Here, a Portuguese company entered into a subcontract with a French company for the carrying out of construction works in France. It employed its own Portuguese workers who, according to the transitional arrangements for Portuguese accession to the Community, were treated as third country nationals. The French authorities imposed certain conditions on the employment of such workers in France. But the CJEU held that the provisions of the Treaty:

‘preclude a Member State from prohibiting a person providing services established in another Member State from moving freely on its territory with all his staff and preclude that Member State from making the movement of staff in question subject to restrictions such as a condition as to engagement *in situ* or an obligation to obtain a work permit.’¹⁶

Subsequent cases confirmed that the freedom to provide services entails the right of a service provider established in one Member State to move freely with all its workers who it lawfully employs in that country (regardless of whether they themselves, on the basis of their nationality, have the right to free movement under the Treaty) to another

¹⁴ Evju (n11) 152-164; M. Houwerzijl, ‘Towards a More Effective Posting Directive’ (2006) 58 BCLL 179, 180-183; Verschueren (n11) 169-177.

¹⁵ (n4).

¹⁶ *ibid* [12].

Member State for the purpose of providing services there.¹⁷ Furthermore, the CJEU explicitly held in *Finalarte* that the Treaty provisions on the free movement of workers do not apply to workers employed by a business established in one Member State who are temporarily sent to another Member State to provide services there.¹⁸ The reason is that posted workers do not, in any way, seek access to the labour market in the latter Member State if they return to their country of origin or residence after completion of their work.¹⁹ The importance of *Rush Portuguesa* and *Finalarte* is immense. After those decisions, the imposition of the host Member State employment standards, which necessarily burdens out-of-state service providers, was seen as a restriction or obstacle to the free movement of services. In order to be lawful, such restrictions had to be justified.

At first, the CJEU showed considerable deference towards the interests of host Member States. In *Rush Portuguesa*, it stated *obiter* that:

‘Community law does not preclude Member States from extending their legislation, or collective labour agreements entered into by both sides of industry, to any person who is employed, even temporarily, within their territory, no matter in which country the employer is established; nor does Community law prohibit Member States from enforcing those rules by appropriate means.’²⁰

The Court offered no explanation or reasoning for this sweeping statement. Encouraged by this *dictum*, many Member States and candidate countries, net importers of posted workers, sought to protect their labour law systems by enacting or strengthening

¹⁷ See *Vander Elst* (n4).

¹⁸ Joined Cases C-49/98, C-50/98, C-52/98 to C-54/98 and C-68/98 to C-71/98 [2001] ECR I-7831, [21]-[23]; cf Joined Cases C-307/09 to C-309/09 *Vicoplus* [2011] ECR 00000 (posted agency workers in certain circumstances fall under the Treaty provisions on the free movement of workers).

¹⁹ *ibid* [22].

²⁰ (n4) [18].

legislation which imposed local employment standards on out-of-state service providers. The German Posting of Workers Act (*Arbeitnehmer-Entsendegesetz*) of 1996 is one example. The adoption of this act was justified by the following reasons: protection of the national construction industry against unfair competition; reduction of unemployment in the domestic construction industry; avoidance of a breakdown of the national collective bargaining system; and, somewhat incidentally, the safeguarding of suitable working conditions for posted workers.²¹ Other examples include the French, Dutch, Austrian and Luxembourg acts of the early 1990s.²²

The Commission's response to *Rush Portuguesa* and the posted workers acts was PWD. The Directive seeks to coordinate the laws of Member States regarding the local employment standards that are applicable to out-of-state service providers.²³ It pursues multiple objectives.²⁴ On the one hand, it safeguards the interests of host Member States to protect their labour law systems by imposing certain local employment standards on foreign service providers.²⁵ It also aims to protect posted workers by entitling them to certain host Member State employment standards where those standards are more favourable for them than the equivalent standards of their country of origin.²⁶ However, PWD seems to be primarily concerned with harnessing the wide-ranging regulatory freedom that *Rush Portuguesa* apparently gave host Member States by limiting local employment standards that could be imposed on out-of-state service providers, thus supporting the free movement of services. The primacy of this objective is reflected in the Treaty bases used for the adoption of the Directive,

²¹ O. Deinert, 'Posting of Workers to Germany – Previous Evolutions and New Influences throughout EU Legislation Proposals' (2000) 16 IJCLLR 217, 217-218. Also *Finalarte* (n18) [38]; Case C-164/99 *Portugaia Construções Ld^a* [2002] ECR I-787, [12].

²² Evju (n11) fn37.

²³ Recital 13.

²⁴ P. Davies, 'Posted Workers: Single Market or Protection of National Labour Law Systems' (1997) 34 CMLR 571.

²⁵ Recitals 5, 12-13.

²⁶ Recitals 5, 17.

the equivalent of Arts.53(1) and 62 TFEU referring to the Treaty chapter on the free movement of services, not the social policy provisions.

PWD applies to service providers established in a Member State which, in the framework of the transnational provision of services, post workers to the territory of another Member State.²⁷ The Directive does not apply to all postings of workers, but only in the following three situations: 1) the service provider posts workers on its account and under its direction, under a contract concluded with the service receiver operating in the host country; 2) the service provider, a member of a corporate group, posts workers to an establishment or an undertaking owned by the group in the host country; 3) the service provider, an employment agency, hires out a worker to an end-user established or operating in the host country.²⁸ In all three situations, there has to be an employment relationship between the service provider and posted workers during the period of posting.²⁹ Non-EU service providers must not be given more favourable treatment than service providers from Member States.³⁰ For the purposes of PWD, a ‘posted’ worker is a worker who, for a limited period, carries out his work in the territory of a Member State other than the Member State in which he normally works.³¹ This provision should be interpreted in line with the concept of ‘temporary sending’ under Rome I. If an employee’s sending is temporary for the purposes of Art.8(2) Rome I, that employee should be regarded as carrying out his work, for a limited period, in a country other than the country in which he normally works for the purposes of PWD. The scope of the Directive is further limited to ‘workers’, as defined by the law of the host Member State.³² The Directive also contains a number of derogations.³³

²⁷ Art.1(1).

²⁸ Art.1(3). For the interpretation of the third point see *Vicoplus* (n18).

²⁹ *ibid.*

³⁰ Art.1(4).

³¹ Art.2(1).

³² Art.2(2).

³³ Arts.1(2), 3(2)-(6). See text to nn117-121 below.

With regard to the range of the host Member State employment standards imposed on out-of-state service providers, PWD distinguishes between those that *must* and those that *may* be imposed. According to Art.3(1), the local standards that must be afforded posted workers, regardless of the law applicable to the employment contract (the so-called ‘nucleus’ of mandatory rules for minimum protection or ‘hard core’ of protective rules),³⁴ concern the following 7 matters:

- maximum work periods and minimum rest periods;
- minimum paid annual holidays;
- minimum rates of pay, including overtime rates;³⁵
- conditions of hiring-out of workers, in particular the supply of workers by employment agencies;
- health, safety and hygiene at work;
- protection of pregnant women, women who have recently given birth, children and young people;
- non-discrimination.

The reason these particular matters are listed, and not also for example unfair dismissal or redundancy, is that the employment standards pertaining to the listed matters are of ‘immediate interest during the period of posting’.³⁶ Pursuant to the first indent of Art.3(10), host Member States may also impose, in compliance with the Treaty and on a basis of equality of treatment between the host Member State and out-of-state service providers, employment standards concerning non-listed matters ‘in the case of public policy provisions’.

³⁴ Recitals 13, 14.

³⁵ See Case C-341/02 *Commission v Germany* [2005] ECR I-2733.

³⁶ Davies (n24) 579; European Commission, Explanatory Memorandum accompanying the Proposal of PWD COM(91) 230 final-SYN 346, [25].

Regarding the sources of the relevant host Member State employment standards, PWD distinguishes between those set legislatively and those set collectively. With regard to the former category, the Directive allows the application of the standards set ‘by law, regulation or administrative provision’.³⁷ With regard to the latter category, the key questions are which types of collectively set standards can be imposed on out-of-state service providers and in which sectors of the economy. The Directive attempts to accommodate various traditions of collective standard setting existing in the EU. On the one hand, it mandates the application of the standards set by ‘collective agreements or arbitration awards which have been declared universally applicable’,³⁸ i.e. ‘collective agreements or arbitration awards which must be observed by all undertakings in the geographical area and in the profession or industry concerned’.³⁹ This accommodates the interests of countries such as France and Germany that provide for the extension of application (also known as the *erga omnes* effect) of collectively set standards. On the other hand, Member States that do not have a system for declaring collective agreements or arbitration awards to be of universal application may, ‘if they so decide’, impose, on a basis of equality of treatment, employment standards set by ‘collective agreements or arbitration awards which are generally applicable to all similar undertakings in the geographical area and in the profession or industry concerned’ or ‘collective agreements which have been concluded by the most representative employers’ and labour organisations at national level and which are applied throughout national territory’.⁴⁰ These provisions essentially cater for the interests of countries such as Denmark and Sweden that have neither legislatively set standards concerning some of the listed matters, most importantly the minimum wage, nor a system for extending the application of collectively set standards. The provisions concerning the

³⁷ Art.3(1).

³⁸ *ibid.*

³⁹ Art.3(8), first subparagraph.

⁴⁰ Art.3(8), second subparagraph.

imposition of collectively set standards apply only to the building sector.⁴¹ In other sectors, collectively set standards may be imposed only in accordance with the Treaty and on a basis of equality of treatment.⁴²

Two issues have proven to be particularly problematic in the interpretation and application of PWD.⁴³ The first concerns the host Member State employment standards that *may* be imposed on out-of-state service providers; the second concerns the application of collectively set standards.

Many Member States took advantage of the possibility afforded by the first indent of Art.3(10) by proclaiming all or much of their employment legislation to be of public policy nature. As discussed in section 2.2 of Chapter VI, the CJEU decision in *Commission v Luxembourg*⁴⁴ shows that such an extension of the host Member State employment standards is unlawful. Here, the CJEU adopted an extremely narrow interpretation of the concept of ‘public policy provisions’ of Art.3(10) that had been favoured by the Commission. In its Communication of July 2003,⁴⁵ the Commission stated that this concept referred to ‘mandatory rules from which there can be no derogation and which, by their nature and objective, meet the overriding reasons in the public interest. These might include, in particular, the prohibition of forced labour or the involvement of public authorities in monitoring compliance with legislation on working conditions’.⁴⁶ Furthermore, the Commission referred to the CJEU case-law on the concept of public policy in the context of free movement of persons. According to

⁴¹ Art.3(1). Annex to PWD widely defines the building sector as encompassing ‘all building work relating to the construction, repair, upkeep, alteration or demolition of buildings’.

⁴² Art.3(10), second indent.

⁴³ For a thorough account of the many problems concerning the application and interpretation of PWD see A. van Hoek and M. Houwerzijl, ‘Comparative study on the legal aspects of the posting of workers in the framework of the provision of services in the European Union’ available at www.ec.europa.eu/social/BlobServlet?docId=6677&langId=en (last accessed 26/9/2012).

⁴⁴ Case C-319/06 [2008] ECR I-4232.

⁴⁵ European Commission, ‘Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions: The Implementation of PWD in the Member States’ COM(2003) 458 final, 12-14.

⁴⁶ *ibid* 13, affirmed in Case C-319/06 *Commission v Luxembourg* (n44) [32].

the Commission, ‘recourse to the concept of public policy must be justified on overriding general interest grounds, must presuppose the existence of a genuine and sufficiently serious threat affecting one of the fundamental interests of society and must be in accordance with the general principles of law’.⁴⁷ It is unlikely that many employment law provisions concerning non-listed matters, if any, can satisfy this test.⁴⁸ Certainly, none of the challenged provisions of Luxembourg law met this standard. In effect, in *Commission v Luxembourg* the CJEU held that the host Member State’s ‘nucleus of mandatory rules for minimum protection’ or the ‘hard core of clearly defined protective rules’⁴⁹ set not only the floor but also the ceiling of protection for posted workers. The Court adopted the same view in *Rüffert*, a case concerning social clauses in public contracts.⁵⁰

As mentioned, some countries have neither legislatively set standards concerning some of the listed matters nor a system for extending the application of collectively set standards. The second subparagraph of Art.3(8) PWD provides that such countries may, ‘if they so decide’, impose on out-of-state service providers employment standards laid down by collective agreements which satisfy the requirements of general applicability or of the representative status of the collective partners. When implementing the Directive, Sweden introduced legislation laying down employment standards concerning all of the listed matters apart from the

⁴⁷ ibid (references omitted), affirmed in Case C-319/06 *Commission v Luxembourg* (n44) [50].

⁴⁸ In its Communication, at p14, the Commission seemingly left some space for the application of PWD, Art.3(10) when it referred to the finding of a group of experts advising the Commission that the concept of ‘public policy provisions’ covered ‘provisions concerning fundamental rights and freedoms...such as freedom of association and collective bargaining, prohibition of forced labour, the principle of non-discrimination and elimination of exploitative forms of child labour, data protection and the right to privacy’. But these fundamental rights and freedoms are already protected by international human rights instruments. The imposition of the host Member State employment standards concerning these matters cannot therefore add to the protection of posted workers falling within the scope of PWD since these fundamental rights and freedoms already receive an essentially similar level of protection in the law of their country of origin.

⁴⁹ Recitals 13, 14.

⁵⁰ Case C-346/06 [2008] ECR I-1989. See also Case E-12/10 *Re Posting of Workers Act: Surveillance Authority v Iceland* [2011] 3 CMLR 31; Case E-2/11 *STX Norway Offshore AS and others v Norway* [2012] 2 CMLR 12 (EFTA Court).

minimum wage. With regard to wages, Sweden did not avail itself of the second subparagraph of Art.3(8), but instead relied on the suitability and effectiveness of its existing model of industrial relations.⁵¹ In Sweden, trade unions are responsible for safeguarding the level of wages and working conditions. Most employers and their employees are covered by collective agreements. An employer not belonging to an employers' organisation is expected to enter into an 'application agreement' in which it undertakes to comply with the terms and conditions of employment laid down in the collective agreement covering the profession or industry concerned. Sectoral collective agreements, in principle, do not regulate wages. Instead, the level of wages is left to be negotiated on a case-by-case basis at the level of each workplace, having regard to the qualifications and tasks of the employees concerned. If an employer who is not a member of any employers' organisation refuses to enter into an 'application agreement', unions will force it to do so by means of primary and secondary industrial action. The existence of an extensive right to undertake industrial action against recalcitrant employers is of crucial importance for the functioning of the Swedish model of industrial relations. Out-of-state service providers, who ordinarily do not belong to a Swedish employers' organisation, were similarly expected to enter into an 'application agreement' with the relevant union and to negotiate the level of wages of posted workers on a case-by-case basis at the workplace level. But *Laval*⁵² disclosed not only the shortcomings of the Swedish implementation of PWD but also raised several general questions regarding collective standard setting in the context of posting of workers.

Laval, a Latvian company, posted its Latvian workers to Sweden in connection with a construction contract that its Swedish affiliate had won there. The contract

⁵¹ See M. Rönnmar, 'Free Movement of Services versus National Labour Law and Industrial Relations Systems: Understanding the *Laval* case from a Swedish and Nordic Perspective' (2007-2008) 10 CYELS 493.

⁵² (n2).

concerned the renovation of a school in a Stockholm suburb. Employment standards, and in particular the level of wages, are considerably lower in Latvia than in Sweden. The ability to undercut local competitors was a reason for the Laval group winning the contract. After Laval had refused to negotiate and enter into collective agreements with the major Swedish construction union and to pay Swedish wages to its Latvian workers, the union organised a blockade of all Laval's construction sites in Sweden. A sympathy industrial action was also taken by the electricians' union. The industrial action was unusually effective. It forced the Latvian company to withdraw from Sweden and to file for bankruptcy of its Swedish affiliate. The Latvian company brought proceedings in Sweden seeking remedies for the violation by the unions of its freedom to provide services. The Swedish court referred a series of questions to the CJEU on issues concerning PWD and EC law.

The CJEU identified several problems with the Swedish implementation of PWD. First, Sweden had not made use of the possibility provided for in the second subparagraph of Art.3(8) because 'recourse to...[that] possibility requires...that the Member State *must* so decide'.⁵³ Since Sweden had not referred, in the implementing legislation or elsewhere, to any collective agreement meeting the necessary requirements, provisions contained in any such agreement could not be imposed on the Latvian service provider. Furthermore, the Directive did not allow the imposition of the running wage on out-of-state service providers, only the minimum wage.⁵⁴ Consequently, foreign service providers could not be required to enter into negotiations on the level of wages for each workplace on a case-by-case basis.⁵⁵ Third, where employment standards concerning the listed matters were laid down in the implementing legislation, out-of-state service providers could not be required to comply

⁵³ *ibid* [66].

⁵⁴ *ibid* [70].

⁵⁵ *ibid* [71].

with more favourable collectively set standards.⁵⁶ Art.3(7), which provides that Art.3(1)-(6) PWD ‘shall not prevent application of terms and conditions of employment which are more favourable to workers’, did not allow host Member States to impose terms and conditions of employment concerning the listed matters that went beyond the mandatory minimum laid down in legislation.⁵⁷ What Art.3(7) did allow was the application of more favourable terms and conditions of employment contained in the law applicable to the employment contract or voluntarily accepted by the service provider in the employment contract or a collective agreement.⁵⁸ Finally, collectively set standards concerning non-listed matters could not be imposed on out-of-state service providers since such standards, formulated without State authorities having had recourse to the first indent of Art.3(10), could not be regarded as ‘public policy provisions’.⁵⁹

Laval raises a more general question of whether, where there is a system for declaring collective agreements to be of universal application or where the host Member State avails itself of the second subparagraph of Art.3(8), the imposition of collectively set standards which go above legislatively set standards is lawful. On the one hand, Art.3(1) prescribes that, as regards the building sector, Member States shall ensure the application of the relevant standards set by collective agreements which have been declared universally applicable. Furthermore, Art.3(1) refers to Art.3(8) which, with regard to countries that do not have a system for declaring collective agreements to be of universal application, provides for the application of the relevant standards set by collective agreements meeting the requirements of general applicability or of the representative status of the collective partners. On the other hand, the statements in *Laval* to the effect that out-of-state service providers cannot be required to comply with more favourable collectively set standards in situations where there are legislatively set

⁵⁶ ibid [78]-[80].

⁵⁷ ibid [80].

⁵⁸ ibid [81].

⁵⁹ ibid [84].

standards suggests a different conclusion.⁶⁰ The EFTA Court addressed this question in *STX Norway Offshore AS v Norway*.⁶¹ The provisions concerning minimum normal working hours contained in a universally applicable collective agreement were held to precede those laid down in legislation.⁶² Another general question raised by *Laval* is whether the ‘public policy provisions’ test of Art.3(10) can be used as a basis for imposing collectively set standards concerning non-listed matters. Since both the extension of the application of a collective agreement and the decision to impose standards set by a collective agreement which satisfies the requirements of general applicability or of the representative status of the collective partners imply state involvement, *Laval* would suggest that this is possible. However, in light of *Commission v Luxembourg*,⁶³ this seems to be only a theoretical possibility since collective agreements do not deal with ‘genuine and sufficiently serious threats affecting fundamental interests of society’. Similarly, it also appears that the possibility provided by the second indent of Art.3(10) of imposing collectively set standards in sectors other than building is largely theoretical.⁶⁴

To sum up, EU law has always allowed the imposition of some host Member State employment standards on out-of-state service providers. But the range and type of standards that can be imposed have been curtailed over time. The evolution of the law in this field from the perception that posted workers fall within the Treaty provisions on the free movement of workers, via the CJEU decisions in *Rush Portuguesa* and *Finalarte* and the adoption of PWD, to the recent decisions in *Commission v Luxembourg*, *Laval* and *Rüffert*, shows a clear pattern. The interests of the internal market prevail over those of host Member States.

⁶⁰ Eklund (n11) 570-571; Kilpatrick (n11) 17.

⁶¹ (n50).

⁶² ibid [47]-[56].

⁶³ Case C-319/06 (n44).

⁶⁴ Kilpatrick (n11) 17.

2. Enforcing the Directive

Although there is a trend of curtailing the range and type of employment standards that can be imposed on out-of-state service providers, PWD continues to safeguard some of the host Member State standards. Wherever the proper balance of the competing interests may be, the objectives of the law in this field cannot be achieved unless there is an effective mechanism for enforcing the relevant local standards. There are essentially three ways of enforcing those standards, namely ‘public’, ‘collective’ and ‘private’ enforcement. ‘Public’ enforcement refers to the monitoring and enforcement of the relevant standards by public authorities, primarily labour inspectorates and immigration authorities. ‘Collective’ enforcement refers to the monitoring and enforcement by trade unions. In theory, both the host and home Member State public authorities and unions could have a role to play. However, given that a Directive’s objective is the protection of the host Member State labour law systems, it is logical that it is the host Member State actors that are interested in, and bear the burden of, enforcing the relevant standards. The home Member State actors do not have an interest in enforcing the host Member State standards because they benefit from the free movement of services. ‘Private’ enforcement refers to the enforcement of the relevant standards through labour litigation. It is in relation to this third possible way of enforcement that the rules of PIL come into play. In order to assess the role that PIL has in the context of posting of workers, it is necessary to determine the relative importance of private enforcement of the relevant standards. This, in turn, requires an examination of the current state of (in)effectiveness of both public and collective enforcement.

2.1. (In)effectiveness of public enforcement

Generally speaking, public enforcement of labour standards is an ineffective mechanism for achieving compliance. It has been reported, for example, that an average UK employer will get inspected for compliance with the minimum wage regulation once every 330 years.⁶⁵ The analysis of the CJEU case-law shows that public enforcement of PWD also lacks effectiveness.

The CJEU has dealt on a number of occasions with monitoring and enforcement measures undertaken by the host Member State public authorities.⁶⁶ Many host Member States used to or still require out-of-state service providers to do one or more of the following: to obtain work permits or visas for posted workers who are third country nationals, to submit a prior declaration concerning the posting to the host Member State authorities, to be represented in the host Member State, to keep labour and social documents concerning the posting in the host Member State and in accordance with the law of the host Member State. A measure of this kind represents a restriction on the free movement of services since it is ‘liable to prohibit, impede or render less attractive the provision of services to the extent that it involves expenses and additional administrative and economic burdens’.⁶⁷ In order to be lawful, such a measure must comply with the Treaty by satisfying several conditions.⁶⁸ It must not discriminate against out-of-state service providers. It must be justified on the ground of

⁶⁵ D. Metcalf, ‘Britain’s Minimum Wage: What Impact on Pay and Jobs?’ (Winter 2006-2007) *CentrePiece*, available at cep.lse.ac.uk/pubs/download/CP217.pdf (last accessed 26/9/2012).

⁶⁶ Case 279/80 *Webb* [1981] ECR 3305; Case 62-63/81 *Seco* [1982] ECR 223; *Rush Portuguesa* (n4); *Vander Elst* (n4); Case C-272/94 *Guiot* [1996] ECR I-1905; Joined Cases C-369/96 and C-376/96 *Arblade and Leloup* [1999] ECR I-8453; Case C-165/98 *Mazzoleni* [2001] ECR I-2189; *Finalarte* (n18); *Portugaia Construções Lda* (n21); Case C-279/00 *Commission v Italy* [2002] ECR I-1425; Case C-60/03 *Wolff* [2004] ECR I-9553; Case C-445/03 *Commission v Luxembourg* [2004] ECR I-10191; Case C-168/04 *Commission v Austria* [2006] ECR I-9041; Case C-244/04 *Commission v Germany* [2006] ECR I-885; Case C-433/04 *Commission v Belgium* [2006] ECR I-10653; Case C-490/04 *Commission v Germany* [2007] ECR I-6095; Case C-319/06 *Commission v Luxembourg* (n44); Case C-219/08 *Commission v Belgium* [2009] ECR I-9213; Case C-515/08 *dos Santos Palhota* [2010] ECR I-9133; *Vicoplus* (n18).

⁶⁷ *Mazzoleni* *ibid* [24].

⁶⁸ See e.g. *Finalarte* (n18) [28]-[33], [41]-[42] and [49]-[50].

overriding reasons in the public interest, such as the social protection of posted workers. That interest must not be accorded the same or essentially similar protection to that accorded by the provisions to which the service provider is subject in the home Member State. The measure must also be proportionate to the objective pursued, i.e. appropriate for securing it and not go beyond what is necessary in order to attain it. Many of the measures that host Member States used to or still impose on out-of-state service providers fail to meet the required conditions.

Many host Member States used to require out-of-state service providers to obtain a prior authorisation for posting workers who are not EU nationals. It will be remembered that in *Rush Portuguesa*⁶⁹ a Portuguese company used its Portuguese workers, who were treated as third country nationals, to perform services in France. The CJEU held that the Treaty precluded France from imposing on out-of-state service providers conditions relating to the recruitment of manpower *in situ* or the obtaining of work permits. Similarly, in *Vander Elst*⁷⁰ a Belgian service provider lawfully employed third country nationals in Belgium. It posted those workers to France. The Court found that French authorities could not require the service provider to obtain and pay for work permits for those workers.⁷¹ In several subsequent cases,⁷² the Court held that the following measures would, in a less restrictive but as effective manner as a prior authorisation, give the host Member State authorities a guarantee that posted workers were lawfully employed in the home Member State: ‘an obligation imposed on a service-providing undertaking to report beforehand to the local authorities on the presence of one or more deployed workers, the anticipated duration of their presence

⁶⁹ (n4).

⁷⁰ (n4).

⁷¹ *ibid* [19].

⁷² Case C-445/03 *Commission v Luxembourg* (n66); C-244/04 *Commission v Germany* (n66); *Commission v Austria* (n66); Case C-219/08 *Commission v Belgium* (n66).

and the provision or provisions of services justifying the deployment,⁷³ and an obligation to provide the host Member State authorities ‘with information showing that the situation of the workers concerned is lawful as regards matters such as residence, work permit and social coverage’ in the home Member State.⁷⁴

Indeed, one of the most common measures imposed on out-of-state service providers is a general requirement to submit a prior declaration concerning the posting to the host Member State authorities. *Dos Santos Palhota*⁷⁵ indicates that such a requirement is lawful, provided it is not overly burdensome for out-of-state service providers. Here, the CJEU found that Belgian legislation which provided that the posting could not take place before the competent authorities had received a prior declaration and issued a registration number to the service provider was not in accordance with the Treaty. But had the posting not been so conditioned, the obligation to make a prior declaration would have been lawful. Many Member States impose such declaratory requirements on out-of-state service providers, usually coupled with a criminal or administrative fine as the penalty for infringement. But the van Hoek/Houwerzijl study on the implementation and application of PWD demonstrates that fines are rarely imposed in practice and, furthermore, that the fines which have been imposed are rarely enforced either locally or abroad.⁷⁶ This brings into question the effectiveness of prior declarations.

With regard to the service provider’s representation in the host Member State, the CJEU has held that the requirement to maintain a registered office or a branch office in the host Member State constitutes ‘the very negation of the fundamental freedom to

⁷³ Case C-445/03 *Commission v Luxembourg* (n66) [31].

⁷⁴ *ibid* [46].

⁷⁵ (n66). See also Case C-319/06 *Commission v Luxembourg* (n44) where the CJEU dealt with the Luxembourg prior declaration procedure, which was found not to be sufficiently clear and unambiguous.

⁷⁶ (n43) Executive Summary, 32.

provide services'.⁷⁷ Similarly, host Member States cannot require out-of-state service providers to appoint a local representative to retain the relevant labour and social documents after the posting has come to an end.⁷⁸ All host Member States can do is require out-of-state service providers to appoint a posted worker to act as the link between them and the host Member State authorities for the duration of the posting.⁷⁹

In *Arblade and Leloup*⁸⁰ the CJEU addressed the issue of keeping and drawing up of labour and social documents. The Court held that the host Member State could require the relevant documents to be kept on site, or at least in an accessible and clearly identified place in that country, and be available to the local authorities where this was necessary for monitoring local employment standards, in particular where there was no organised system for cooperation or exchanges of information between Member States as envisaged by Art.4 PWD.⁸¹ Furthermore, the Court found that an out-of-state service provider could not be required to draw up the relevant documents pursuant to the local record keeping requirements where the documents kept in accordance with the home Member State law were adequate to enable the monitoring of local standards.⁸² It is only if the respective rules of the home and host Member State differed to such an extent that the monitoring of local standards could not be carried out on the basis of the documents drawn up in accordance with the law of the home country that an out-of-state service provider could be required to comply with the local record keeping requirements.⁸³ Consequently, before obliging an out-of-state service provider to draw up the documents in accordance with the local requirements and to keep them locally, the host Member State authorities should verify that the protection of posted workers

⁷⁷ *Commission v Italy* (n66) [18].

⁷⁸ *Arblade and Leloup* (n66).

⁷⁹ Case C-319/06 *Commission v Luxembourg* (n44) [91] and [94].

⁸⁰ (n66). See also *dos Santos Palhota* (n66).

⁸¹ *ibid* [61]-[62].

⁸² *ibid* [64] and [66].

⁸³ *ibid* [62]-[63].

was not sufficiently safeguarded by the production, within a reasonable time, of originals or copies of the documents kept in the home Member State or, failing that, by keeping the originals or copies of those documents available in the host Member State.⁸⁴

Where the conditions for requiring an out-of-state service provider to keep the relevant documents in the host Member State were met, the host Member State could also require the translation of those documents into the local language.⁸⁵ The case-law also shows that foreign service providers cannot be required to retain the relevant documents in the host Member State after the termination of the posting,⁸⁶ but can be required to send the copies of the relevant documents to the host Member State authorities at the end of, or after, the posting period.⁸⁷

If the host Member State authorities find out that an out-of-state service provider has not complied with the relevant local employment standards, they should not act before they have assessed the effect of their actions on the service provider's freedom to provide services. Just because PWD allows the imposition of certain local standards on foreign service providers, it does not relieve the host Member State authorities from ensuring that their actions accord with the Treaty, i.e. that they are non-discriminatory, justified and proportionate.⁸⁸ Unless the enforcement of the relevant standards confers a genuine benefit on the posted workers by significantly adding to their social protection, the host Member State authorities will violate the Treaty.⁸⁹ The Treaty will also be breached if the public authorities' actions are disproportionate.⁹⁰ These requirements impose a heavy burden on the host Member State authorities since they require them to

⁸⁴ *ibid* [65].

⁸⁵ Case C-490/04 *Commission v Germany* (n66).

⁸⁶ *Arblade and Leloup* (n66) [76]-[79].

⁸⁷ *dos Santos Palhota* (n66).

⁸⁸ Case C-490/04 *Commission v Germany* (n66) [16]-[19]. See also *STX Norway Offshore AS and others v Norway* (n50) [34]-[35], [70] and [74].

⁸⁹ *Seco* (n66); *Guiot* (n66); *Arblade and Leloup* (n66); *Mazzoleni* (n66); *Finalarte* (n18); *Portugaia Construções Ld^a* (n21).

⁹⁰ *Mazzoleni* (n66); *Finalarte* (n18).

communicate with the corresponding home Member States authorities,⁹¹ to examine employment legislation of foreign countries, whose up-to-date version may only be available in a foreign language, and compare it to their own legislation.

To sum up, the restrictions which the Treaty, as interpreted by the CJEU, imposes on the host Member State authorities when monitoring and enforcing the relevant local employment standards render public enforcement of those standards largely ineffective. The authorities cannot act until they have established that an out-of-state service provider has failed to comply with the relevant standards. The main source of information are prior declarations which out-of-state service providers may be required to submit to the host Member State authorities. However, fines for breaching the obligation to submit a prior declaration are rare and hard to enforce, and therefore not much of a deterrent in practice. Indeed, as the van Hoek/Houwerzijl study confirms, service providers often “forget” to notify.⁹² Another source of information are labour and social documents which out-of-state service providers may be required to keep in host Member States for the duration of the posting. But if an out-of-state service provider fails to submit a prior declaration to the host Member State authorities, those authorities may be ignorant of the fact that the posting is taking place and thus unable to inspect *in situ* the relevant documents for the purpose of monitoring the relevant standards. After the posting has come to an end, the relevant documents can be obtained only from abroad following the cooperation and exchange of information mechanism between Member States, whose shortcomings are well documented.⁹³

⁹¹ See PWD, Art.4.

⁹² (n43) Executive Summary, 31.

⁹³ European Commission, ‘Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions - Posting of workers in the framework of the provision of services: maximising its benefits and potential while guaranteeing the protection of workers’ COM(2007) 304 final, 9: ‘the very small number of contacts made through liaison offices, established in Article 4 of the Directive, indicates that Member States either ignore this form of cooperation or have sought other forms’. See also the Commission Recommendation of 31 March 2008 on enhanced administrative cooperation in the context of the posting of workers in the framework of the provision of services [2008] OJ C85/1.

Finally, even if the host Member State authorities manage to find out that an out-of-state service provider has breached the relevant local standards, they can act only if they ensure that their actions are non-discriminative, genuinely benefit posted workers and proportionate. The obligations to communicate with the corresponding home Member States authorities in order to determine the content of foreign employment legislation, often available only in a foreign language, and to compare it with local legislation impose significant practical barriers to the effective public enforcement of the relevant local standards. Indeed, the Commission has acknowledged that public enforcement is the Directive's Achilles heel.⁹⁴ The Commission's threat to commence infringement proceedings against any Member State whose public enforcement measures are perceived as breaching the Treaty and PWD⁹⁵ disincentivises Member States from attempting to increase the effectiveness of public enforcement.

2.2. (In)effectiveness of collective enforcement

The CJEU has dealt with collective enforcement of the host Member State employment standards in two recent cases. In *Laval*⁹⁶ Swedish trade unions attempted to enforce, by means of industrial action, Swedish collectively set standards against a Latvian service provider. The service provider brought proceedings against the unions in Sweden claiming they had violated its freedom to provide services. The CJEU held that the Treaty provisions on the free movement of services had a horizontal direct effect against the unions.⁹⁷ Since the industrial action aimed at forcing an out-of-state service

⁹⁴ (n45) 14-15: 'Most of the difficulties encountered by the Member States have to do with *monitoring compliance with the law*. The particular nature of transnational postings, i.e. their temporary nature and the clash between different legal systems, makes such monitoring tricky and difficult. Language barriers are the first problem... Another source of difficulties is the need to *compare different countries' legislation...*' (original emphasis).

⁹⁵ European Commission, 'Communication from the Commission: Guidance on the posting of workers in the framework of the provision of services' COM(2006) 159 final.

⁹⁶ (n2).

⁹⁷ *ibid* [98].

provider to comply with the host Member State collectively set standards is liable to make the provision of services ‘less attractive or more difficult’,⁹⁸ it represents a restriction of the fundamental Treaty freedom. In order to be lawful, the industrial action has to be non-discriminatory, justified and proportionate. Otherwise, the union is liable for any damage caused to the service provider. Since the imposition of the Swedish collectively set standards in *Laval* was not in accordance with PWD, the industrial action aimed at enforcing those standards could not be justified. After the CJEU had decided that the Swedish unions had violated the Latvian service provider’s fundamental freedom, the Swedish courts ordered the unions to pay damages and litigation costs.⁹⁹

The other relevant case is *Viking*.¹⁰⁰ *Viking*, a Finish company, owned a ferry registered in Finland, manned with a predominantly Finish crew, plying between Finland and Estonia. *Viking* decided to re-register the vessel in Estonia in order to benefit from lower labour costs in that country.¹⁰¹ The International Transport Workers’ Federation (‘ITF’) has a policy of combating the use of flags of convenience. It issued a call to its members to boycott the Finish company. Following this, *Viking* commenced proceedings in England against the ITF and its affiliate, the Finnish Seamen’s Union, seeking an injunction to stop the boycott. The claim was based on the violation of the freedom of establishment guaranteed by Art.49 TFEU (ex Art.43 TEC). English courts had jurisdiction over the ITF, as an English domiciliary, under Art.2 and

⁹⁸ *ibid* [99].

⁹⁹ M. Rönnmar, ‘*Laval* returns to Sweden: The Final Judgment of the Swedish Labour Court and Swedish Legislative Reform’ (2010) 39 ILJ 280.

¹⁰⁰ Case C-438/05 [2007] ECR I-10779.

¹⁰¹ Since *Viking* undertook not to dismiss the Finnish crew ([19]), it is not clear how a mere reflagging of the vessel would have led to the reduction of labour costs. It will be remembered, as discussed in Chapter V, section 3.2, that the flag of the ship is not considered to be a relevant consideration for determining the applicable law of a seaman’s employment contract. Furthermore, one of the principles of the ITF is that only the unions in the country of the beneficial ownership of the vessel (in this case Finland) can enter into collective agreements regarding the crew’s terms and conditions of employment. In other words, Finish law would have continued to apply to the seamen’s employment contracts and the Finish union would have continued to be the only bargaining partner on the labour side.

over the Finnish union, as a co-defendant, under Art.6(1) Brussels I. The Court of Appeal referred a question to the CJEU whether the actions of the ITF and the Finish union violated Viking's fundamental freedom. The CJEU held firstly that the freedom of establishment had a horizontal direct effect against the unions.¹⁰² Consequently, the industrial action would have been lawful only if it had been non-discriminatory, justified and proportionate. In contrast to *Laval*, the CJEU in *Viking* did not decide whether the unions had in fact violated the Treaty. Since *Viking* was eventually settled,¹⁰³ English courts did not have an opportunity to decide on the lawfulness of the industrial action and potential liability of the unions.

Laval and *Viking* demonstrate the ineffectiveness of collective enforcement of the host Member State employment standards. Although in both cases the CJEU recognised that the right to take collective action was a fundamental right which formed an integral part of the general principles of Community law,¹⁰⁴ it nevertheless subordinated this right to the fundamental Treaty freedoms. Somewhat paradoxically, the more an industrial action is effective, the more it will restrict the fundamental Treaty freedoms, and the less likely it will meet the requirement of proportionality.¹⁰⁵ Given the trend of declining union strength in Member States, it comes as no surprise that unions refrain from engaging in industrial action which potentially violates the Treaty. With regard to the UK, it has been noted that, 'Anecdotal evidence following *Viking* and *Laval* suggests that employee representatives interpret the judgments as having a chilling effect on industrial action.'¹⁰⁶ Even the ILO Committee of Experts on the Application of Conventions and Recommendations expressed, in its 2010 Report,

¹⁰² *Viking* (n100) [55] and [66].

¹⁰³ 'Finnish Shipping Group Settles Case Over Cheap Labour', *Financial Times*, 4 March 2008.

¹⁰⁴ *Viking* (n100) [44]; *Laval* (n2) [91].

¹⁰⁵ Davies (n11) 141-145; Kilpatrick (n11) 18-19.

¹⁰⁶ R. O'Donoghue and B. Carr, 'Dealing with *Viking* and *Laval*: From Theory to Practice' (2008-2009) 11 CYELS 123, 162. Also K. Apps, 'Damages Claims against Trade Unions after *Viking* and *Laval*' (2009) 34 ELR 141.

‘serious concern’ about the practical limitations on the effective exercise of the right to strike – enshrined in ILO Convention No 87 of 9 July 1948 concerning freedom of association and protection of the right to organise – imposed by the CJEU decisions.¹⁰⁷

2.3. Conclusion

Because of the restrictions imposed by the Treaty and the CJEU case-law on the host Member State authorities and trade unions, both public and collective enforcement of the host Member State employment standards that can be imposed on out-of-state service providers are largely ineffective. This further supports the conclusion that, in the context of posting of workers, the interests of the internal market prevail over those of host Member States. The European Commission has proposed the adoption of two instruments, the Regulation on the exercise of the right to take collective action within the context of the freedom of establishment and the freedom to provide services¹⁰⁸ and the Directive on the enforcement of PWD,¹⁰⁹ aimed at remedying some of the perceived problems concerning enforcement. The effect of these initiatives remains to be seen. In any event, given the current state of ineffectiveness of public and collective enforcement, private enforcement of the relevant standards, and thereby PIL, could play a crucial role in the context of posting of workers. But even if the situation with regard to public and collective enforcement improves, following the likely adoption of the two proposed instruments, the potential importance of private enforcement of the relevant standards will remain. The following section examines whether European PIL of employment is able to adequately perform this role.

¹⁰⁷ The Report is available at <http://www.ilo.org/public/libdoc/ilo/P/09661/> (last accessed 26/9/2012).

¹⁰⁸ COM(2012) 130 final. The legal basis for the proposed Regulation is Art.352 TFEU reserved for cases where the Treaties do not provide the necessary powers to implement actions necessary, under the policies defined in the Treaties, to attain one of the objectives of the Treaties.

¹⁰⁹ COM(2012) 131 final.

3. Private enforcement of the Directive in England

England is a net receiver of posted workers. This section therefore firstly deals with issues concerning the posting of workers to this country. English workers are also being posted abroad in the framework of the transnational provision of services. A question then arises if an English posted worker can commence proceedings in England for breach of the relevant host Member State employment standards.

3.1. A receiving perspective

The UK did not pass specific legislation to implement PWD. Instead, the UK has sought to comply with the Directive by amending its existing employment legislation to ensure that posted workers fall within its territorial reach. S.196 of the Employment Rights Act 1996 used to contain express territorial limitations. Most rights conferred by the Act did not apply to employees who, under their employment contracts, ordinarily worked outside Britain.¹¹⁰ Since posted workers by definition ordinarily work outside Britain, they fell outside the scope of those rights. S.196 was repealed in 1999.¹¹¹ The void left by the repeal was filled by the House of Lords in *Lawson v Serco*.¹¹² According to LORD HOFFMANN, employees working in Britain are one of the categories covered by ERA 1996. Since posted workers work in Britain, albeit temporarily, ERA 1996 applies to them. The position in relation to anti-discrimination legislation is similar. Express territorial limitations used to exclude those who worked ‘wholly or mainly outside Great Britain’. This was altered by the Equal Opportunities (Employment Legislation) (Territorial Limits) Regulations 1999 to allow those who

¹¹⁰ s.196(2), 196(3).

¹¹¹ ERelA 1999, s.32(3).

¹¹² [2006] UKHL 3.

worked partly in Britain to rely on anti-discrimination legislation.¹¹³ The Equality Act 2010 is silent with regard to its territorial reach. The Government's Explanatory Notice to the Bill for the Act states that, 'As far as territorial application is concerned...the Bill leaves it to tribunals to determine whether the law applies, depending on for example the connection between the employment relationship and Great Britain.' In *Van Winkelhof*¹¹⁴ *Lawson v Serco* was regarded as the leading authority for determining the territorial scope of EqA 2010. Similarly, the National Minimum Wage Act 1998 applies to a worker who 'is working...in the United Kingdom'.¹¹⁵ With regard to the EU-law derived rights (e.g. rights granted by the Working Time Regulations 1998), they apply to all employees working anywhere in Europe, including those posted from another Member State to England.

Several issues remain open. First, it is not entirely clear what 'working in Britain' means. Of what duration and nature should a worker's work in Britain be before they can be regarded as falling within the scope of ERA 1996 and other pieces of employment legislation?

One view is that there is a difference between workers posted to Britain who fall within the scope of PWD and other workers posted to Britain.¹¹⁶ According to this view, the repeal of s.196 ERA 1996 did not change the law in relation to posted workers falling outside the scope of the Directive, namely workers posted by non-EU employers. Such posted workers come within the territorial reach of ERA 1996 only if they ordinarily work in Britain. With regard to posted workers falling within the scope of the Directive, they can invoke the rights granted by ERA 1996 even if they ordinarily work outside Britain. But such an interpretation of LORD HOFFMANN's 'employees

¹¹³ Compare e.g. the pre- and post-1999 versions of SDA 1975, s.10.

¹¹⁴ [2012] EWCA Civ 1207.

¹¹⁵ s.1(2)(b).

¹¹⁶ A. Scott 'The Territorial Scope of British Employment Legislation' [2010] LMCLQ 640, 654-655.

working in Britain' category is not supported by the wording of PWD. According to Art.1(4) PWD, undertakings established outside the EU must not be given a more favourable treatment than undertakings established in a Member State. If non-EU employers posting workers to Britain did not have to comply with ERA 1996 when their workers ordinarily worked outside Britain, they would be put in a more favourable position in comparison to Member State employers that have to comply with ERA 1996 in comparable situations. Since such result would contravene Art.1(4) PWD, it must be avoided.

One of the most contentious issues in drafting PWD was whether postings of short duration should be excluded from its scope. The initial proposal of the Directive provided for the exemption of all postings not exceeding three months.¹¹⁷ The 1993 proposal reduced the period to one month.¹¹⁸ Since these provisions did not find their way into the final version of the Directive, this instrument applies, in principle, to all covered postings from day one. There is one compulsory exception from this rule: in the case of initial assembly and/or first installation of goods where this is an integral part of a contract for the supply of goods and necessary for taking the goods supplied into use, the host country standards concerning minimum paid annual holidays and minimum rates of pay do not apply if the period of posting does not exceed eight days and if the case does not concern the building sector.¹¹⁹ PWD also allows host Member States to partly exempt certain other categories of posting from the scope of the Directive, namely postings not exceeding one month¹²⁰ and postings concerning 'non-significant' amount of work.¹²¹ But given it is in the interest of host Member States to impose their employment standards whenever possible, it comes as no surprise that the

¹¹⁷ (n36) Art.3(2).

¹¹⁸ COM(93) 225 final-SYN 346, Art.3(2).

¹¹⁹ Art.3(2).

¹²⁰ Art.3(3), 3(4).

¹²¹ Art.3(5).

optional exceptions are seldom implemented.¹²² In particular, the UK has not made use of this possibility. Consequently, the employment standards set out in ERA 1996 and other pieces of employment legislation which, pursuant to PWD, must be imposed on out-of-state service providers apply from day one. Of course, an employee must satisfy the qualifying period of employment in order to be able to rely on employment legislation. But both work in and outside the UK should be taken into account for this purpose.

The application of British employment legislation, in its entirety and from day one, to posted workers brings into question the compliance with PWD and the Treaty of the UK's method of implementation of this instrument. The total repeal of s.196 ERA 1996 was justified as being necessary for implementing the Directive.¹²³ But PWD only obliges host Member States to impose on out-of-state service providers employment standards concerning matters listed in Art.3(1). Indeed, in relation to those standards, the existence of s.196 would have prevented the proper implementation of the Directive. However, many provisions of ERA 1996, including those concerning unfair dismissal and redundancy, do not concern a listed matter. The UK was therefore not obliged to repeal s.196 in its entirety. Since the first indent of Art.3(10) PWD allows host Member States to impose standards concerning non-listed matters 'in the case of public policy provisions', the total repeal of s.196 effectively gave all provisions of ERA 1996 concerning non-listed matters such public policy status. Similarly, the existence in other pieces of British employment legislation of provisions which do not concern a listed matter, but which extend their application to workers posted from other Member States, implies recourse to Art.3(10). But in light of *Commission v Luxembourg*,¹²⁴ such an extensive territorial reach of the employment legislation must be seen as being

¹²² van Hoek and Houwerzijl (n43) 34-35.

¹²³ HC Debates Vol 336 col 32, 26 July 1999.

¹²⁴ Case C-319/06 (n44).

contrary to both PWD and the Treaty provisions on the free movement of services.¹²⁵

Furthermore, as discussed in section 2.2 of Chapter VI, it is possible, although far from certain, that giving a public policy status to provisions concerning non-listed matters might also contravene Art.9(1) ('mandatory overriding provisions') Rome I. If so, both PWD and Rome I would require provisions contained in British employment legislation concerning non-listed matters to be applied only in situations where English (or Scottish) law governs the employment contract.

But if Art.9(1) Rome I does not prevent the overriding application of provisions concerning non-listed matters, an interesting situation would arise. PWD and the Treaty would preclude the imposition of such provisions on service providers established in other Member States, whereas Art.9 Rome I would allow the imposition of such provisions on non-EU service providers. In that case, a difference in treatment between Member State and non-EU service providers would arise to the detriment of the latter.

Another issue is whether employment standards set by English collective agreements can be imposed on out-of-state service providers. Since the UK does not have a system for declaring collective agreements to be of universal application, only standards set by collective agreements that meet the requirements of general applicability or of the representative status of the collective partners could be imposed. *Laval*¹²⁶ shows that a country can make use of the possibility provided for in the second subparagraph of Art.3(8) PWD only if it expressly so decides. Since the UK has not referred in its legislation or elsewhere to any collective agreement meeting the necessary requirements, English collectively set standards cannot be imposed on out-of-state service providers.

¹²⁵ C. Barnard, 'The UK and Posted Workers: The Effect of *Commission v Luxembourg* on the Territorial Application of British Labour Law' (2009) 38 ILJ 122; L. Merrett, *Employment Contracts in Private International Law* (Oxford, 2011) 271-274.

¹²⁶ (n2).

Finally, there is a question of whether workers posted to England can effectively enforce the relevant employment standards before English courts. Do English courts have international jurisdiction to hear and decide such cases? Defendants in employment disputes who are domiciled in the EU and those domiciled outside the EU fall under different jurisdictional regimes. English courts can assume jurisdiction over an employer domiciled in a Member State pursuant to the rules of Brussels I.¹²⁷ But this Regulation does not prejudice the application of the jurisdictional rules contained in other Community instruments, such as PWD, and in national legislation harmonised pursuant to such instruments.¹²⁸ Jurisdiction over employers domiciled outside the EU is governed by national jurisdictional rules.

The rules of jurisdiction in employment matters of Brussels I have been examined in Chapter IV. Member State employers usually fall under the jurisdiction of the courts of their domicile or the courts for the habitual place of work. Other jurisdictional bases (engaging place of business; ancillary establishments; consent) seldom apply and would in any event rarely give jurisdiction to the courts of the host Member State. In cases of posting of workers to England, the competent courts are therefore by definition foreign courts. However, Art.5(2) PWD states that Member States must ensure that adequate procedures are available to workers and/or their representatives for the enforcement of obligations under this Directive. Furthermore, Art.6 PWD provides that, in order to enforce the right to the terms and conditions of employment guaranteed by Art.3, judicial proceedings may be instituted in the Member State in whose territory the worker is or was posted. Art.6 has not been specifically implemented in the UK. Nevertheless, there are jurisdictional rules in England which posted workers can invoke. Employment standards which, pursuant to Art.3 PWD,

¹²⁷ Brussels I, Arts.2, 3.

¹²⁸ *ibid* Art.67.

must be accorded workers posted to England are contained in legislation. Statutory claims concerning breach of employment legislation can only be brought before employment tribunals.¹²⁹ Jurisdiction of employment tribunals in England is set out in reg.19(1) of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2004. Under reg.19, employment tribunals have jurisdiction to deal with proceedings where the employer resides or carries on business in England and Wales. *Pervez v Macquaire Bank Ltd*¹³⁰ shows that whenever an employee falls within the scope of employment legislation, the requirements of reg.19 are satisfied.¹³¹ In cases of posting of workers falling within the scope of PWD, reg.19 of the 2004 Regulations should be regarded as effectively implementing Art.6 PWD.

The 2004 Regulations also set out the jurisdiction of employment tribunals over non-EU employers for breach of statutory rights conferred by employment legislation. As mentioned, there is a possibility that workers posted to England by such employers, which do not fall within the scope of PWD, are in a somewhat different legal position than workers posted to England by Member State employers. It is possible, although far from certain, that the definition of overriding mandatory provisions under Art.9(1) Rome I is not as narrow as the definition of ‘public policy provisions’ under Art.3(10) PWD. If so, the provisions contained in British employment legislation which do not concern a listed matter and therefore do not satisfy the test of Art.3(10) PWD might nevertheless satisfy the requirements of Art.9(1) Rome I and as such be applied against non-EU employers. If so, employment tribunals would have jurisdiction over statutory claims for breach of employment standards concerning non-listed matters brought by workers posted by non-EU employers, but not over the same types of claim brought by

¹²⁹ See e.g. ERA 1996, s.205(1) which provides that a collection of complaints under the Act may be made to an employment tribunal and that a remedy may not be sought otherwise than by such a complaint. See also EqA 2010, s.120.

¹³⁰ [2011] ICR 266 (EAT).

¹³¹ *ibid* [21].

workers posted by Member State employers. The possibility of this outcome is yet another evidence that PWD is primarily concerned with advancing the interests of the internal market, not the interests of posted workers or host Member States.

In any event, the van Hoek/Houwerzijl study demonstrates that posted workers rarely commence proceedings in host Member States: ‘In all the receiving Member States it seems that the right to take legal action has at present hardly been or has never been used by posted workers...’¹³² There are several possible explanations for this. First, posted workers might not be aware of their rights. Second, postings usually do not last long enough for posted workers to become integrated in the host Member State. The host Member State courts usually remain remote and unfamiliar venues for posted workers. Third, many posted workers work in the building, transport, agency work and other relatively low-skilled, low-wage sectors. Such workers experience particular difficulties accessing the host Member State courts due to financial, linguistic, cultural and similar barriers. Fourth, the judgment of the host Member State courts would usually have to be recognised and enforced in the home Member State which is a major disincentive for posted workers. This problem, however, does not arise where the host Member State imposes an obligation on service receivers to act as guarantors in respect of the local employment standards, in particular minimum remuneration, accorded posted workers.¹³³ Fifth, the terms and conditions of employment of senior posted workers (managers, consultants, professionals etc.), who are more likely to have financial means to pursue litigation in the host Member State, normally exceed minimum host Member State employment standards, in particular concerning wages. In order to overcome some of these difficulties, several Member States allow representative workers’ and employers’ organisations to commence legal proceedings,

¹³² (n43) Executive summary, 35.

¹³³ *Wolff* (n66); cf Case C-433/04 *Commission v Belgium* (n66).

independent of posted workers.¹³⁴ But the van Hoek/Houwerzijl study shows that this measure is also largely ineffective.¹³⁵ Consequently, in order for private enforcement of the relevant host Member State employment standards to be a true alternative to public and collective enforcement, it is imperative that posted workers are able to commence and pursue effective proceedings in home Member States.

3.2. A sending perspective

English posted workers can commence proceedings for breach of the relevant host Member State employment standards in the host Member State. The following text examines whether they can also effectively enforce those standards before English courts.

In a typical posting scenario, the courts of the posted worker's country of origin have jurisdiction over disputes concerning his employment contract. English posted workers therefore do not have a problem commencing proceedings in England. But can they pursue *effective* proceedings in England? Typically, a posted worker's employment contract is governed by the law of his country of origin. The effectiveness of proceedings before English courts therefore primarily depends on their ability to apply the relevant host Member State employment standards where the law of the host Member State is not applicable. According to Davies, 'The consequence [of PWD] for the home State government is that the Directive will require it to ensure its labour courts do apply the law of the host State in appropriate circumstances.'¹³⁶ But this conclusion does not seem to be supported by the wording of PWD. The only two provisions of the Directive relevant in this respect are contained in Arts.5(2) and 6, mentioned above.

¹³⁴ van Hoek and Houwerzijl (n43) Executive summary, 34.

¹³⁵ ibid 35; Germany is in exception in this respect: ibid 34-35.

¹³⁶ Davies (n24) 578; also B. Hepple, *Labour Laws and Global Trade* (Oxford, 2005) 169; cf R. Kidner, 'Jurisdiction in European Contracts of Employment' (1998) 27 ILJ 103, 115-116.

But neither of these provisions requires home Member States to lend their courts for the enforcement of the relevant host Member State standards. Art.6 expressly obliges only host Member States to enable the institution before their courts of proceedings for the enforcement of the terms and conditions of employment guaranteed by Art.3. Similarly, Art.3(1) seems to require only host Member States to ensure that the relevant employment standards are imposed on out-of-state service providers: '*Member States shall ensure that...[foreign service providers] guarantee workers posted to their territory the terms and conditions of employment covering the [listed matters].*' Therefore, as long as host Member States enable posted workers to enforce the relevant local standards before their courts, as required by Art.6, it seems that Member States will have fulfilled their Art.5(2) duty.

Does Rome I provide English courts with a basis for applying the relevant host Member State employment standards? It should be noted in this respect that Davies primarily based his conclusion quoted above on Art.7(1) of the Rome Convention.¹³⁷ This Article provided that:

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.

Although the UK, at the time of acceding to the Convention, reserved the right not to apply Art.7(1),¹³⁸ it was considered that PWD overrode such reservations in the case of employment contracts by '[identifying] the relevant mandatory rules in the context of employment contracts and [requiring] the home State courts to apply them.'¹³⁹ But this

¹³⁷ *ibid* 578-579.

¹³⁸ As allowed by the Rome Convention, Art.22(1)(a); see Contracts (Applicable Law) Act 1990, s.2(2).

¹³⁹ Davies (n24) 579.

argument is not relevant any more since Art.7(1) of the Rome Convention as such has not found its way into Rome I.

Admittedly, Art.9(3) Rome I allows the application of the overriding mandatory provisions of the law which is neither the *lex fori* nor the *lex causae*. But the wording of this Article is highly restrictive:

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.

The host Member State is clearly the country of performance of the obligations arising out of the posted worker's employment contract. As demonstrated in section 2.2 of Chapter VI, provisions concerning the matters listed in Art.3(1) or satisfying the test of Art.3(10) PWD represent 'overriding mandatory provisions' for the purposes of Rome I. Therefore, home Member State courts 'may give effect' to the relevant host Member State standards, provided that their violation renders the performance of the contract 'unlawful'. It is not entirely clear what 'unlawful' means in this context. If it is read as 'illegal', as seems to be the prevailing academic opinion,¹⁴⁰ there will be virtually no situations in which the home Member State courts will be able to apply the relevant host Member State standards. If the work carried out in the host Member State contravenes the local provisions concerning maximum work periods and minimum rest periods, minimum rates of pay etc, the performance of the contract will ordinarily not be illegal. Breach of the relevant employment standards usually entitles the employee to

¹⁴⁰ J. Harris, 'Mandatory Rules and Public Policy under the Rome I Regulation' in F. Ferrari and S. Leible (eds), *Rome I Regulation: The Law Applicable to Contractual Obligations in Europe* (Munich, 2009) 269, 305-308; T. Hartley, *International Commercial Litigation: Text, Cases and Materials on Private International Law* (Cambridge, 2009) 607; cf A. Bonomi, 'Overriding Mandatory Provisions in the Rome I Regulation on the Law Applicable to Contracts' (2008) 10 YPIL 285, 296-299 (effect should also be given to foreign overriding mandatory provisions which impose a specific positive behaviour or guarantee a specific remedy to one of the parties).

appropriate remedies (compensation, the right to refuse to carry out work until the relevant standards are complied with etc.), without rendering the performance of the contract illegal. At least in English law, illegality occurs if the work violates immigration, taxation, and social security rules.¹⁴¹ But since these rules do not concern ‘civil and commercial matters’, they are outside the scope of Rome I¹⁴² and thus cannot be applied under Art.9(3).

Finally, it will be remembered that British legislation which is derived from EU law has a different territorial scope than purely domestic legislation.¹⁴³ Given that PWD is an EU law instrument, the question arises of whether English courts can rely on the *Bleuse*¹⁴⁴ line of cases to apply the relevant host Member State employment standards? Since PWD does not oblige home Member States to enforce the host Member State standards, the answer is negative, as confirmed in *Bullen v Club Cantabrica Coach & Air Holidays Ltd.*¹⁴⁵

The inability of posted workers to commence effective proceedings for the enforcement of the relevant host Member State employment standards in their country of origin further supports the conclusion that the European regime of posting of workers is primarily concerned with advancing the interests of the internal market, not of posted workers or host Member States. If European PIL of employment is to contribute to the fulfillment of the social goals of the EU, posted workers must be able to commence and pursue effective proceedings in home Member States. To achieve this, a provision like the one in Art.7(1) of the Rome Convention could be reintroduced in Rome I. Since this is highly unlikely,¹⁴⁶ a realistic solution is to amend PWD by introducing a

¹⁴¹ S. Deakin and G.S. Morris, *Labour Law* (Oxford, 5th ed, 2009) 131-133.

¹⁴² Art.1(1).

¹⁴³ See Chapter VI, section 1.3.

¹⁴⁴ [2008] ICR 488 (EAT).

¹⁴⁵ ET, case number 3303362/2009, 21 April 2010, unreported.

¹⁴⁶ A. Dickinson, ‘Third-Country Mandatory Rules in the Law Applicable to Contractual Obligations: so long, farewell, Aufwiedersehen, adieu?’ (2007) 3 JPIL 53.

provision that would oblige home Member States to lend their courts for the enforcement of the relevant host Member State standards.

Conclusions

Since its inception, EU law has had to balance the competing interests of the internal market and the host Member States' interests in the social sphere. It is in the area of posting of workers in Europe that these considerations have clashed with particular force. The analysis of various aspects of the regulation of posting of workers in Europe shows a clear pattern of favouring the interests of the internal market over those of host Member States and posted workers. First, whilst guaranteeing the freedom to provide services, EU law has always allowed host Member States to impose some of their employment standards on out-of-state service providers. Recently, however, the CJEU has significantly curtailed the range and type of local standards that can be imposed, thereby endangering the existing model of industrial relations of certain Member States such as Sweden. Second, whilst consistently holding that 'Community law [does not] prohibit [host] Member States from enforcing [the relevant local standards] by appropriate means',¹⁴⁷ the CJEU has imposed restrictions on the host Member State authorities and trade unions which undermine the effectiveness of both public and collective enforcement of those standards. This state of affairs gives private enforcement of those standards, and thereby the rules of PIL, a potentially crucial role. The European Commission has proposed the adoption of two instruments which should remedy some of the perceived problems concerning public and collective enforcement. But even if these initiatives achieve their objectives, the potential importance of private enforcement of the relevant standards will remain.

¹⁴⁷ *Rush Portuguesa* (n4) [18].

Posted workers have the option of commencing proceeding in host Member States for breach of the relevant local employment standards. But posted workers rarely do so due to their often precarious socio-economic position, ignorance of the posting of workers regime and the temporary nature of posting. In order for private enforcement of the relevant host Member State standards to be a true alternative to public and collective enforcement, posted workers must be able to commence and pursue *effective* proceedings in home Member States. Although the home Member State courts have jurisdiction over disputes concerning the posting of workers abroad, neither PWD nor Art.9(3) Rome I seems to allow these courts to apply the relevant host Member State standards. An amendment of PWD which would oblige home Member State courts to do this is desirable. But as things stand, by not enabling posted workers to effectively enforce the relevant host Member State standards in their home countries, European PIL of employment fails to protect the interests of both host Member States and posted workers, thereby furthering, as far as possible, those of the internal market.

IX CONCLUSION

The development of European PIL has revolutionised the understanding of PIL in Europe.¹ The features of this process are said to be federalisation of PIL rules in EU regulations, (quasi-)constitutionalisation of European PIL, and methodological pluralisation, which leads to a bifurcation of intra-EU and external conflicts and to a conflict of two choice-of-law methods, one grounded in traditional thinking, the other based on specific EU-law reasoning. The findings of this dissertation support, and can be explained in terms of, those observations.

Federalisation of PIL is more than a codification of PIL rules in EU regulations. It implies a shift in the traditional rules and perceptions in individual Member States, and in the objectives pursued by this field of law.

English common law of conflict of laws of employment provides a good example of the changes brought about in a Member State by the European regime. As section 1 of Chapter VI shows, statutory employment claims in England do not traditionally trigger the application of choice-of-law rules. The question of whether an employment statute applies is considered to be one of statutory construction. When interpreting the territorial scope of a statute, English courts are exclusively concerned with protecting their own regulatory objectives and employment standards. If an employee falls outside the territorial reach of employment legislation, in other words if the English regulatory objectives and employment standards are not concerned, the employee cannot claim under that legislation. The fact that the employment contract is solely governed by English law and that, consequently, the employee cannot rely on employment legislation of any other country or that the employee finds himself in a

¹ R. Michaels, 'New European Choice-of-Law Revolution' (2007-2008) 82 *Tulane Law Review* 1607.

legal vacuum by simultaneously falling outside the scope of employment legislation of foreign countries that are closely connected with the employment contract is traditionally regarded as irrelevant. But section 2 of Chapter VI demonstrates that Rome I, and to a certain extent the Rome Convention, have radically changed the law in this field by largely merging contractual and statutory claims into one type of claim for choice-of-law purposes. Similarly, Chapter VII shows that Rome II and Rome I do not seem to allow English courts to adhere to the traditional approach to tortious employment claims which allowed concurrence of contractual and tortious causes of action and, consequently, the application of two laws to essentially one claim. Claims traditionally perceived as tortious seem to have been largely merged with contractual and statutory claims for the purposes of choice of law. Even if not, the law governing such claims will in practice ordinarily be determined pursuant to choice-of-law rules for contract by virtue of the accessory choice-of-law rule contained in the escape clause of Art.4 Rome II. By effectively largely merging the three types of employment claim into one category, the European choice-of-law instruments determine situations in which the whole of English law applies (or does not apply) to an international employment dispute. Moreover, the Brussels regime, with its special rules of jurisdiction in employment matters explored in detail in Chapter IV, has supplanted, in the cases falling within its scope, the traditional jurisdictional rules which are based on widely different notions.

The arguments advanced with regard to the English common law of conflict of laws of employment can be transposed to other fields of English law where the problems of the territorial scope of statutes and concurrence of contractual and other causes of action arise. An obvious example is the territorial scope of consumer protection legislation. English courts still approach the question of whether a consumer can claim under a consumer protection statute (e.g. Consumer Credit Act 1974) as an

issue of statutory construction.² But, following the line of arguments put forward in Chapter VI, one would come to the conclusion that the territorial scope of consumer protection legislation is also primarily a matter for Rome I.³ These various effects of federalisation of PIL are further examples of what HARTLEY labelled ‘systematic dismantling’ of the common law of conflict of laws.⁴

The reason for the changes introduced in the Member States’ traditional rules and perceptions by European PIL of employment is that the role of this field of law is different to that of national PIL regimes. European PIL of employment is concerned with supra-national interests. It performs a regulatory function, one of allocating and protecting regulatory authority of states in the field of labour law, thus maintaining and managing the diversity of European national labour law systems and safeguarding the objectives of uniform and harmonised EU employment legislation. This is a facet of European PIL’s (quasi-)constitutionalisation.

As the analysis of the objective of employee protection in Chapter II shows, the distribution of adjudicatory authority should be performed through jurisdictional rules that guarantee employees the right to pursue their claims in favourable forums, and not to defend their cases in unfamiliar and inaccessible forums. Jurisdictional preference accorded to employees, however, should be proportionate and take into account the states’ legitimate interests.⁵ The distribution of legislative authority should be performed through choice-of-law rules that safeguard the application of the law of the state that is sufficiently closely connected with the employment contract in question, legitimately interested in regulating it, with which law the parties to the contract are

² *Office of Fair Trading v Lloyd’s Bank TSB* [2007] UKHL 48.

³ See C. Bisping, ‘Avoid the Statutist Trap: The International Scope of the Consumer Credit Act’ (2012) 8 *JPL* 35.

⁴ T. Hartley, ‘The European Union and the Systematic Dismantling of the Common Law of Conflict of Laws’ (2005) 54 *ICLQ* 813.

⁵ Chapter II, section 4.

sufficiently closely connected and presumably familiar, and whose application they reasonably expect. In addition, party autonomy should be allowed as long as it benefits the employee by building upon the mandatory minimum standard of protection set by the objectively applicable law.⁶ Chapters IV and V demonstrate that the rules concerning employment of Brussels I and Rome I largely accord with the mentioned considerations. Nevertheless, it is suggested that Brussels I would be improved if the rule of the engaging place of business were abolished, and two new jurisdictional rules were introduced, one in favour of claimant employees (the ‘seeking out’ rule), the other in favour of claimant employers (the rule of the habitual place of work). Furthermore, it is suggested that Rome I would be improved by the abolition of the rule of the engaging place of business. The effective amalgamation of the three types of employment claim in English law into one category for choice-of-law purposes is a manifestation of the regulatory function of ‘European’ choice-of-law rules, which endeavour to pinpoint one country to which an international employment relation objectively ‘belongs’, which therefore has legislative authority with regard to that relation which should be safeguarded. But, as suggested in Chapter VII, the escape clause of Rome II needs to be amended if it is to adequately channel legislative authority over an international employment relation to one country, and cater for the situations where the employment contract is governed by two laws (the chosen law and the objectively applicable law). Finally, Chapter III shows that the respect for diversity of national labour law systems is achieved through wide and inclusive personal scope of the special jurisdictional and choice-of-law rules of Brussels I and Rome I. This can be seen as an attempt to allocate and protect regulatory authority of states that have intermediate legal categories of dependent self-employed workers or ascribe employer responsibilities to multiple employing entities.

⁶ Chapter II, section 3.

But the effective amalgamation of the three types of employment claim and the channelling of regulatory, in particular legislative, authority over an international employment relation to one country creates significant problems in cases of interaction between European PIL of employment and EU primary law. According to Rome I and Brussels I, the law of the country of an employee's 'origin' remains applicable, and the courts of that country retain competence, when the employee is temporarily posted abroad. Service providers from Member States with relatively low levels of terms and conditions of employment who provide services in affluent Member States can undercut local competitors. Indeed, EU law, namely the Treaty and the Posted Workers Directive, gives those service providers the freedom to provide services within the EU, and allows host Member States to impose only a limited range and type of local employment standards on out-of-state service providers. Furthermore, as Chapter VIII demonstrates, all ways of enforcing the relevant host country standards, namely public, collective and private enforcement, are largely ineffective. This shows that the interests of the internal market take precedence over those of host Member States. Calls have been made, from various quarters (including most of the academia, trade unions, politicians, many national governments and the EU bodies), to reform the regime of the posting of workers in Europe by increasing the effectiveness of public and collective enforcement of the relevant standards. Another measure, suggested in this dissertation, could be to increase the effectiveness of private enforcement, thus making European PIL a part of the solution to posting of workers in Europe.

Finally, the methodological pluralisation of EU PIL is reflected in the fact that the determination of the territorial scope of EU-law derived employment rights is based on specific EU-law reasoning. Although it is argued in Chapter VI that the territorial scope of British employment legislation is primarily a matter for Rome I, EU-law derived employment rights must remain an exception, since the unilateralist approach to

determining the territorial reach of those rights is mandated by EU law.⁷ In cases of conflicts with third countries (i.e. situations involving connections with one or more EU and non-EU countries), Member State courts must safeguard the objectives of uniform and harmonised EU employment legislation in appropriate cases, regardless of the law applicable pursuant to the choice-of-law rules of Rome I. It remains yet to be clarified what the appropriate cases are.

If European PIL of employment indeed performs a regulatory function, primarily in the European context, there are further questions that should be addressed, which could not have been done in the space of this dissertation. In national labour law systems, employment law is but one aspect of legal regulation of employment relations. Other aspects include collective bargaining, social security and taxation. In national laws, these various aspects complement each other in achieving the national regulatory objectives. European PIL of employment is traditionally considered in isolation of fields of law such as European and international law of collective bargaining, social security and taxation. A further step in determining whether European PIL of employment adequately performs its regulatory function is to consider its interaction with other elements of the system of regulation of international employment relations and how the system as a whole contributes to the achievement of supra-national regulatory objectives.

Finally, further research, either solely of European PIL of employment or of the system of the EU regulation of international employment relations as a whole, should take greater account of the comparative perspective. For example, as mentioned in section 3.2 of Chapter II, the choice-of-law rules for determining the objectively applicable law of Rome I are an attempt to achieve the desired flexibility and take into account the various public and private interests involved. Another attempt is the

⁷ Chapter VI, section 1.3.

solution of the Second Restatement of the Conflict of Laws and its progeny. Unlike European PIL of employment, which channels legislative authority over an international employment relation to one country, the Second Restatement allows various aspects of an international employment relation (i.e. various issues) to be governed by various laws. To determine the law applicable to an issue, the US courts are required to consider, among other things, governmental interests.⁸ As discussed in Chapter VIII, European PIL of employment is at the centre of the problem of posting of workers in Europe. The employment contracts that a service provider from a Member State with relatively low levels of terms and conditions of employment has with its employees who it employs in that country remain subject to that country's law when those employees are posted abroad for the purpose of performing services there. In the US, an analogous problem with posted workers does not arise. One explanation lies in the specificities of the US Constitution.⁹ But another possible explanation is that the PIL rules concerning employment in the US are different. Because the legislative authority over an international employment relation is not channelled to one country, but rather various issues can be governed by various laws, service providers from less affluent US states are not in a position to benefit from their comparative advantage, since the issue of which employment standards are posted workers entitled to during the period of posting can be subject to the law of the host state. Of course, research is needed to test this hypothesis, and, furthermore, whether it is realistic for European PIL law to adopt a solution similar to that of the Second Restatement. The fate of Art.7(1) of the Rome Convention suggests that it is not.

This dissertation has endeavoured to show that European PIL of employment is endowed with a regulatory function, that it has brought about significant changes in the

⁸ Second Restatement of the Conflict of Laws, §§6, 187, 188.

⁹ C. Barnard, 'Restricting Restrictions: Lessons for the EU from the US?' (2009) 68 CLJ 575.

traditional English rules and perceptions, and that certain PIL rules should be amended in order for this field of law to adequately perform its task. This dissertation has also aimed to demonstrate that European PIL is not only concerned with resolving individual private disputes and achieving private justice and fairness in individual cases, but that it has an important systemic function. This, in turn, reveals something about PIL as a whole. If European PIL of employment has such a ‘federalised’, ‘(quasi-)constitutional’ role, that is a piece of evidence for the proposition that the concept of ‘private’, expressed in its very name, is obscuring the true nature of the discipline.

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