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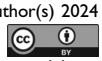

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Private international law regulation of individual employment relationships within the european union

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Abstract
This article is a revised version of a concept paper written for the European Commission on the private international law regulation of individual employment relationships within the EU. It aims to assess the regulation of such relationships from the perspective of European private international law and indicate potential avenues for reform.

Keywords
Private international law, conflict of laws, jurisdiction, choice of law, EU law

1. Introduction

Private international law issues arising out of or in relation to individual employment relationships are, within the EU,[1] resolved by the Brussels Ia Regulation,[2] Rome I Regulation,[3] Posted Workers Directive[4] and the Posted Workers Enforcement Directive.[5]

1. For a full coverage of this field, see Uglješa Grušić, *The European Private International Law of Employment* (CUP 2015).
2. Regulation No 1215/2012 [2012] OJ L351/1. This Regulation superseded Regulation No 44/2001 [2001] OJ L12/1, which, in turn, superseded the 1968 Brussels Convention [1972] OJ L299/32. The regime of jurisdiction and recognition and enforcement of judgments established by the Brussels I Regulation has been extended, with some modifications, to Norway, Switzerland and Iceland: 2007 Lugano Convention [2007] OJ L339/3, replacing the 1988 Lugano Convention [1988] OJ L319/9.
3. Regulation No 593/2008 [2008] OJ L177/6, superseding the 1980 Rome Convention [1980] OJ L266/1.
4. Directive 96/71/EC [1997] OJ L18/1, amended by Directive 2018/957 [2018] OJ L173/16 and Directive 2020/1057 [2020] OJ L249/49.
5. Directive 2014/67/EU [2014] OJ L159/11.

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These legal instruments apply to different kinds of individual employment relationships which have an international element such as those entered into by migrant workers, workers employed by a foreign employer, workers who live in one country and travel to a place of work in another country, workers whom their employer allows to move to another country to live and work there remotely, frontier workers, posted workers, workers transferred within the employer's group to another country, commercial representatives covering more than one country, international transport workers, workers working offshore, teleworkers working from anywhere and nomadic workers. The sheer diversity of transnational individual employment relationships poses problems for the application and interpretation of the above-mentioned legal instruments because, except for the Posted Workers Directive and the Posted Workers Enforcement Directive, they are not limited to any particular kind of transnational individual employment relationship. Although the Court of Justice of the EU has interpreted these legal instruments on many occasions, many issues remain unresolved. The question arises as to whether these issues should be resolved in a future reform of key European private international law instruments.

This article examines the key concepts and operation of the rules of European private international law of employment whose goal is to protect employees as weaker parties[6] in light of the CJEU jurisprudence, and in particular:

- the scope of application of the protective rules of Brussels Ia and Rome I, in particular the meaning of the concept of 'individual employment contract';
- the meaning of the key connecting factors used in the protective rules of Brussels Ia and Rome I, that is, the 'habitual place of work' and the 'engaging place of business';
- the process to determine jurisdiction and the applicable law;
- the role of mandatory provisions and public policy;
- the relevance of the conflict-of-laws rules of the Posted Workers Directive.

2. Meaning of 'individual employment contract'

The protective rules of Brussels Ia apply to 'matters relating to individual contracts of employment'.[7] Those of Rome I apply to 'individual employment contracts'.[8] The CJEU has recently[9] dealt with the meaning of this concept in *Holterman*,[10] *Bosworth*,[11] *Markt24*[12] and *ROI Land Investments*.[13] Also relevant is *Voogsgeerd*.[14]

For the purposes of this article, it is not necessary to present the facts of these cases in detail. In brief, *Holterman* and *Bosworth* raised the question of whether contracts of managerial staff fell within the definition of 'individual employment contract'. In *Markt24*, the CJEU dealt with a

6. Brussels Ia, Recitals 14, 18; Rome I, Recitals 23, 35; Posted Workers Directive, Recitals 13, 14, 17.
7. Brussels Ia, Art. 20(1).
8. Rome I, Art. 8(1). The 'individual employment contract' must also fall within the concept of 'civil and commercial matters': Case C-154/11 *Mahamdia v Algeria* ECLI:EU:C:2012:491; Case C-280/20 *ZN v Bulgaria* ECLI:EU:C:2021:443 (embassy and consular staff).
9. See also Case 266/85 *Shenavai v Kreischer* [1987] ECR 239.
10. Case C-47/14 *Holterman Ferho Exploitatie BV v FLF Spies von Büllesheim* ECLI:EU:C:2015:574.
11. Case C-603/17 *Bosworth v Arcadia Petroleum Ltd* ECLI:EU:C:2019:310.
12. Case C-804/19 *BU v Markt24 GmbH* ECLI:EU:C:2021:134.
13. Case C-604/20 *ROI Land Investments Ltd v FD* ECLI:EU:C:2022:807.
14. Case C-384/10 *Voogsgeerd v Navimer SA* [2011] ECR I-13275.

case where the performance of the employment contract had not commenced at the moment of its termination. *ROI Land Investments* raised the question of whether an accessory contract concluded with a third party related to the employer ('letter of comfort' that guaranteed the performance of the employer's obligations under the employment contract with the claimant) fell within the definition of 'individual employment contract'. *Voogsgeerd* concerned a triangular employment relationship within a corporate group.

The CJEU confirmed the following principles concerning the interpretation of the concept of 'individual employment contract' in its judgments. First, it is autonomous.[15] Second, it should be consistent across Brussels Ia, the Lugano Convention and Rome I (and their predecessors).[16] Third, the concept of 'individual employment contract' in these legal instruments is related to the concept of 'worker' used in substantive EU law, although the two concepts remain distinct.[17] Fourth, the concept of 'individual employment contract' should be interpreted in light of the goal of employee protection.[18] Fifth, to determine whether a contract is an 'individual employment contract', national courts should take into account that such contracts typically exhibit the following characteristics:

> 'they create a lasting bond which brings the worker to some extent within the organisational framework of the business of the undertaking or employer, and they are linked to the place where the activities are pursued, which determines the application of mandatory rules and collective agreements';[19]
>
> 'the independent concept of a "contract of employment"…presupposes a relationship of subordination of the employee to the employer';[20]
>
> 'the concept of "employee"…must be defined in accordance with objective criteria which distinguish the employment relationship by reference to the rights and duties of the persons concerned. 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';[21]
>
> 'an employment relationship implies the existence of a hierarchical relationship between the worker and his employer, and that the issue whether such a relationship exists must, in each particular case, be assessed on the basis of all the factors and circumstances characterising the relationship between the parties'.[22]

15. *Holterman* [36]-[37]; *Bosworth* [24]; *Markt24* [24]; *ROI Land Investments* [28]-[29].
16. *Holterman* [38]; *Bosworth* [22]; *ROI Land Investments* [29], [50]. See also Rome I, Recital 7.
17. *Holterman* [36] (referring to Case C-116/06 *Kiiski v Tampereen kaupunki* [2007] ECR I-7643, concerning non-discrimination and the protection of pregnant workers, workers who have recently given birth or are breastfeeding), [41] (referring to the concept of 'worker' in primary EU law and the Directive on the protection of pregnant workers, workers who have recently given birth or are breastfeeding), [46] (referring to Case C-229/14 *Balkaya v Kiesel Abbruch- und Recycling Technik GmbH* ECLI:EU:C:2015:455, concerning collective redundancies); *Bosworth* [25] (referring to *Kiiski*), [26] (referring to Case C-147/17 *Sindicatul Familia Constanţa v Direcţia Generală de Asistenţă Socială şi Protecţia Copilului Constanţa* ECLI:EU:C:2018:926, concerning the safety and health of workers and working time).
18. *Holterman* [43]; *ROI Land Investments* [25].
19. *Holterman* [39], referring to *Shenavai* [16].
20. *Holterman* [40]; see also *Bosworth* [28] and *Markt24* [25].
21. *Bosworth* [25]; see also *Holterman* [41], *Markt24* [25] and *ROI Land Investments* [31].
22. *Bosworth* [26]; see also *Holterman* [46] and *ROI Land Investments* [32].

The form of the relationship between the parties is not determinative. Furthermore, the conclusion of a formal contract is not a condition for the application of the protective private international law rules – 'the absence of any formal contract does not preclude the existence of an employment relationship that falls within the concept of "individual contract of employment"'.[23] Finally, it is not relevant whether the work that is the subject of an employment contract has been performed or not.[24] In *Voogsgeerd*, the CJEU provided some guidance regarding the concept of employer in a triangular employment relationship for the purposes of the protective private international law rules. The referring court should 'assess what the real relationship between the two companies is… The court seised must, in particular, take into consideration all the objective factors making it possible to establish that there exists a real situation different from that which appears from the terms of the contract'.[25]

These principles allowed the CJEU to suggest that there was an 'individual employment contract' in the above-mentioned cases, except *Bosworth*. This is because the defendants in this case were senior officers and directors, had each an employment contract 'drafted by themselves or at their discretion'[26] and 'exercised control over by whom, where and on what terms they were employed'.[27] This indicated that the defendants had an ability to influence the claimants that was not negligible and, therefore, there was no relationship of subordination even if they were answerable to the claimants' shareholder.[28]

The autonomous and broad interpretation of the concept of 'individual employment contract', as well as a similarly broad interpretation of the concept of 'worker' in substantive EU law, indicates that this concept is fit for purpose and is able to prevent and control abuses. This is of considerable importance today when individual employment relationships exhibit an ever greater complexity and the rise of bogus self-employment and remote and digital platform work puts additional pressure on the employee/self-employed worker dichotomy.

There is, however, one area of uncertainty. Since the CJEU found in *Bosworth* that there was no relationship of subordination, it did not deal with the other questions posed by the referring court. The most important question was whether a claim brought by an employer against their employee for breach of an obligation classified as non-contractual under substantive law (e.g. a claim in fraud or conspiracy) triggered the application of the protective jurisdictional rules. Since the CJEU did not deal with this question in *Bosworth*, we must wait for another opportunity for the clarification of the case law on the jurisdictional treatment of concurrent causes of action in the context of international employment litigation.[29]

3. Meaning of key connecting factors

The protective rules of Brussels Ia and Rome I are based on two key connecting factors, the 'habitual place of work' and the 'engaging place of business'. An employee may commence proceedings

23. *Bosworth* [27]; see also *ROI Land Investments* [32].
24. *Markt24* [26].
25. *Voogsgeerd* [62].
26. *Bosworth* [29].
27. Ibid [30].
28. Ibid [31]-[33].
29. Compare Opinions of AG Øe in *Markt24* [16] and *Bosworth* [91]-[103] with the Opinion of AG Villalon in *Holterman* [26], [33]-[36].

in the courts for the habitual place of work[30] or, absent a habitual place of work, in the courts for the engaging place of business.[31] In the absence of party autonomy, an individual employment contract is, subject to the operation of the escape clause,[32] governed by the law of the country of the habitual place of work[33] or, absent a habitual place of work, by the law of the country of the engaging place of business.[34]

3.1. Habitual place of work

The CJEU has interpreted the connecting factor of the habitual place of work[35] in cases concerning commercial representatives covering more than one country,[36] workers working offshore,[37] posted workers,[38] lorry drivers,[39] seamen[40] and aircrew.[41]

In cases concerning commercial representatives covering more than one country, the habitual place of work was equated to 'the place where or from which the employee principally discharges his obligations towards his employer',[42] that is, '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'.[43] The location and use made of the employee's office (together with the distribution of working time among various countries) was the crucial factor for determining the habitual place of work.[44]

Unlike commercial representatives, workers working offshore do not have an office and, thus, a professional base from which they work. Such workers, provided they work on fixed or floating installations positioned within the territorial waters of a country or above the continental shelf of a country, have a habitual place work.[45] Problems arise if an offshore worker works in two or more countries or on the high seas. If an offshore worker carries out the same kind of work in two or more countries, the habitual place of work 'is, in principle, the place where [the employee] spends most of his working time'[46] looking at the entire period of employment,[47] unless the

30. Brussels Ia, Art. 21(1)(b)(i).
31. Ibid Art. 21(1)(b)(ii).
32. Rome I, Art. 8(4).
33. Ibid Art. 8(2).
34. Ibid Art. 8(3).
35. That is, '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' (Brussels Ia, Art. 21(1)(b)(i)) and 'the country in which or, failing that, from which the employee habitually carries out his work in performance of the contract' (Rome I, Art. 8(2)).
36. Case C-125/92 *Mulox IBC Ltd v Geels* [1993] ECR I-4075; Case C-383/95 *Rutten v Cross Medical Ltd* [1997] ECR I-57.
37. Case C-37/00 *Weber v Universal Ogden Services Ltd* [2002] ECR I-2013.
38. Case C-437/00 *Pugliese v Finmeccanica SpA, Betriebsteil Alenia Aerospazio* [2003] ECR I-3573; Case C-64/12 *Anton Schlecker v Boedeker* ECLI:EU:C:2013:551.
39. Case C-29/10 *Koelzsch v Luxembourg* [2011] ECR I-1595.
40. *Voogsgeerd*.
41. Joined Cases C-168/16 and C-169/16 *Nogueira v Crewlink Ireland Ltd* and *Moreno Osacar v Ryanair Designated Activity Company* ECLI:EU:C:2017:688.
42. *Mulox* [24].
43. *Rutten* [23].
44. *Mulox* [25]; *Rutten* [25].
45. *Weber*.
46. Ibid [50].
47. Ibid [51]-[52].

intention of the parties[48] or the link of the subject matter of the dispute with another place of work[49] indicate that that place of work should be regarded as the habitual place of work. If an offshore worker carries out different kinds of work in two or more countries, qualitative criteria relating to the nature and importance of work carried out in different countries become relevant.[50] The CJEU has not dealt with the situation in which an offshore worker works on the high seas. It appears that there is no habitual place of work in this situation, although a strong case can be made for the application of the law of the flag.[51]

Postings can cake various forms. They may occur under an existing employment contract. They may result in the suspension or termination of an employment contract and/or the conclusion of a new employment contract, either with the same or a different employer. An employee can be posted to the employer's place of business abroad or to a subsidiary, affiliate or customer abroad. Rome I provides 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.[52] 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; the conclusion of a new contract of employment with the original employer or 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.[53]

The CJEU has dealt with postings in two cases. Both cases concerned intra-group transfers. In the first case, an intra-group transfer resulted in the suspension of an employment contract with one employer and the conclusion of an employment contract with a new employer. The CJEU held that the habitual place of work for the second employer could also be the habitual place of work for the first employer when, at the time of the conclusion of the second employment contract, the first employer itself had an interest in the employee's performance of the work for the second employer in a place decided on by the latter.[54] The existence of that interest is determined in an overall manner taking into consideration all the facts of the case, and in particular: that the conclusion of the second contract was envisaged when the first was being concluded; that the first contract was amended on account of the conclusion of the second contract; that there is an organisational or economic link between the two employers; that there is an agreement between the two employers providing a framework for the coexistence of the two contracts; that the first employer retains management powers in respect of the employee; and that the first employer is able to determine the duration of the employee's work for the second employer.[55] In the second case, an employee was unilaterally permanently posted by her employer to a foreign branch. The CJEU implicitly confirmed that this unilateral posting, which ultimately only lasted two days, did not change the habitual place of work.[56]

48. Ibid [54].
49. Ibid [58].
50. Ibid [51].
51. Laura Carballo Piñeiro, *International Maritime Labour Law* (Springer 2015).
52. Rome I, Art. 8(2).
53. Ibid recital 36.
54. *Pugliese* [23].
55. Ibid [24].
56. *Schlecker*.

Postings raise a host of questions regarding the determination of the habitual place of work, most importantly how to distinguish a permanent from a temporary posting. It is clear that all the circumstances of the case should be taken into account, that the intention of the parties is a crucial factor and that a sufficiently long posting leads to a change of the habitual place of work regardless of the intention of the parties. What is a sufficiently long posting for this purpose is unclear. Advocate General Wahl gave an example of 'a very long posting (over 10 years)'[57] which would lead to a change of the habitual place of work regardless of what the parties initially intended. The concept of posting was also unclear under the Posted Workers Directive. This shortcoming has been remedied recently. First, the Posting of Workers Enforcement Directive aims, among other things, to introduce legal certainty with respect to the concept of posting by providing, in Article 4, a non-exhaustive list of indicative factual elements characterising both the temporary nature inherent to the notion of posting and the existence of a genuine link between the employer and the Member State from which the posting takes place. The purpose of these provisions is to help Member State authorities to identify genuine postings and to prevent and sanction any abuse and circumvention of the applicable rules. Second, the Posted Workers Directive was itself amended in 2018. The revised Directive provides for the application of an extended set of terms and conditions of employment of the host Member State for long-term postings (longer than 12 or 18 months).[58] The courts should refer to these rules when determining whether a posting is temporary for the purposes of Rome I.

In a case concerning a lorry driver, the CJEU held that there was a habitual place of work where 'it is possible…to determine the State with which the work has a significant connection'[59] such as when it was possible to determine 'the place in which or from which the employee actually carries out his working activities and, in the absence of a centre of activities,…the place where he carries out the majority of his activities'.[60] Particularly relevant facts were: the place from which the employee carried out his transport tasks, received instructions concerning his tasks and organised his work, the place where his work tools were situated, the places where the transport was principally carried out and where the goods were unloaded, and the place to which the employee returned after completion of his tasks.[61]

In a case concerning a seaman, the CJEU held that the habitual place of work was in the country in which the employee 'principally carries out his work',[62] 'with which the work has a significant connection',[63] 'in which or from which the employee actually carries out his working activities and, if there is no centre of activities,…the place where he carries out the majority of his activities'.[64] Importantly, the CJEU stated that where 'the place from which the employee carries out his transport tasks and also receives the instructions concerning his tasks is always the same, that place must be considered to be the' habitual place of work.[65] Conversely, the flag of the vessel, which has

57. Ibid, Opinion of AG Wahl, [43].
58. Posted Workers Directive, Art. 3(1a).
59. *Koelzsch* [44].
60. Ibid [45].
61. Ibid [49].
62. *Voogsgeerd* [33].
63. Ibid [36].
64. Ibid [37]; similarly [41].
65. Ibid [39]; similarly [40], [44].

traditionally been an important connecting factor in international maritime labour law,[66] did not play any role in this case.

In a case concerning aircrew, the CJEU held that the habitual place of work was 'the place where, or from which, the employee actually performs the essential part of his duties vis-à-vis his employer'.[67] Particularly relevant facts were: the place from which the employee carried out his transport-related tasks, the place where he returned after his tasks, received instructions concerning his tasks and organised his work, the place where his work tools were to be found,[68] the place where the aircraft aboard which the work was habitually performed were stationed[69] and the 'home base' of the employee within the meaning of EU aviation and social security law.[70] The nationality of the aircraft did not play a role in determining the habitual place of work.[71]

Finally, in a case concerning a worker hired in one country to work in another, but where the employer did not assign any work to the employee, who did not perform any work for the employer, the CJEU held that the habitual place of work was the place 'in which the employee was required, pursuant to the contract of employment, to discharge the essential part of his or her obligations towards his or her employer'.[72]

Two conclusions can be derived from this overview of the CJEU case law. First, the connecting factor of the habitual place of work is flexible enough to cover various kinds of transnational individual employment relationships. Second, this connecting factor is interpreted very broadly, which leaves very little, if any, room for the connecting factor of the engaging place of business.

The dominance of the connecting factor of the habitual place of work comes with some downsides. The rise of remote work and digital platforms has enabled employers to expand their labour pool to workers based in foreign countries. This can have two consequences. The first is the fragmentation of the internal labour market within the firm and the subjection of the internal labour market to different jurisdictions and laws, with the concomitant creation of obstacles to collective bargaining. The second is the expansion of the labour pool to workers based in foreign, including non-EU, countries, which carries the risk of undermining employment standards and unfair competition.[73] Furthermore, it is unclear whether the country of the habitual place of work should be equated with the country of the flag of the vessel, at least in some situations.

3.2. Engaging place of business

The CJEU has interpreted the connecting factor of the engaging place of business[74] in only one case, *Voogsgeerd*. The CJEU judgment in *Voogsgeerd*, however, raises more questions than it

66. See generally Carballo Piñeiro (n 51).
67. *Ryainair* [58].
68. Ibid [63].
69. Ibid [64].
70. Ibid [65]-[74].
71. Ibid [75]-[76].
72. *Markt24* [42].
73. Uglješa Grušić, 'Remote Work in Private International Law', in Nicola Countouris and others (eds), *The Future of Remote Work* (European Trade Union Institute 2023) 185.
74. That is, 'the place where the business which engaged the employee is or was situated' (Brussels Ia, Art. 21(1)(b)(ii)) and 'the country where the place of business through which the employee was engaged is situated' (Rome I, Art. 8(3)).

answers.[75] It is clear that the engaging place of business can be determined only by taking into account facts that relate purely to the conclusion of the employment contract or the creation of the employment relationship, not their performance.[76] But the terms 'place of business' and 'engaged' are unclear. It is unclear if the content of the concept of 'place of business' should be derived from the concept of 'branch, agency or other establishment' used in Article 7(5) Brussels Ia, or whether it can also cover other places of business such as independent employment agencies. It is unclear if the term 'engaged' refers to the negotiation or conclusion of the employment contract *by/through* a particular place of business or *at* a particular place of business.[77] The better interpretation appears to be that the term 'place of business' covers the employer's domicile and any 'branch, agency or other establishment' within the meaning of Article 7(5) Brussels Ia.[78] Furthermore, the term 'engaged' should be interpreted as referring to the active involvement in the conclusion of the employment contract through advertising, negotiation, or conclusion of the employment contract by/through a place of business.[79]

The connecting factor of the engaging place of business leads to considerable legal uncertainty and unforeseeability. Furthermore, it is within the control of the employer, so it does not support the objective of employee protection. Finally, it does not support the objective of proximity because the place of engagement can be fortuitous and, if the engaging place of business moves to another country after engagement, this connecting factor points to the place where it 'is situated' at the moment of commencement of proceedings. That is why the CJEU was right to interpret this connecting factor very narrowly and effectively marginalise it.

4. Processes for determining jurisdiction and the applicable law

This section points out the weaknesses that exist in the processes for determining jurisdiction and the applicable law.

4.1. Process for determining jurisdiction

Brussels Ia aims to achieve the goal of employee protection in two ways. First, it gives employees access to more forums for obtaining redress than it does employers. An employee, for example, may commence proceedings in the courts of the Member State in which the employer is domiciled,[80] in the courts for the habitual place of work[81] or, absent a habitual place of work, in the courts for the engaging place of business.[82] The concept of employer's domicile is extended and covers employers not domiciled within the EU pursuant to Article 63, but which have a branch, agency or other establishment in the EU in relation to disputes arising out of the operations of the establishment.[83] The courts for the habitual place of work and for the engaging place of business are available even if

75. Uglješa Grušić, 'Should the Connecting Factor of the "Engaging Place of Business" Be Abolished in European Private International Law?' (2013) 62 *International and Comparative Law Quarterly* 173.
76. *Voogsgeerd* [44]-[46], [48]-[50].
77. Compare *Voogsgeerd* [49] and [50].
78. Ibid, Opinion of AG Trstenjak, [78]-[85].
79. Ibid, CJEU judgment, [49] and [50]; Opinion of AG Trstenjak, [68], [70]-[72].
80. Brussels Ia, Art. 21(1)(a).
81. Ibid Art. 21(1)(b)(i).
82. Ibid Art. 21(1)(b)(ii).
83. Ibid Art. 20(2).

the defendant employer is not domiciled within the EU.[84] An employer may only commence proceedings in the courts of the Member State in which the employee is domiciled or on a counterclaim in the court selected by the employee.[85] Second, employers cannot impose unfavourable jurisdiction agreements on employees. A jurisdiction agreement entered into before a dispute has arisen is effective only if it increases the number of forums available to the employee.[86] A violation of these protective jurisdictional rules is a ground for refusing recognition or enforcement of a foreign judgment where the employee was the defendant.[87]

This process for determining jurisdiction suffers from five weaknesses that run against the goal of employee protection. First, the rule extending the concept of employer's domicile may disfavour claimant employees because its application disapplies national jurisdictional rules, which may be more favourable to employees than the jurisdictional rules of Brussels Ia. The goal of employee protection would be better satisfied if the rule extending the concept of employer's domicile applied without prejudice to the right of claimant employees to rely on national jurisdictional rules against employers not domiciled within the EU, even if they have an establishment in the EU.

Second, while persons domiciled outside the EU can, generally speaking, be sued in the Member State courts under national jurisdictional rules,[88] employers domiciled outside the EU can only be sued in the courts for the habitual place of work or, absent a habitual place of work, in the courts for the engaging place of business if the habitual place of work/engaging place of business is located in the EU. Such employers cannot be sued in the Member State courts under national jurisdictional rules.[89] This makes little sense from the perspective of employee protection. The goal of employee protection would be better satisfied if the availability of the courts for the habitual place of work or, absent a habitual place of work, of the courts for the engaging place of business did not prejudice the right of claimant employees to sue employers domiciled outside the EU under national jurisdictional rules.

Third, as discussed in section 3, the connecting factor of the habitual place of work is interpreted very broadly, which leaves very little, if any, room for the connecting factor of the engaging place of business. This means that there is little reason to keep the jurisdictional rule based on the connecting factor of the engaging place of business, in particular if Advocate General Øe was correct to find in *Markt24* that 'the forum established in Article 7(5) of the Brussels Ia Regulation is, in principle, the same as that for the "business which engaged the employee", within the meaning of Article 21(1)(b)(ii) of that regulation'[90] and that Article 7(5) applied even if the establishment in question no longer existed at the moment of commencement of proceedings.[91] If the jurisdictional rule based on the connecting factor of the engaging place of business were abolished, a new rule could be introduced instead of it, which, by analogy to the jurisdictional rule over contracts for the provision of services,[92] would, absent a habitual place of work, give jurisdiction to the courts for each place of work.[93]

84. Ibid Art. 21(2).
85. Ibid Art. 22.
86. Ibid Art. 23.
87. Ibid Art. 45(1)(e)(i).
88. Ibid, Art. 6(1).
89. *ROI Land Investments*.
90. *Markt24*, Opinion of AG Øe, [90], fn 68.
91. Ibid [93].
92. Brussels Ia, Art. 7(1)(b) second indent; Case C-386/05 *Color Drack GmbH v Lexx International Vertriebs GmbH* [2007] ECR I-3699.
93. Uglješa Grušić, 'Jurisdiction in Employment Matters in Brussels I: A Reassessment' (2012) 61 ICLQ 91.

Fourth, if the habitual place of work is outside the EU, the jurisdictional rule based on the connecting factor of the engaging place of business is inapplicable.[94] If the jurisdictional rule based on the connecting factor of the engaging place of business is kept, the goal of employee protection would arguably be better satisfied if it were available in two situations: where there is not a habitual place of work at all or where the habitual place of work is outside the EU.

Fifth, it is unclear if arbitration agreements contained in employment contracts should only be enforced under the same or similar conditions that apply to jurisdiction agreements. This problem arises because, on the one hand, arbitration is expressly excluded from the subject-matter scope of Brussels Ia,[95] but, on the other hand, arbitration agreements, if effective, deprive employees of the regulation's jurisdictional protection. There is evidence that arbitration clauses are used by digital platforms in contract with their workers.[96] The goal of employee protection would be better satisfied if it were clarified in a recital to Brussels Ia that arbitration agreements cannot undermine the jurisdictional protection that it provides to employees.

4.2. Process for determining the applicable law

The parties to an individual employment contract can choose the applicable law, but the choice may not deprive employees of the protection afforded to them by the mandatory provisions of the law applicable in the absence of choice.[97] In the absence of choice, an individual employment contract is governed by the law of the country of the habitual place of work[98] or, in the absence of a habitual place of work, by the law of the country of the engaging place of business.[99] 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 (the escape clause).[100]

The process for determining the applicable law has given rise to several questions. What laws can the parties to an employment contract choose as the applicable law and how can they exercise their party autonomy? How to determine whether a provision is mandatory for the purposes of this choice-of-law rule? Are all mandatory provisions or only those concerning the protection of employees relevant? What are the sources of such provisions (case law, legislation, collective agreements and/or custom)? When do such provisions apply if the chosen law and the objectively applicable law provide different rights and remedies in the same situation? How should the laws in question be compared (general *v* issue-by-issue *v* something-in-between comparison)? What is the role of the courts (active or passive)?

The CJEU and Advocate General Sánchez-Bordona addressed most of these questions in the recent *Gruber* case, which concerned the law applicable to employment contracts between Romanian lorry drivers and their Romanian employers where most of the work was carried out in Western Europe.[101] They confirmed that Article 8(1) allows the parties to an individual

94. Case 32/88 *Six Constructions Ltd v Humbert* [1989] ECR 341.
95. Brussels Ia, Art. 1(2)(d).
96. See *Aslam v Uber BV* [2017] IRLR 4 (English employment tribunal) [35].
97. Rome I, Art. 8(1).
98. Ibid Art. 8(2).
99. Ibid Art. 8(3).
100. Ibid Art. 8(4).
101. Joined Cases C-152/20 and C-218/20 *DG v SC Gruber Logistics SRL and Sindicatul Lucrătorilor din Transporturi, DT v SC Samidani Trans SRL* ECLI:EU:C:2021:600.

employment contract to choose freely, expressly or impliedly, the law governing their contract.[102] Moreover, Article 8(1) does not prohibit the use of standard clauses pre-formulated by the employer.[103] As Recital 35 clarifies, Article 8(1) safeguards the application of not only 'provisions which cannot be derogated from by agreement' in purely domestic contracts[104] but also of provisions 'which can only be derogated from to [the] benefit [of employees]' in accordance with the law applicable in the absence of choice.[105] The relevant mandatory provisions are only those provisions which provide specific protection to employees.[106] Such provisions can be derived not only from statute but also from other sources like collective agreements.[107] The CJEU clarified how to compare the chosen law with the objectively applicable law. The law applicable in the absence of choice establishes the floor of protection.[108] The application of Article 8 requires a two-step approach:

> in a first step, that the national court identify the law that would have applied in the absence of choice and determine, in accordance with that law, the rules that cannot be derogated from by agreement and, in a second step, that that court compare the level of protection afforded to the employee under those rules with that provided for by the law chosen by the parties. If the level of protection provided for by those rules is greater, those same rules must be applied.[109]

The CJEU and Advocate General further indicated that minimum wage was an example of a comparable subject area.[110] There are also parts of Advocate General opinions in other cases offering some answers to these questions.[111]

Does the different wording of the escape clause for individual employment contracts and the escape clause for contracts in general[112] imply that the fixed choice-of-law rules for individual employment contracts can be disapplied more easily than the fixed choice-of-law rules for contracts in general?[113] What factors can be taken into account for the purposes of applying the escape clause? The CJEU and Advocate General Wahl dealt with these questions in *Schlecker*. This case concerned an employee who was unilaterally permanently posted by her employer to the employer's foreign branch. Advocate General Wahl opined that the relationship between the

102. Ibid, CJEU judgment, [36].
103. Ibid [40].
104. Ibid, AG Opinion, [63]-[68], [70]
105. Ibid, CJEU judgment, [29].
106. Ibid, AG Opinion, [54], [61].
107. Ibid, CJEU judgment, [30].
108. Ibid [24].
109. Ibid [27].
110. Ibid [31]-[32]; AG Opinion, [72]. See also AG Opinion, [54], fn 34 (health and safety as example of a comparable subject area).
111. *Voogsgeerd*, Opinion of AG Trstenjak, [49] (no overall comparison of the two bodies of employment law that is entirely divorced from the case under consideration; the comparison should take into account those matters which relate directly to the subject matter of the dispute), [50] (law giving a longer notice period or a longer limitation period more favourable for the employee), [50], fn 21 (the right to leave, protection against dismissal and/or the protection of acquired rights as examples of comparable subject areas); *Schlecker*, Opinion of AG Wahl, [24] (only mandatory provisions of the objectively applicable law that are more favourable to the employee apply over the relevant provisions of the chosen law), [34] (protection against dismissal as an example of a comparable subject area).
112. Rome I, Art. 4(3).
113. Ibid Art. 4(1), 4(2).

fixed choice-of-law rules and the escape clause for individual employment contracts is not the same as the relationship between the fixed choice-of-law rules and the escape clause for contracts in general.[114] All the circumstances of the case can be taken into account for the purposes of applying the escape clause, although the following are particularly relevant: payment of income taxes, affiliation to social security, pension, sickness insurance and invalidity schemes, parameters relating to salary determination and other working conditions.[115] Recital 20 of Rome I further states that account should be taken of whether the contract in question has a very close relationship with another contract or contracts.

The reasons for abolishing the connecting factor of the engaging place of business apply with the same force to Rome I. If the choice-of-law rule based on the connecting factor of the engaging place of business were abolished, the applicable law in the absence of party autonomy and a habitual place of work would be determined by the direct application of the principle of the closest connection. The same technique is used to determine the applicable law of contracts in general that do not fall within a fixed choice-of-law rule and do not have a characteristic performance.[116]

5. The role of mandatory provisions and public policy

Mandatory provisions play a role in choice of law. Public policy plays a role with respect to choice of law and foreign judgments.

5.1. Mandatory provisions

The parties to an individual employment contract can choose the applicable law in accordance with Article 3 Rome I. Article 3 provides that in purely domestic/purely intra-EU contracts, choice of law shall not prejudice the application of provisions of the objectively applicable law/EU law which cannot be derogated from by agreement.[117]

Choice of law may not have the result of depriving the employee of the protection afforded to him by the mandatory provisions of the objectively applicable law.[118] As already mentioned, mandatory provisions are defined as provisions which cannot be derogated from by agreement or which can only be derogated from to the employee's benefit.[119]

The court can always apply the overriding mandatory provisions of the law of the forum.[120] The court can also give effect to the overriding mandatory provisions of the law of the place of performance of the contract, in so far as those overriding mandatory provisions render the performance of the contract unlawful.[121] Overriding mandatory provisions are defined as provisions the respect for which is regarded as crucial by a country for safeguarding its public interests, such as its political, social or economic organisation, to such an extent that they are applicable to any situation falling within their scope, irrespective of the law otherwise applicable to the contract.[122]

114. *Schlecker*, AG Opinion, [58].
115. Ibid, CJEU judgment, [41].
116. Rome I, Art. 4(4).
117. Ibid Art. 3(3) and 3(4).
118. Ibid Art. 8(1).
119. Ibid recital 35.
120. Ibid Art. 9(2).
121. Ibid Art. 9(3).
122. Ibid Art. 9(1).

The CJEU has dealt with overriding mandatory provisions of a third country in *Nikiforidis*.[123] To escape an economic crisis, Greece took certain measures in 2010, in agreement with the EU, the European Central Bank and the International Monetary Fund, for the reduction of its public debt. Law No 3833/2010 and Law No 3845/2010 imposed a total reduction of 15% in the remuneration of public sector workers. The two laws applied to public sector workers working both in Greece and abroad. The two laws purported to affect the employment of Nikiforidis, a Greek national employed as a teacher at the Greek primary school in Nuremberg, Germany under an employment contract governed by German law. The question arose whether the two Greek laws could be applied to Nikiforidis' employment contract. After concluding that Article 9 Rome I precluded the application, as legal rules, of the overriding mandatory provisions of a country that is not the country of the forum or the country of the place of performance of the contract,[124] the CJEU held that if the applicable German substantive employment law allowed the courts to take into account as a matter of fact rules belonging to another legal system, Article 9 should not stand in the way of this.[125] Eventually, the German Federal Labour Court refused to give effect to the Greek laws and ruled that Nikiforidis' salary remained unaffected by such laws under the applicable German law. Nikiforidis was, therefore, allowed to recover unpaid wages. But the effectiveness of Greek legislation aimed at reducing its public debt pursuant to an agreement with the EU, ECB and the IMF was thereby precluded.

5.2. Public policy

A provision of foreign law can be refused application and a foreign judgment can be refused recognition or enforcement if the application of the provision and the recognition or enforcement of the judgment is manifestly incompatible with the public policy (*ordre public*) of the forum.[126] Public policy has not given rise to problems of application and interpretation in relation to transnational individual employment relationships.

6. Relevance of the conflict-of-laws rules of the Posted Workers Directive

The Posted Workers Directive seeks to coordinate the laws of the Member States with regard to the employment standards that are applicable to service providers from a Member State that post workers within the EU.[127] The Directive 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.[128] It guarantees posted workers the application of certain employment standards that are in force in the host Member State. The Posted Workers Directive and the Posted Workers Enforcement Directive provide mechanisms for the enforcement of those standards.

123. Case C-135/15 *Greece v Nikiforidis* ECLI:EU:C:2016:774.
124. Ibid [50].
125. Ibid [51]-[52].
126. Rome I, Art. 21; Brussels Ia, 45(1)(a).
127. Posted Workers Directive, Recital 13.
128. Ibid Art. 1(1) and 1(3).

The Posted Workers Directive contains several conflict-of-laws rules.[129] First, according to the Directive, the concept of 'worker', which defines its scope, is provided by the host Member State law.[130]

Second, the Directive provides that there are certain host Member State employment standards that must, and some that may, be imposed on out-of-state service providers.[131] The range of employment standards that must be applied has recently been extended and now covers the following matters: maximum work periods and minimum rest periods; minimum paid annual leave; remuneration, including overtime rate; the conditions of hiring-out of workers, in particular the supply of workers by temporary employment undertakings; health, safety and hygiene at work; protection of pregnant women, women who have recently given birth, children and young people; non-discrimination; the conditions of workers' accommodation where provided by the employer to workers away from their regular place of work; and allowances or reimbursement of expenditure to cover travel, board and lodging expenses for workers away from home for professional reasons. In addition, the Directive now also provides specific rules for long-term postings (longer than 12 or 18 months).[132]

Third, the Directive makes an additional forum available to posted workers on top of those available under Brussels Ia. In order to enforce the right to the terms and conditions of employment guaranteed in Article 3, judicial proceedings may be instituted in the Member State in whose territory the worker is or was posted.[133]

7. Conclusion

The autonomous and broad interpretation of the concept of 'individual employment contract', as well as a similarly broad interpretation of the concept of 'worker' in substantive EU law, indicates that this concept is fit for purpose and is able to prevent and control abuses. It is, however, uncertain whether a claim brought by an employer against their employee for breach of an obligation classified as non-contractual under substantive law triggers the application of the protective rules of Brussels Ia and Rome I. This could be clarified in a future reform of these instruments, especially in a future reform of Brussels Ia.[134]

The connecting factor of the habitual place of work is flexible enough to cover various kinds of transnational individual employment relationships. This connecting factor is interpreted very broadly, which leaves very little, if any, room for the connecting factor of the engaging place of business. This is a welcome development because the connecting factor of the engaging place of business leads to considerable legal uncertainty and unforeseeability, and does not support the objectives of employee protection and proximity. However, the rise of remote work and digital

129. Rome I, Art. 23; Case C-626/18 *Poland v European Parliament and Council of the European Union* ECLI:EU:C:2020:1000 [133]; Case C-620/18 *Hungary v European Parliament and Council of the European Union* ECLI:EU:C:2020:1001 [179]
130. Posted Workers Directive Art. 2(2).
131. Ibid Art. 3(1), 3(10).
132. Ibid Art. 3(1a).
133. Ibid Art. 6.
134. In relation to Rome I, the problem created by concurrent causes of action in the context of international employment litigation is largely avoided by the fact that the Rome II Regulation recognises the doctrine of accessory allocation in its general choice-of-law rule and the choice-of-law rule for *culpa in contrahendo*: Regulation (EC) No 864/2007 [2007] OJ L199/40, Arts 4(3), 12(1).

platforms has revealed some downsides of the connecting factor of the habitual place of work. The expansion of the labour pool to workers based in foreign countries can lead to the fragmentation of the internal labour market within the firm, the subjection of the internal labour market to different jurisdictions and laws, with the concomitant creation of obstacles to collective bargaining, the undermining of employment standards and unfair competition. The EU should monitor this risk and, if necessary, intervene. Furthermore, it is unclear whether the country of the habitual place of work should be equated with the country of the flag of the vessel, at least in some situations. This could be clarified in a future reform of Brussels Ia and Rome I.

There are weaknesses in the process for determining jurisdiction that run against the goal of employee protection. This goal would be better satisfied if Brussels Ia were amended so that 1) the rule extending the concept of employer's domicile applies without prejudice to the right of claimant employees to rely on national jurisdictional rules against employers not domiciled within the EU, even if they have an establishment in the EU; 2) the availability of the courts for the habitual place of work or, absent a habitual place of work, of the courts for the engaging place of business does not prejudice the right of claimant employees to sue employers domiciled outside the EU under national jurisdictional rules; 3) the rule based on the connecting factor of the engaging place of business is abolished and a new rule introduced which, absent a habitual place of work, gives jurisdiction to the courts for each place of work; and 4) it is clarified in a recital to Brussels Ia that arbitration agreements cannot undermine the jurisdictional protection that it provides to employees.

The process for determining the applicable law works well. However, the reasons for abolishing the connecting factor of the engaging place of business apply with the same force to Rome I. If this were to happen, the applicable law in the absence of party autonomy and a habitual place of work would be determined by the direct application of the principle of the closest connection.

The rules concerning mandatory provisions and public policy in Brussels Ia and Rome I work well, as do the conflict-of-laws rules in the Posted Workers Directive.

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