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Challenges for the Future Development of the European Private International Labour Law[1]

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Abstract

The paper addresses the evolution of the rules of the European private international labour law and identifies three key challenges that will shape the future development of this field of law and that will have to be addressed by the judiciary and/or the legislators. These challenges include: (i) the operation of the connecting factor engaging place of business, (ii) the interpretation of the escape clause and (iii) challenges resulting from the fourth industrial revolution and emergence of new working arrangements.

Keywords

Conflict of Laws; Private International Labour Law; Escape Clause; Employment Contract; Platform Work; Engaging Place of Business; Rome I Regulation; Rome Convention; Schlecker; Voogsgeerd.

1 Introduction

The area of the European private international labour law has gone through quite a remarkable development in relatively short time. When the Brussels Convention[2] was adopted in 1968, it did not contain any provisions concerning employment contracts despite the fact that the original draft incorporated employment contracts under rules on exclusive jurisdiction and designated the courts of the habitual place of work or domicile of the employer

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2 Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters.

as compulsory forum for matters concerning employment contracts.[3] This was primarily due to the fact that work was already in progress on an instrument unifying rules for determining the law applicable to cross-border contracts, which was eventually adopted in June 1980 as the Rome Convention.[4] Authors of the Brussels Convention wanted to make sure that disputes over contracts of employment will as far as possible be brought before the courts of the state whose law governs the contract and in an attempt to avoid discrepancies between the rules on jurisdiction and rules on the law applicable that will be enshrined in a later convention, they decided to exclude any rules concerning employment contracts from the Brussels Convention altogether.[5] Employment contracts were thus subjected to general regime and the jurisdiction was determined either by the general rule based on domicile of the defendant or special rule concerning contractual matters, which conferred jurisdiction to the courts of the place of performance of the obligation in question. Brussels regulation also enabled prorogation of jurisdiction with respect to employment contracts and in the case of proceedings based on a tort committed at work, jurisdiction was given to the courts for the place where the harmful event occurred.

The Rome Convention in 1980 developed a complex mechanism for determining the law applicable to employment contracts and enshrined special protective rules in its Art. 6. It introduced habitual place of work as a principal connecting factor and the engaging place of business as a subsidiary connecting factor.[6] Moreover it instituted an escape clause, which provided that both the principal and subsidiary connecting factors could be disregarded if it appears from the circumstances as a whole that the contract is more closely connected with another country, in which case the contract shall be governed by the law of that country. Controversial rule, limiting

3 Report on the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters by Mr P. Jenard. In: Official Journal No C 59/1 of 27 September 1968, p. 24 ("Jenard Report").

4 Convention of 19 June 1980 on the law applicable to contractual obligations.

5 Jenard Report, p. 24.

6 According to Art. 6 para. 2 letter b) Rome Convention: if the employee does not habitually carry out his work in any one country, a contract of employment shall be governed (in the absence of choice) by the law of the country in which the place of business through which he was engaged is situated.

the freedom of choice by parties to the employment contract was introduced as well. Under this rule, a choice of law made by the parties shall not have the result of depriving the employee of the protection afforded to him/her by the mandatory rules of the law which would be applicable according to the principal or subsidiary connecting factor in the absence of choice.

Following the adoption of the Lugano I Convention,[7] which reflected on the adoption of the Rome Convention and introduced special rules for employment contracts, the Brussels Convention was amended in 1989 to incorporate special provisions as well. As envisaged by the Jenard Report, rules on jurisdiction were synchronised with conflict rules established by the Rome Convention. Thus, the jurisdiction was principally conferred to the courts for the habitual place of work. Secondary rule of the engaging place of business was introduced as well, while the employee could still initiate proceeding also in the courts of the state where of employer's domicile. Special protective rules concerning prorogation of jurisdiction were introduced as well.

Following the adoption of the Treaty of Amsterdam, which enabled the European Union ("EU") (then European Community) to adopt acts of secondary legislation in the field of private international law, the abovementioned rules were transferred into regulations with only minor amendments and remain in force up to now. After witnessing practical operation of these rules for several decades, the time is ripe for articulating key challenges for the future development of the European private international law. Some of the challenges are a consequence of globalisation, digitalisation and other technological changes, known as the fourth industrial revolution, which affect the way in which work is performed. Other issues are brought about by the very design of the rules of the European private international labour law and from the interpretation of these rules provided by the Court of Justice of the EU ("CJEU also EU Court of Justice, alternatively Court of Justice"). This paper will address three distinct challenges: (i) operation of the connecting factor engaging place of business, (ii) interpretation of the escape clause and finally (iii) challenges resulting from digitalisation and emergence of new working arrangements.

7 Convention of 16 September 1988 on jurisdiction and the enforcement of judgments in civil and commercial matters (Lugano I Convention) which applies between EU member states and EFTA countries, replaced in 2007 by Lugano II Convention.

2 Operation of the connecting factor engaging place of business

The European private international labour law prescribes several connecting factors for determining the law applicable to individual employment contracts, while imposing a strict hierarchy between them. The principal rule, enshrined in Art. 6 para. 2 (a) of the Rome Convention (Art. 8 para. 2 of the Rome I Regulation[8]) states that individual employment contract shall be governed by the law of the country in which (or from which)[9] the employee habitually carries out his/her work in performance of the contract, even if the employee is temporarily employed in another country. The primary connecting factor is thus the habitual place of work of the employee. The secondary rule contained in Art. 6 para. 2 (b) of the Rome Convention (Art. 8 para. 3 of the Rome I Regulation) refers to the application of the law of the country where the place of business through which the employee was engaged is situated. According to the Rome Convention, this subsidiary connecting factor of the engaging place of business was to be utilised "*if the employee does not habitually carry out his work in any one country.*"[10] The Rome I Regulation did not adopt the same wording and instead calls for the use of the subsidiary connecting factor in situations "where the law applicable cannot be determined pursuant to para. 2" (i.e. by means of the principal connecting factor of the habitual place of work). The new wording in the Rome I Regulations is the result of the extraordinary way in the CJEU interpreted provisions of Art. 6 of the Rome Convention. The phrasing of the Rome Convention suggested relatively wide scope of application for the secondary connecting factor of the engaging place of business, since it envisaged its application to all situations when the employee does not habitually carry out his/her work in any one country, thus covering e.g. all workers engaged in international transport. However, CJEU took different

8 Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations.

9 Following established case law of the Court of Justice of the EU, Rome I Regulation extended definition of the connecting factor of habitual place of work to include not just country *in which*, but also *from which* the employee habitually carries out his/her work in performance of the contract.

10 Art. 6 para. 2 letter b) of the Rome Convention.

path and severely restricted options for invoking the subsidiary connecting factor of the engaging place of business, primarily by giving extremely broad interpretation to the concept of habitual place of work. Thus, the habitual place of works covers (i) the place from which the employee predominantly fulfils his/her obligations towards the employer;[11] (ii) the place where the employee has established the effective centre of his/her working activities;[12] and in the absence of office space, also (iii) the place where the employee carries out the majority of his/her work.[13]

Citing the objective of Art. 6 of the Rome Convention, which is to guarantee adequate protection to the employee, in *Koelzsch*[14] the CJEU reiterated that the principal connecting factor of habitual place of work set out in Art. 6 (2)(a) of the Rome Convention, must be given a broad interpretation, while the subsidiary connecting factor of the engaging place of business in Art. 6 (2)(b) thereof, can apply only if the court seized is not in a position to determine the country in which the work is habitually carried out. If employee carries out his/her work in more than one state, the primary connecting factor of habitual place of work should nonetheless be applied when it is possible for the court to determine the state with which the work has a significant connection.[15] In such a case, the factor of the country in which the work is habitually carried out must be understood as referring to the place in which or from which the employee actually carries out his working activities and, if there is no centre of activities, to the place where he carries out the majority of his activities.[16]

The EU Court of Justice made it abundantly clear, that even employment contracts in international transport sector will fall within the scope of the principal connecting factor of the habitual place of work.

11 Judgment of the Court of Justice of 13 July 1993, Case C-125/92, para. 21–23.
12 Judgment of the Court of Justice (Sixth Chamber) of 9 January 1997, Case C-383/95, para. 23.
13 Judgment of the Court of Justice (Sixth Chamber) of 27 February 2002, Case C-37/00, para. 42.
14 Judgment of the Court of Justice (Grand Chamber) of 15 March 2011, Case C-29/10, para. 43.
15 Ibid., para. 44.
16 Ibid., para. 45.

In *Voogsgeerd*[17] CJEU provided some guidance for interpretation of the subsidiary connecting factor of the engaging place of business. First of all it stated that the concept of engaging place of business must be understood as referring exclusively to the place of business which engaged the employee (where the employment contract was concluded or where the *de facto* employment relationship was created) and not to that with which the employee is connected by his actual employment.[18] In this context national courts should take into consideration indicators such as the place of business which published the recruitment notice and that which carried out the recruitment interview. As regards formal requirements for the engaging place of business, CJEU expressly ruled out the requirement for the business unit to have legal personality. It must however, amount to a stable structure of an undertaking. Consequently, not only the subsidiaries and branches but also other units, such as the offices of an undertaking, could constitute places of business within the meaning of Art. 6 (2)(b) of the Rome Convention, even though they do not have legal personality.[19] Such a business unit must however, in principle, belong to the undertaking which engages the employee, that is to say, form an integral part of its structure.[20] This is significant, as it would most probably exclude staffing agencies from being regarded as engaging place of business.[21]

Another requirement formulated by the Court is a certain degree of permanence of the business unit. The Court explicitly warns that 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 agent 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 an engaging place of business.

17 Judgment of the Court of Justice (Fourth Chamber) of 15 December 2011, Case C-384/10.

18 Ibid., para. 46, 52.

19 Ibid., para. 54.

20 Ibid., para. 57.

21 See also Grušić, U. Should the connecting factor of the "engaging place of business" be abolished in European private international law? *International & Comparative Law Quarterly*. 2013, Vol. 62, No. 1, p. 187.

Finally, CJEU pronounced, that even the place of business of an undertaking other than that which is formally referred to as the employer, with which that undertaking has connections, may be classified as a place of business if objective factors make it possible to establish that there exists a real situation different from that which appears from the terms of the employment contract, even though the authority of the employer has not been formally transferred to that other undertaking.[22]

Case law of the Court of Justice significantly reduced the scope of application of the subsidiary connecting factor, while failing to provide clear enough interpretation of the concept of the engaging place of business. Broad interpretation of the habitual place of work means that in almost all imaginable scenarios, including employment in international transport, it will be possible to establish habitual place of work of an employee. Thus, the subsidiary connecting factor of the engaging place of business would come into play principally in cases where the employee does not work on the territory of any state entity (e.g. employees working on high seas, in Antarctica or even in space).[23] Another possible scenarios mentioned by *Grušić* include situations when employee does not have one permanent basis, but maintains two or more bases with equal distribution of his/her working time between them or a case in which employee does not have any permanent base and even analysis of the distribution of his/her working time and the intention of the parties do not lead to a conclusion enabling to establish a habitual place of work. Final alternative could be a situation when employee does have a base in some country, but the connection with that base is not strong enough.[24]

All in all, scenarios in which the subsidiary connecting factor of the engaging place of business could be invoked are rare and the provision is thus stripped

22 Judgment of the Court of Justice (Fourth Chamber) of 15 December 2011, Case C-384/10, para. 65.

23 See also Kadlecová, T. *Evropské mezinárodní právo soukromé v kontextu pracovního práva*. Praha: Wolters Kluwer ČR, 2013, p. 127; Grušić, U. Should the connecting factor of the "engaging place of business" be abolished in European private international law? *International & Comparative Law Quarterly*. 2013, Vol. 62, No. 1, pp. 181–182.

24 Grušić, U. Should the connecting factor of the "engaging place of business" be abolished in European private international law? *International & Comparative Law Quarterly*. 2013, Vol. 62, No. 1, pp. 181–182.

of any reasonable practical value. Considering the objective of the rules determining the law applicable to employment contracts,[25] i.e. protection of employees as a weaker party, as well as the general aim of legal certainty and predictability, keeping the subsidiary connecting factor of the engaging place of business in the regulation does not contribute to fulfilment of these objectives. As CJEU made clear in *Voogsgeerd*, the concept of the engaging place of business refers exclusively to the place of business where the employment contract was concluded (or where the *de facto* employment relationship was created) and not to that with which the employee is connected by his actual employment.[26] Such a constructions does not provide strong enough connection with the actual performance of the contract and gives rise to the risk of manufacturing artificial connections, since determining the country in which the place of business through which the employee was engaged will be situated is completely at the discretion of the employer.[27] This might even be one of the reasons why CJEU is so wary of conferring any more significance to this connecting factor.[28] Complex structure of the subsidiary connecting factor as well as its complicated relation with the principal connecting factor make it increasingly susceptible to incorrect interpretation by national courts.[29] Should the subsidiary connecting factor be replaced, situations falling within its current scope could be easily remedied by applications of the principle of the closest connection. It would streamline the structure of Art. 8 of the Rome I Regulation and thus making it less prone to inaccurate interpretation and application. Employing directly the principle of the closest connection would also contribute to the attainment of the objective of employee protection, as it would lead to application of law that has adequate connection with the performance of the employment contract

25 Preamble Rome I Regulation, para. 23, 35.

26 Judgment of the Court of Justice (Fourth Chamber) of 15 December 2011, Case C-384/10, para. 46, 52.

27 Grušić, U. Should the connecting factor of the "engaging place of business" be abolished in European private international law? *International & Comparative Law Quarterly*. 2013, Vol. 62, No. 1, p. 188.

28 Compare Kadlecová, T. *Evropské mezinárodní právo soukromé v kontextu pracovního práva*. Praha: Wolters Kluwer ČR, 2013, p. 127.

29 Grušić, U. Should the connecting factor of the "engaging place of business" be abolished in European private international law? *International & Comparative Law Quarterly*. 2013, Vol. 62, No. 1, p. 190.

itself, as opposed to the law of a country in which the contract was merely concluded. Finally, it would also limit the scope for speculation and evasion of protective legislation by employers, which is the case with respect to the engaging place of business, which could be unilaterally determined by the employer. Moreover, as *Grušić* points out, the location of the engaging place of business would remain relevant for the purpose of determining the closest connection as one of the factors that need to be taken into consideration.[30] It will be interesting to observe how the case law of the EU Court of Justice as well as academic discussions in the future will tackle this issue.

3 Interpretation of the escape clause

The escape clause contained in Art. 6 para. 2 of the Rome Convention (resp. Art. 8 para. 4 of the Rome I Regulation) represents a very significant tool, which enables the competent court to effectively set aside generally applicable connecting factors of the habitual place of work or the engaging place of business and to proclaim as applicable the law of the state with which the employment contract is more closely connected, as appearing from the circumstances of the case as a whole.

However, the formulation of the escape clause itself is very concise and as such opens a wide room for various interpretations. It therefore might come as a surprise, that CJEU so far did not have ample opportunities to provide guidance for application and interpretation of the escape clause.

It is worth noting in this context that the escape clause enshrined in Art. 6 of the Rome Convention (Art. 8 of the Rome I Regulation) is not a special instrument, developed exclusively for the purpose of determining the law applicable to individual contracts of employment. Similar mechanism is laid down also in Art. 4 para. 5 of the Rome Convention (Art. 4 para. 3 of the Rome I Regulation), which sets out general rules determining the law applicable to contractual obligations in the absence of choice by parties.

Such situation naturally invites temptation to consider possible convergence between these two provisions and especially creates the questions to what extent the case law interpreting the general escape clause in Art. 4 may

30 Ibid.

be utilised with respect to the escape clause applicable to employment contracts.[31] After CJEU provided interpretation of the general escape clause contained in the Rome Convention in the case *Intercontainer Interfrigo*,[32] several serious questions were raised as to potential impact of this judgment on the application and interpretation of the escape clause concerning employment contracts. In *Intercontainer Interfrigo* CJEU rejected strict interpretation of the escape clause, applied e.g. by Dutch and Scottish courts, according to which the escape clause is subsidiary to the general and specific presumptions contained in Art. 4 para. (2) to (4).[33] The Court of Justice instead opted for more flexible interpretation and stated that it is not the case that national court may only refrain from applying the presumptions in Art. 4 para. (2) to (4) of the Rome Convention where they do not have any genuine connecting value, but they may also be disregarded in a situation where the court finds that the contract is more closely connected with another country.

Van Den Eeckhout alerts to the fact that when interpreting Art. 6 of the Rome Convention (Art. 8 of the Rome I Regulation) account has to be taken of the objective of the particular provision, which is to protect or even favour the employee as a weaker party to the contract.[34] Referring to the Green paper on Rome I Regulation[35] which describes the escape clause as a tool for avoiding the harmful consequences for the worker of rigid connection

31 Both the general escape clause enshrined in Art. 4 para. 5 and the escape clause concerning employment contracts in Art. 6 para. 2 Rome Convention were transferred into the Rome I Regulation. Whereas the escape clause regarding the employment contracts (Art. 8 para. 4) remained fundamentally unchanged, the general escape clause (Art. 4 para. 3) was altered so that it now requires not just "more close connection," but "manifestly more close connection." It is not without interest that the Dutch language version of the regulation contains the reference to "manifestly more close connection" in both Art. 8 para. 4 and Art. 4 para. 3, which is not the case in the English, Slovak, Czech, German or French versions of the regulation.

32 Judgment of the Court of Justice (Grand Chamber) of 6 October 2009, Case C-133/08.

33 Ibid., para. 63. See also Opinion of Advocate General Bot of 19 May 2009, Case C-133/08, para. 71–79.

34 Van Den Eeckhout, V. Navigeren door artikel 6 EVO-Verdrag c.q. artikel 8 Rome I-Verordening: mogelijkheden tot sturing van toepasselijk arbeidsrecht. Een analyse vanuit de vraag naar de betekenis voor het internationaal arbeidsrecht van de zaak Intercontainer Interfrigo (C-133/08). *Arbeidsrechtelijke Annotaties*. 2010, Vol. 9, No. 1, pp. 54–57.

35 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/2002/0654 final, p. 35 ("Green paper on Rome I Regulation").

of the employment contract to the law of the place of performance, she saw this as a window for interpretation of the escape clause in Art. 6 (2) in a way, which would enable to proclaim as the law applicable the most protective i.e. substantively most favourable law for the employee.[36]

CJEU finally addressed the escape clause contained in Art. 6 (2) of the Rome Convention in *Schlecker* case.[37] The court stated that in so far as the objective of Art. 6 of the Rome Convention is to guarantee adequate protection for the employee, that provision must ensure that the law applied to the employment contract is the law of the country with which that contract is most closely connected.[38] However, at the same time the court adopted deliberations of the Advocate General, who pointed out in point 36 of his Opinion, that interpretation must not automatically result in the application, in all cases and regardless of the nature of the dispute, of the law most favourable to the worker. The Advocate General further recalled earlier cases *Koelzsch*[39] and *Voogsgeerd*,[40] emphasising that it was with a clearly expressed concern for "adequate", and not necessarily optimal or "favourable", protection for the employee and guided by considerations which had already been identified by the court in interpreting the rules of jurisdiction laid down by the Brussels Convention,[41] that the court held that 'compliance with the employment protection rules provided for by the law of that country must, so far as is possible, be guaranteed'.[42] A different interpretation would, according to the Advocate General, significantly undermine legal certainty and the predictability of the approaches adopted in the context of the mechanism for determining the law applicable to an individual employment contract, in that, depending on the nature of the dispute and

36 Green paper on Rome I Regulation, p. 56.
37 Judgment of the Court of Justice (Third Chamber) of 12 September 2013, Case C-64/12.
38 Ibid., para. 34.
39 Judgment of the Court of Justice (Grand Chamber) of 15 March 2011, Case C-29/10, para. 41–42.
40 Judgment of the Court of Justice (Fourth Chamber) of 15 December 2011, Case C-384/10.
41 Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters
42 Opinion of Advocate General Wahl of 16 April 2013, Case C-64/12, para. 36.

the time at which the court is required to give a ruling, the law regarded as the most favourable will not necessarily always be the same.[43]

Furthermore, the Court of Justice stated that national court must take account of all the elements which define the employment relationship and single out one or more as being, in its view, the most significant. Nevertheless, the court cannot automatically conclude that the rule laid down in Art. 6 (2)(a) of the Rome Convention must be disregarded solely because, by dint of their number, the other relevant circumstances – apart from the actual place of work – would result in the selection of another country.[44] The court further proceeded to provide some examples of significant factors suggestive of a connection with a particular country that should be considered by national courts in each case. These include the country in which the employee pays taxes on the income from his activity and the country in which he is covered by a social security scheme and pension, sickness insurance and invalidity schemes. In addition, the national court must also take account of all the circumstances of the case, such as the parameters relating to salary determination and other working conditions.[45]

In *Schlecker* CJEU followed its approach defined in *Intercontainer Interfrigo* in favour of more flexible interpretation of the escape clause. Thus the connecting factor habitual place of work, referred to in Art. 6 (2)(a) of the Rome Convention may be disregarded not only where that factor is not genuinely indicative of a connection, but even where an employee carries out the work in performance of the employment contract habitually, for a lengthy period and without interruption in the same country, the national court may disregard the law applicable in that country, if it appears from the circumstances as a whole that the contract is more closely connected with another country.[46]

Despite this ruling, many questions concerning the operation of the escape clause still persist. Besides the concern for protection of employee as a weaker party to the employment contract, there are other factor that

43 Ibid., para. 37.
44 Ibid., para. 40.
45 Ibid., para. 41.
46 Opinion of Advocate General Wahl of 16 April 2013, Case C-64/12, para. 42.

need to be taken into account when interpreting the escape clause. After rulings in cases *Laval*[47] and *Viking*[48] it became abundantly clear that the Court of Justice will not shy away from enforcing market freedoms, such as free movement of services at the cost of protection of employees. This could find reflection also in the interpretation of the escape clause. As *Van Den Eeckhout* points out, in the context of posting of workers the escape clause may be interpreted either from the perspective of enforcing the aim of protecting employees and thus proclaiming the law of the host state as being more closely connected to the case or on the other hand, declaring the domestic law of the posting employer as more closely connected as a result of protecting the free movement of services within the internal market of the EU.[49] Such considerations would surface if the Court of Justice was confronted with a case involving connections to both new and old member states and not just Germany and the Netherlands, as in the *Schlecker* case discussed above. Since the Court of Justice opened door for flexible interpretation of the escape clause by national courts, it is easily possible to assume that courts of new member states might be inclined to promote the principle of free movement of services whilst the courts of old member states may favour protection of employees as a way of combating the phenomenon of social dumping. It will be particularly interesting to see how the case law will deal with the issue of materialisation of conflicts law and how the limits to this occurrence will be set. Since many of the "material considerations" are stemming from sources of EU law, such as the principles of free movement of workers and services or fundamental rights enshrined e.g. in the Charter of Fundamental Rights of the European Union, this may even lead to a situation of divergence in interpretation of sources

47 Judgment of the Court of Justice (Grand Chamber) of 18 December 2007, Case C-341/05.

48 Judgment of the Court of Justice (Grand Chamber) of 11 December 2007, Case C-438/05; See also cases Judgment of the Court of Justice (Second Chamber) of 13 April 2008, Case C-346/06; Judgment of the Court of Justice (First Chamber) of 19 June 2008, Case C-319/06.

49 Van Den Eeckhout, V. Navigeren door artikel 6 EVO-Verdrag c.q. artikel 8 Rome I-Verordening: mogelijkheden tot sturing van toepasselijk arbeidsrecht. Een analyse vanuit de vraag naar de betekenis voor het internationaal arbeidsrecht van de zaak Intercontainer Interfrigo (C-133/08). *Arbeidsrechtelijke Annotaties*. 2010, Vol. 9, No. 1, p. 59.

of EU private international law depending on whether the particular case involves intra-EU situation or extra-EU situation.[50]

4 Challenges resulting from a shift towards on-demand economy

Besides the notorious trend of globalisation, recent years have been characterised by a considerable expansion of new forms of working arrangements known as crowdwork or platform work, brought about by the fourth industrial revolution. There is quite a confusion between various terms in this respect, hence as suggested by *Todolí-Signes*, for the purpose of this article we will use the term "on-demand economy" as an umbrella term covering several types of working arrangements, which have in common the use of an online platform to match supply and demand.[51] The term thus encompasses three different business models: (i) the sharing economy, implying an online platform, such as AirBnB or BlaBlaCar, through which independent "micro-entrepreneurs" exploit their underused goods and put it on the market; (ii) online crowdsourcing, which involves outsourcing a job traditionally performed by an employee to an undefined group of individuals in the form of an open call, whereby the work could be performed virtually, without any physical work by the service provider (SpinWrite, Elance or Amazon Mechanical Turk) and finally (iii) offline crowdsourcing, which differs from online crowdsourcing in the sense that it requires local and physical performance by the service provider, typical example being Uber.[52]

These new types of working arrangements pose a series of serious questions not only for labour law, but also for private international law. From the labour law perspective, on-demand economy invigorates the crucial debate over the scope of labour law and definition of the crucial term of dependent

50 See more in Ibid., pp. 61–64; Van Den Eeckhout, V. Alle wegen leiden naar Rome (I), alle wegen vertrekken vanuit Rome (I)!? Mogelijkheden tot opheldering van ipr-onduidelijkheden bij internationale detachering. *Arbeidsrechtelijke Annotaties*. 2009, Vol. 8, No. 2, pp. 10–12.

51 Todolí-Signes, A. The End of the Subordinate Worker? The On-Demand Economy, the Gig Economy, and the Need for Protection for Crowdworkers. *International Journal of Comparative Labour Law and Industrial Relations*. 2017, Vol. 33, No. 2, p. 245.

52 Ibid., pp. 245–254.

work, in particular the notion and role of the criterium of subordination.[53] There are, however, also issues that spill over into the realm of private international law.

The pivotal question from the standpoint of private international law is characterisation of various forms of working arrangements within the on-demand economy. In principle, there are only two options in the European private international law. Either the legal relationship would be considered to constitute individual contract of employment, which will lead to application of protective provisions contained in Art. 8 of the Rome I Regulation or it will not be regarded as employment contract and thereby will be treated as a contract for the provision of services according to Art. 4 para. 1 (b) of the Rome I Regulation. The first scenario would lead to the application of the principal connecting factor of habitual place of work, whilst in the second case the contract would be governed by the law of the country where the service provider (worker) has his/her habitual residence. In both cases the otherwise applicable law may be set aside via the escape clause (see above) if the case exhibited (manifestly) closer connection with another country. Since most workers in various arrangements of on-demand economy would be probably working from home, this dichotomy wouldn't cause major problems in a sense that it would lead to the application of law of a country, which does not have sufficient enough connection to the performance of the work.[54]

The situation is however different when it comes to the choice of law by the parties to the contract. With regard to employment contracts the regulation

53 See e.g. Schoukens, P., Barrio, A. The changing concept of work: When does atypical work become typical? *European Labour Law Journal*. 2017, Vol. 8, No. 4, pp. 306–332; Todolí-Signes, A. The End of the Subordinate Worker? The On-Demand Economy, the Gig Economy, and the Need for Protection for Crowdworkers. *International Journal of Comparative Labour Law and Industrial Relations*. 2017, Vol. 33, No. 2, pp. 241–268; Barancová, H. *Nové technológie v pracovnoprávnych vzťahoch*. Praha: Leges, 2017, pp. 34–54; Švec, M., Olšovská, A. Transformácia pracovného a sociálneho prostredia zamestnancov: Práca 4.0.-24/7? In: Barancová, H., Olšovská, A. (eds.). *Pracovné podmienky zamestnancov v období štvrtej priemyselnej revolúcie*. Praha: Leges, 2018, pp. 74–88.

54 Compare Cherry, M. A. Regulatory options conflicts of law and jurisdictional issues in the on-demand economy. Conditions of Work and Employment Series No. 106 [online]. *International Labour Office*. Published in 2019, p. 21 [cit. 20. 1. 2020]. https://www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---travail/documents/publication/wcms_712523.pdf

provides guarantees preventing the employer from attempting to subordinate the contract to the law of a country with which it does not have sufficient links and which provides as low as possible protection to the employee by forcibly incorporating a choice of law clause into the contract. According to Art. 8 (1) of the Rome I Regulation, choice of law may not have the result of depriving the employee of the protection afforded to him by provisions that cannot be derogated from by agreement under the law that, in the absence of choice, would have been applicable pursuant to para. 2 (habitual place of work), 3 (engaging place of business) and 4 (escape clause) of that Art. No such guarantees, however, are provided in case the contract is characterised as a contract for the provision of services, which makes the door to the race to the bottom wide open.

In the environment of the on-demand economy it is reasonable to assume that in most cases choice of law clauses will be incorporated in standardised online[55] form contracts or terms of service to which the worker has to assent before he/she can even create a user account on the platform.[56] These online forms could have a form of *a click-wrap* contracts, which require the user to manifest his/her consent by clicking "I agree" or a *browse-wrap* contract that requires no clear demonstration of acceptance.[57] Needless to say that any attempt to negotiate would most probably go in vain.[58] As *Cherry* points out, up to this day there is no relevant case law, that would address the issues

55 Art. 25 para. 2 Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters ("Brussels I bis Regulation") expressly stipulates that communication by electronic means which provides a durable record of the agreement shall be equivalent to "writing."

56 Cherry, M. A. Regulatory options conflicts of law and jurisdictional issues in the on-demand economy. Conditions of Work and Employment Series No. 106 [online]. *International Labour Office.* Published in 2019, pp. 24–25 [cit. 20. 1. 2020]. https://www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---travail/documents/publication/wcms_712523.pdf

57 Kyselovská, T. *Vybrané otázky vlivu elektronizace na evropské mezinárodní právo soukromé a procesní: (se zaměřením na princip teritoriality a pravidla pro založení mezinárodní příslušnosti soudu ve sporech vyplývajících ze smluvních závazkových vztahů).* Brno: Masarykova univerzita, 2014, pp. 17–18.

58 Cherry, M. A. Regulatory options conflicts of law and jurisdictional issues in the on-demand economy. Conditions of Work and Employment Series No. 106 [online]. *International Labour Office.* Published in 2019, p. 25 [cit. 20. 1. 2020]. https://www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---travail/documents/publication/wcms_712523.pdf

of jurisdiction or law applicable in the sphere of crowdwork platforms not only in the EU, but nor in California or India.[59] Therefore it will be very interesting to see how the Court of Justice will handle the issues of characterisation of various working arrangements in the on-demand economy and especially how will tackle choice of law clauses in online forms, in particular in the form of *browse-wrap* contract in the context of platform work.

Nevertheless, probably the crucial question is the sustainability of the connection to the place of work. As mentioned above, if particular working arrangement is to be characterised as employment contract, the principal connecting factor of habitual place of work would apply, in case the court classified the arrangement as a contract for the provision of services, the law of the country of habitual residence of the service provider would govern the contract. That is obviously not favourable for the online platform, which would need to abide by rules in many different countries around the world.[60] Therefore, the platforms are highly motivated to make use of choice of law clauses. Given the special mechanism in Art. 8 (1) of the Rome I Regulation, such a strategy will not work completely if the legal relation is characterised by the court as an employment contract. It will, however, most likely work if particular working arrangement is deemed to constitute a service contract. Unless CJEU provides a clear guidance concerning characterisation of working arrangements in the on-demand economy for the purposes of EU private international law instruments, legal uncertainty over the issue of the law applicable would prevail, since national courts seem to have very different approaches towards classification of on-demand work. Moreover, even in the absence of choice, the default connecting factors linking the contract with the place of work performance/habitual residence of the service provider may not be the best solution for the workers/service providers either. Admittedly the contract probably still will have sufficiently close connection with the law determined by these connecting factors (assuming the service provider works from his/her home), but we have to take into account the very special character of these types of relations, which are usually triangular, consisting of the worker (services provider), the platform

59 Ibid., p. 27.
60 Ibid., p. 25.

(intermediary) and the client, each of whom might be located in a different country. It this sense the arrangement reminds the triangular structure of the posting of workers. And the similarities do not end here, since both on-demand work and posting of workers create incentives for exploiting lower standards of labour protection in certain countries by outsourcing activities to be performed by workers to which these lower standards will apply, leading thus to unfair competition and race to the bottom in labour regulation. Therefore it is not improper to suggest drawing some inspiration from the legal regulation of posting of workers, aimed at targeting the race to the bottom, namely the special construct subjecting the posted workers to certain provisions of the host country's legal regulations while in principle remaining to be covered by the legislation of their country of origin.[61] This mechanism is similar to the one provided for in Art. 8 (1) of the Rome I Regulation.[62] Even though both Art. 8 (1) of the Rome I Regulation and the mechanism of the posting of workers directive were, quite rightly, heavily criticised for their complexity and difficulties connected with their application in practice, it nevertheless may still be the lesser of two evils. On-demand work could thus be subjected to the more favourable of the two options consisting of the law of the country were the work/service is provided and the law of the country in which the platform is headquartered. Even better solution, however, would be adoption of a special international instrument laying down minimum standards for on-demand work, such as the Maritime Labour Convention,[63] as suggested by *Cherry*.[64]

61 Article 3 para. 1 Directive No. 96/71/EC of 16 December 1996 concerning the posting of workers in the framework of the provision of services.

62 The same provision is enshrined also in Art. 6 para. 2 Rome I Regulation with respect to consumer contracts.

63 Maritime Labour Convention (MLC) was adopted by the International Labour Organization in 2006 as its convention number 186 and entered into force on 20 August 2013.

64 *C*herry, M. A. Regulatory options conflicts of law and jurisdictional issues in the on-demand economy. Conditions of Work and Employment Series No. 106 [online]. *International Labour Office*. Published in 2019, pp. 30–33 [cit. 20. 1. 2020]. https://www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---travail/documents/publication/wcms_712523.pdf

5 Conclusion

This paper sought to identify crucial challenges for the future development of the private international labour law of the EU. Some of these challenges are stemming from the changing environment and patterns in the world of work, brought about by the fourth industrial revolution. Others are resulting from the very construction of rules of the European private international labour law and from the way CJEU interprets them. Three different issues were discussed above: (i) operation of the connecting factor engaging place of business, (ii) interpretation of the escape clause and finally (iii) challenges resulting from a shift towards on-demand economy.

As regards the connecting factor engaging place of business, CJEU interpreted it in a way, which dramatically undermined the scope of application of this connecting factor, so it now could be engaged only in relatively rare circumstances. Given also the fact that this connecting factor might be difficult to establish and especially the fact that it creates connection to a place where the employment contract was concluded (or where the de facto employment relationship was created) as opposed to a place linked with the actual performance of the employment contract, legitimate question arises as to whether preserving this connecting factor is still justified and appropriate in light of the objectives of the regulation as a whole and in particular objectives of Art. 8 of the Rome I Regulation.

Second challenge addressed in this paper concerns interpretation of the escape clause, enshrined in Art. 8 (4) of the Rome I Regulation. Considering the significance of this clause, which enables to set aside both the principal (Art. 8 para. 2) and subsidiary connecting factors (Art. 8 para. 3) it is surprising that CJEU was not given sufficient opportunity to shed more light on the subject of interpretation of this provision. The case law up to date favours broad interpretation of this clause and even though judgment in the *Schlecker* case provided some useful insight, many questions still remain unresolved. Particularly concerning is the risk of diverging interpretation of this clause by national courts in old and new EU member states within the context of cross-border provision of services. Besides there is also a scope for variability in interpretation of the escape clause depending on whether

particular case has purely intra-union character or not. Common denominator of all these issues is the question of materialisation of conflict law and potential limits thereof.

Finally, the last batch of issues concerns those resulting from digitalisation of the economy and the phenomenon marked as on-demand work. The crucial question in this respect will be that of characterisation, as it determines whether protective provisions concerning employment contracts would apply or not. Another matter in this respect is the dilemma how to prevent the race to the bottom while at the same time preserving legal certainty and predictability and avoiding making the rules too complex and confusing for practice. It will be mainly up to the decision-making practice of national courts and especially CJEU to address these issues in forthcoming years, but academic discourse might be of some help as well, as may be appropriate legislative initiatives on EU level or better even in case of on-demand work, on a global level.

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