

23.2 European labour market: Posted Workers Directive and the social implications of the movement of labour

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1. INTRODUCTION

Much can be, and has been, said about *Laval*.¹ Yet one thing that can hardly be said about this case is that it concerned the *global* labour market. *Laval* was a European affair. Nevertheless, this rich case tells us a lot about the economic and social constitution of the European Union (EU), the world's most deeply integrated regional economic organisation, and the role of law in shaping that constitution. *Laval* also prompts us to think more generally about the social implications of the global movement of labour, goods, services and capital.

This chapter starts by describing the European context of *Laval* and arguing that the factors which gave rise to this case do not exist on the global plane. It then addresses the specific mode of reasoning mandated by EU law which largely determined the outcome of *Laval*. This indicates one of the social pitfalls of economic integration driven by law which ought to be taken into account in the creation and development of any economic and political union of states. Next, the chapter describes the role of private international law in the clash of the economic and social spheres of the EU. The final section mentions some other key challenges facing regional and global labour markets.

2. LAVAL: A EUROPEAN AFFAIR

Laval cannot be discussed in isolation from its sister case, *Viking*.² These cases concerned two situations where the economic and social spheres of the EU clash with particular force.

In *Laval*, a Latvian company by the name of Laval posted its Latvian workers to Sweden to perform a construction contract that its Swedish affiliate had won there. After Laval refused to negotiate and enter into collective agreements with local trade unions and to pay Swedish wages to its Latvian workers, the unions organised a blockade of all Laval's construction sites in Sweden. This forced Laval to withdraw from Sweden and to file for bankruptcy of its Swedish affiliate. Laval then brought proceedings in Sweden seeking remedies for the violation of its freedom to provide services.

In *Viking*, a Finnish company by the name of Viking owned a ferry registered in Finland, plying its trade between Finland and Estonia. It decided to re-register the vessel in Estonia in order to benefit from lower labour costs in that country. The International Transport Workers' Federation (ITF) has a policy of combatting the use of flags of convenience. It called on its members to boycott Viking. Viking then commenced proceedings in England against the ITF and its affiliate, the Finnish Seamen's Union, seeking an injunction to stop the boycott. The claim was based on the violation of Viking's freedom of establishment.

¹ Case C-341/05 *Laval un Partneri Ltd v. Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avdelning 1, Byggettan and Svenska Elektrikerförbundet* [2007] ECR I-11767.

² Case C-438/05 *International Transport Workers' Federation and Finnish Seamen's Union v. Viking Line ABP and OÜ Viking Line Eesti* [2007] ECR I-10779.

Primary EU law guarantees economic operators the freedoms of establishment and to provide services.³ The European Court of Justice (ECJ) held that these freedoms have a horizontal direct effect against trade unions.⁴ Since an industrial action aimed at forcing a service provider from one Member State to comply with the employment standards of another Member State or an establishment to abandon its plan to move from one Member State to another is liable to make the exercise of the fundamental economic freedoms ‘less attractive, or more difficult’,⁵ it represents a restriction of those freedoms. In order to be lawful, the industrial action has to be non-discriminatory, justified and proportionate.

Although in both cases the ECJ recognised that the right to take collective action is a fundamental right forming an integral part of the general principles of EU law,⁶ it subordinated this right to the fundamental economic freedoms. In *Laval*, the imposition of Swedish collectively agreed employment standards and the running wage on out-of-state service providers was not in accordance with the then extant version of the Posted Workers Directive (PWD).⁷ The PWD seeks to coordinate the laws of the Member States with regard to employment standards that are applicable to service providers from a Member State that post workers within the EU.⁸ It lays down a ‘nucleus of mandatory rules for minimum protection’ that have to be observed by out-of-state service providers in the host Member State.⁹ Since the Swedish collectively agreed employment standards in question and the running wage were not part of this ‘nucleus’, their enforcement against an out-of-state service provider by means of industrial action could not be justified.¹⁰ In *Viking*, the ECJ noted that the right to take collective action for the protection of workers was a legitimate interest which, in principle, justified the restriction of the fundamental economic freedoms,¹¹ but then added that a collective action could be justified only where the jobs or conditions of employment of the trade union members were jeopardised or under serious threat.¹² The ECJ further noted that a collective action would not be proportionate unless the unions had exhausted other means at their disposal less restrictive of the freedom of establishment.¹³ *Laval* and *Viking* have had a chilling effect on industrial action in Europe.

The factors that gave rise to *Laval* and *Viking* do not exist on the global plane. Primary EU law guarantees the freedoms of establishment and to provide services. It has long been established that the freedom to provide services entails the right of a service provider established in one Member State to move freely with all its workers whom it lawfully employs in that country to other Member States for the purpose of providing services there and that the imposition of the host Member State employment standards, which represents a

³ Consolidated Version of the Treaty on the Functioning of the EU [2016] OJ C59/47, arts 49 (freedom of establishment) and 56 (freedom to provide services).

⁴ *Laval* (n 1) [98]; *Viking* (n 2) [55].

⁵ *Laval* (n 1) [99]. Similarly, *Viking* (n 2) [72].

⁶ *Laval* (n 1) [91]; *Viking* (n 2) [44].

⁷ Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services [1997] OJ L18/1. This directive has been amended by Directive (EU) 2018/957 of the European Parliament and of the Council of 28 June 2018 amending Directive 96/71/EC concerning the posting of workers in the framework of the provision of services [2018] OJ L 173/16, which is mentioned below in text accompanying nn 22-24.

⁸ *Ibid.*, Recital 13.

⁹ *Ibid.*, Art 3 contains a list of employment standards that either must or may be imposed on out-of-state service providers.

¹⁰ *Laval* (n 1) [106]–[111].

¹¹ *Viking* (n 2) [77].

¹² *Ibid.*, [81].

¹³ *Ibid.*, [87].

burden on out-of-state service providers, is a restriction of the free movement of services that has to be non-discriminatory, justified and proportionate in order to be lawful.¹⁴ *Laval* and *Viking* controversially extend this case law to circumstances where the fundamental economic freedoms are restricted not by public authorities, but by trade unions. The World Trade Organization has done much to liberalise the trade in services by virtue of the General Agreement on Trade in Services. But the global opening up of the trade in services is not nearly as comprehensive and deep as the free movement of services within the EU.¹⁵ This is why *Laval* tells us a lot about the EU's economic and social constitution, but little, if anything, directly about the global labour market.

3. THE MODE OF LEGAL REASONING IN *LAVAL*: PITCHING SOCIAL RIGHTS AGAINST FUNDAMENTAL ECONOMIC FREEDOMS

Almost anyone who has written about *Laval* and *Viking* agrees that these two cases contributed to the erosion of social rights within the EU. The ECJ decisions have indeed undermined the employment standards and systems of industrial relations of countries like Sweden and Finland.

Sweden, for example, is a country that traditionally relies on trade unions for the setting, monitoring and enforcement of the level of wages and other employment standards.¹⁶ Interestingly, sectoral collective agreements in Sweden do not, in principle, regulate wages. Instead, the level of wages is generally left to be negotiated on a case-by-case basis at the level of each workplace. If an employer refuses to negotiate the level of wages, unions will force it to do so by means of primary and secondary industrial action. When implementing the PWD, Sweden introduced legislation laying down many employment standards to be observed by out-of-state service providers as the nucleus of mandatory rules for minimum protection. But with respect to the minimum wage, Sweden decided to rely on the suitability and effectiveness of its traditional system of industrial relations. The PWD seeks to accommodate the interest of countries like Sweden by providing that Member States that have neither legislatively set employment standards nor a system for declaring collective agreements or arbitration awards to be of universal application may, 'if they so decide', impose, on a basis of equality of treatment, employment standards set by 'collective agreements or arbitration awards which are generally applicable to all similar undertakings in the geographical area and in the profession or industry concerned' and/or 'collective agreements which have been concluded by the most representative employers' and labour

¹⁴ Case C-113/89 *Rush Portuguesa Lda v. Office national d'immigration* [1990] ECR I-1417; Case C-43/93 *Raymond Vander Elst v. Office des Migrations Internationales* [1994] ECR I-3803; Joined Cases C-49/98, C-50/98, C-52/98 to C-54/98 and C-68/98 to C-71/98 *Finalarte Sociedade de Construção Civil Lda (C-49/98), Portugaia Construções Lda (C-70/98) and Engil Sociedade de Construção Civil SA (C-71/98) v. Urlaubs- und Lohnausgleichskasse der Bauwirtschaft and Urlaubs- und Lohnausgleichskasse der Bauwirtschaft v. Amilcar Oliveira Rocha (C-50/98), Tudor Stone Ltd (C-52/98), Tecnam-Tecnologia do Ambiente Lda (C-53/98), Turiprata Construções Civil Lda (C-54/98), Duarte dos Santos Sousa (C-68/98) and Santos & Kewitz Construções Lda (C-69/98)* [2001] ECR I-7831.

¹⁵ A. Mattoo and A. Carzaniga (eds), *Moving People to Deliver Services* (World Bank and OUP, 2003) ix: 'One area has, however, reaped only limited benefits from this climate of openness: the supply of services through the "temporary movement of individual service suppliers" (mode 4). The Uruguay Round negotiations on mode 4 served primarily to facilitate exploratory business visits and the movement of high-level personnel within multinational corporations. Developing countries were disappointed by the limited commitments in their area of comparative advantage and are now seeking greater openness.'

¹⁶ M. Rönnmar, 'Free Movement of Services versus National Labour Law and Industrial Relations Systems: Understanding the *Laval* Case from a Swedish and Nordic Perspective' (2007–2008) 10 *CYELS* 493.

organisations at national level and which are applied throughout national territory'.¹⁷ By deciding not to introduce legislation laying down the minimum wage and not to impose generally applicable collectively set employment standards, Sweden had created a situation where the attempts of Swedish unions to force out-of-state service providers to negotiate the level of wages by means of industrial action led to the violation of the service providers' freedom to provide services.

The outcome in *Laval* was largely determined by the specific mode of reasoning mandated by EU law. *Laval* concerned a clash of a fundamental economic freedom guaranteed by primary EU law and the right to take collective action. The ECJ in both *Laval* and *Viking* recognised the right to take collective action as a fundamental right forming an integral part of the general principles of EU law.¹⁸ One should be forgiven for thinking that the recognition of the right to take collective action as a fundamental social right should have led the Court to balance this right on more or less equal terms with the fundamental economic freedoms. This is, however, not something that the ECJ did or indeed could have done. The moment the Court approached *Laval* and *Viking* with the premise that these two cases concerned the economic operators' fundamental economic freedoms and decided that these freedoms had a horizontal direct effect against trade unions, which was a rather controversial decision, the outcome of these cases was by and large determined. The actions of the unions in question became prima facie violations of the economic operators' fundamental economic freedoms. The industrial action in *Laval* stood little chance of being regarded as justified because the attempt of the unions to force the out-of-state service provider to negotiate the level of wages was not in accordance with the PWD. The industrial action in *Viking* similarly stood little chance of being regarded as proportionate because the (threat of) infliction of as much economic harm as possible on the employer is in the very nature of industrial action. This is why *Laval* and *Viking* were seen as representing one step forward for the recognition of social rights as fundamental rights, but two steps back in terms of their enjoyment within the EU.¹⁹

Let us imagine for a moment that the ECJ had started off with a different premise in *Laval* and *Viking*, namely that these two cases were primarily about the trade unions' right to take collective action and that any restriction of that right had to be non-discriminatory, justified and proportionate to be lawful. Had the Court adopted this approach, it would have probably found the restriction of the unions' right to take collective action by the fundamental economic freedoms to be justified. But it is questionable whether the total subordination of the right to take collective action to the fundamental economic freedoms would have been proportionate. Had the ECJ adopted this approach, it would have probably had to strike a different balance between the interests of the internal market and the interests of Member States like Sweden in protecting their employment standards and systems of industrial relations. That the outcome of *Laval* and *Viking* was largely determined by the mode of reasoning mandated by EU law is clear if one compares these two cases with the 2013 decision of the European Committee of Social Rights.²⁰ Here, the Committee started off with the premise that the Lex Laval adopted by Sweden in the aftermath of the *Laval* case restricted the social rights of the complainant Swedish trade unions. Since the fundamental

¹⁷ PWD, art 3(8), second subparagraph.

¹⁸ *Laval* (n 1) [91]; *Viking* (n 2) [44].

¹⁹ A. C. L. Davies, 'One Step Forward, Two Steps Back? The *Viking* and *Laval* Cases in the ECJ' (2008) 37 *ILJ* 126.

²⁰ *Swedish Trade Union Confederation (LO) and Swedish Confederation of Professional Employees (TCO) v. Sweden*, Decision on admissibility and the merits, Complaint No 85/2012, Complaint No 85/2012, 3 July 2013.

economic freedoms '[could] not be treated, *from the point of view of the system of values, principles and fundamental rights embodied in the [European Social] Charter*, as having a greater *a priori value* than core labour rights,'²¹ the Committee came to the opposite conclusion to that of the ECJ.

It is this disbalance in the economic and social constitution of the EU that has been at the heart of debates since *Laval* and *Viking*. An important part of the European Pillar of Social Rights proclaimed at the Social Summit for Fair Jobs and Growth held in November 2017,²² whose ambition was to remedy the incompleteness of the EU's economic and social constitution, was a revision of the PWD. A directive amending the PWD was adopted in June 2018.²³ The main objectives of the revision of the PWD are to implement the principle that the same work at the same place should be remunerated in the same manner and to ensure a level playing field between posting and local companies in the host Member State.²⁴

Laval, *Viking* and the 2013 decision of the European Committee of Social Rights are of further interest for showing that the view on the balance to be struck between the economic and social spheres of the EU depends on one's standpoint. The criticism of *Laval* and *Viking* has primarily come from scholars from the core Western and Northern European Member States. The revision of the PWD has also primarily found support in these countries.²⁵ This is understandable because it is in these countries that the unfettered fundamental economic freedoms put employment standards and systems of industrial relations under considerable strain. But *Laval* and *Viking* look different when viewed from the perspective of Eastern European Member States.²⁶ Since 2004, the EU has been considerably enlarged by the accession of 13, mostly former communist, countries. The level of wages and other employment standards in these countries was, and still largely is, considerably lower than in the rest of the EU. Cheap labour is the comparative advantage of these countries. The ability of service providers from these countries to move freely with all their workers to other Member States for the purpose of providing services there and to undercut local competition by virtue of lower labour costs could be seen as part of the EU-wide social contract. Looked at from this perspective, the decisions in *Laval* and *Viking* at least partly balance out the socially negative effects in Eastern European Member States of the free movement of goods and services into (eg diminished production capacity and 'goods dumping') and capital out of these countries.²⁷ The revision of the PWD will have the effect of depriving Eastern European Member States of their comparative advantage.

4. THE ROLE OF PRIVATE INTERNATIONAL LAW IN THE CLASH OF THE ECONOMIC AND SOCIAL SPHERES OF THE EU

²¹ *Ibid.*, [122] (emphasis added).

²² European Commission, 'Social Summit for Fair Jobs and Growth: Strengthening the EU's Social Dimension', (Press Release, Brussels, 16 November 2017).

²³ Directive (EU) 2018/957 of the European Parliament and of the Council of 28 June 2018 amending Directive 96/71/EC concerning the posting of workers in the framework of the provision of services [2018] OJ L 173/16.

²⁴ European Commission, 'Proposal for a Directive of the European Parliament and of the Council amending Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services' COM(2016) 128 final.

²⁵ *Ibid.*, 4: 'Austria, Belgium, France, Germany, Luxembourg, the Netherlands and Sweden have claimed support for a modernisation of the Posting of Workers Directive'.

²⁶ *Ibid.*, 5: 'Bulgaria, Czech Republic, Estonia, Hungary, Lithuania, Latvia, Poland, Slovakia and Romania... have argued that a review of the 1996 Directive is premature'.

²⁷ D Kukovec, 'Whose Social Europe?' (Harvard Institute for Global Law and Policy Working Paper Series 2011/#3) <www.harvardiglp.org/category/allresources/working-papers/> accessed 16 April 2018.

This section addresses the role that private international law plays in this clash of the economic and social spheres of the EU. There are two aspects of this role. First, the rules of private international law form part of the relevant legal framework. Second, private international law has a role to play in the enforcement of this legal framework.

Pursuant to the Rome I Regulation on the law applicable to contractual obligations,²⁸ employment contracts are governed by the law of the country of the habitual place of work.²⁹ Absent a habitual place of work, the employment contract is governed by the law of the country of the engaging place of business.³⁰ Exceptionally, if another country is more closely connected with the employment contract, the law of that country will govern.³¹ Even if the parties have chosen the applicable law, the employee cannot be deprived of the protection afforded to him by the law of the country designated as applicable by the objective connecting factors.³² These provisions lay down a kind of a country-of-origin rule. Employment contracts are essentially governed by the law of the country of the *employee's origin*. The law applicable to the employment contract is stable. It does not change when the employee is temporarily posted abroad.³³

Pursuant to the Brussels I Regulation on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters,³⁴ the employee has the choice of suing the employer in several courts, most importantly in the courts of the employer's domicile,³⁵ in the courts for the habitual place of work³⁶ or, in the absence of a habitual place of work, in the courts of the engaging place of business.³⁷ The employee, on the other hand, may, in principle, be sued only in the courts of his domicile.³⁸ A choice-of-court agreement is effective only if it is entered into after the dispute has arisen³⁹ or if it increases the number of courts available to the claimant employee.⁴⁰ A temporary posting abroad neither deprives the courts competent under the Brussels I Regulation of their jurisdiction nor confers jurisdiction on the courts of the country where the employee is temporarily posted.

The Rome I and Brussels I Regulations complement the provisions of primary EU law on the freedom to provide services. Whenever an out-of-state service provider posts its workers to the host Member State, the rules of the two Regulations support its freedom to provide services. The service provider is guaranteed that the law governing the employment contracts it has with its workers and the courts having jurisdiction over disputes concerning those contracts will not change with the temporary posting of workers abroad. It is only by means of the PWD that posted workers are able to invoke the nucleus of mandatory rules for

²⁸ Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I) [2008] OJ L177/6.

²⁹ *Ibid.*, art 8(2).

³⁰ *Ibid.*, art 8(3).

³¹ *Ibid.*, art 8(4).

³² *Ibid.*, art 8(1).

³³ *Ibid.*, art 8(2), second sentence and Recital 36.

³⁴ 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 [2012] OJ L351/1.

³⁵ *Ibid.*, art 21(1)(a).

³⁶ *Ibid.*, art 21(1)(b)(i).

³⁷ *Ibid.*, art 21(1)(b)(ii).

³⁸ *Ibid.*, art 22(1).

³⁹ *Ibid.*, art 23(1).

⁴⁰ *Ibid.*, art 23(2).

minimum protection in force in the host Member State⁴¹ and are granted the right to access the courts in that country in order to enforce those mandatory rules.⁴²

Ever since the adoption of the PWD, one of the main problems concerning this instrument has been its enforcement.⁴³ Generally speaking, there are three basic ways of monitoring the compliance with, and enforcing, the nucleus of mandatory rules for minimum protection to which posted workers are entitled in the host Member State. These are public monitoring and enforcement by public authorities, primarily labour inspectorates and immigration authorities, collective monitoring and enforcement by trade unions and private monitoring and enforcement by posted workers themselves. The recently adopted Posted Workers Enforcement Directive (PWED)⁴⁴ seeks to remedy the deficiencies in the mechanisms for the enforcement, in particular public enforcement, of the PWD. Private international law plays an important role with respect to the collective and private enforcement of the PWD and of the legal framework surrounding the posting of workers more generally.

With respect to the collective enforcement of the legal framework surrounding the posting of workers, the role of private international law is best illustrated by *Viking*, where a Finnish service provider commenced proceedings in England against the International Transport Workers' Federation and its Finnish affiliate. One may wonder why an essentially Finnish industrial dispute concerning a company from Finland which owned a ferry registered in Finland, plying its trade between Finland and Estonia, and which wanted to re-register the vessel in Estonia, ended up in the English courts? The reason lies in private international law. The ITF, which had its domicile in England, called for the boycott of the Finnish company. The High Court assumed jurisdiction over the ITF on the basis of the general jurisdictional rule in what is now Article 4(1) of the Brussels I Regulation. Jurisdiction over the Finnish union was assumed on the basis of the rule of jurisdiction over co-defendants in what is now Article 8(1) of the Regulation. The real reason why the proceedings were commenced in England was the fact that an injunction to stop industrial action can be obtained relatively easily in this country.⁴⁵ Private international law therefore played an effective role in enforcing the fundamental economic freedoms.⁴⁶

With respect to private enforcement, the role of private international law is potentially more beneficial for the interests of posted workers. The rules of jurisdiction of the Brussels I Regulation allow posted workers to commence proceedings to enforce their rights in the courts of their employer's domicile and in the courts for the habitual place of work/engaging place of business. The rules of jurisdiction of the PWD allow posted workers to commence proceedings in the host Member State. This range of jurisdictional options facilitates the private enforcement of the Directive. With respect to the applicable law, the PWD allows

⁴¹ PWD, Recital 13 and art 3.

⁴² *Ibid.*, art 6.

⁴³ See generally U. Grušić, *The European Private International Law of Employment* (Cambridge, Cambridge University Press 2015) 273 et seq.

⁴⁴ Directive 2014/67/EU of the European Parliament and of the Council of 15 May 2014 on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services and amending Regulation (EU) No 1024/2012 on administrative cooperation through the Internal Market Information System ('the IMI Regulation') [2014] OJ L159/11.

⁴⁵ *American Cyanamid Co (No 1) v. Ethicon Ltd* [1975] AC 396 (HL).

⁴⁶ For a more detailed presentation of this argument, see U. Grušić, 'The Right to Strike versus Fundamental Economic Freedoms in the English Courts, Again: Hiding Behind The "Public Law Taboo" in Private International Law' (2013) 9 *JPIL* 413, 426–29.

posted workers to invoke the nucleus of mandatory rules for minimum protection in force in the host Member State, but only before the courts of that country. There is nothing in the PWD, the PWED or the Rome I Regulation⁴⁷ that would allow posted workers to invoke the nucleus of mandatory rules for minimum protection in force in the host Member State before the courts of their employer's domicile or the courts for the habitual place of work/engaging place of business. This is one of the aspects where the PWD and the PWED require improvement with the aim of further facilitating the private enforcement of the Directive.⁴⁸

The role of private international law in the clash of the economic and social spheres of the EU shows that this legal discipline has a prominent public dimension. The rules of private international law complement and reinforce the provisions of primary EU law on the fundamental economic freedoms, thus contributing to the shaping of the economic and social constitution of the EU. Private international law is also being used as an instrument by actors who participate in the transnational European labour market for the achievement of their goals. In *Viking*, for example, the jurisdictional rules of the Brussels I Regulation were used by the claimant economic operator in order to dislocate the resolution of an essentially Finnish industrial dispute to England with the aim of obtaining a powerful English injunction. The instrumentalisation and politisation of private international law in cases like *Viking* is so obvious that in a later case of this kind the English courts held that the claimant could not rely on the jurisdictional rules of the Brussels I Regulation to dislocate the resolution of an essentially Spanish industrial dispute to England because the dispute was found not to have been a 'civil and commercial', but a public law matter.⁴⁹ Although the correctness of this decision is questionable,⁵⁰ this case is a reminder of the public dimension of private international law in this area.

5. LESSONS FOR THE GLOBAL LABOUR MARKET

While *Laval* tells us a lot about the economic and social constitution of the EU and about the role of law in shaping that constitution, it tells us little, if anything, directly about the global labour market. Nevertheless, *Laval* prompts us to think more widely about the social implications of the global movement of labour, goods, services and capital.

If the World Trade Organization ever achieves the opening up of the trade in services at the global level that would be as comprehensive and deep as the free movement of services that exists within the EU,⁵¹ *Laval* would usefully illustrate some of the problems that any such free trade regime would have to address. For the same reason *Laval* is of potential importance to every other regional economic organisation.

But *Laval* has nothing to say about some of the more pressing problems that the global labour market is confronted with and the role of law in creating and resolving such problems, as the following two examples show.

⁴⁷ Art 9(3) Rome I lays down very strict conditions for giving effect to the overriding mandatory provisions of third countries.

⁴⁸ For a more detailed presentation of this argument, see Grušić (n 43) 295–98.

⁴⁹ *British Airways Plc v. Sindicato Espanol de Pilotos de Lineas Aeras* [2013] EWHC 1657 (Comm), [2013] ILPr 45.

⁵⁰ See Grušić (n 46).

⁵¹ See Mattoo and Carzaniga (eds) (n 15).

The first example is the link between technology and non-standard work. This problem can be illustrated by the *Uber* case, recently decided by the English Employment Appeal Tribunal.⁵² Uber is an international transport network which operates in many cities throughout the world through a smartphone app. A crucial element of Uber's business model is relatively low labour costs which are achieved, among other things, by shifting many business risks onto Uber drivers. Uber tries to achieve this by means of a complex transnational contractual network. The mentioned *Uber* case reveals that Uber, as it operates in the UK, is comprised of a Dutch company, which holds the legal rights to the app, and two UK companies which hold relevant licences to operate private hire vehicles in London and beyond. The passenger is said to enter into several different contractual relationships each time he or she uses the app, one with one of the UK companies for the provision of booking services (governed by English law), one with the Dutch company for the use of the app (governed by Dutch law) and one with the driver for the provision of transportation services (governed by English law). The driver is said to enter into a contractual relationship with the passenger (governed by English law) and the Dutch company (governed by Dutch law), although he or she has a much closer effective relationship with one of the UK companies. One of the purposes of this complex transnational contractual network, which relies on 'fictions, twisted language and even brand new terminology'⁵³ is to present Uber drivers as self-employed workers not entitled to the protection of employment legislation and to dislocate the resolution of any dispute between Uber drivers and Uber to international arbitration. The phenomenon of 'Uberisation', which is brought about by the rise of platform capitalism and shared economy worldwide, presents significant challenges for the global labour market, the most important of which is how to adequately respond to the consequent rise of non-standard work.

The second example is the use of complex corporate structures and supply chains to procure cheap labour in developing countries. In capital-intensive industries, such as extraction and chemical industries, it is not uncommon for a parent company from a developed country to carry on its activities abroad, typically in a developing country, through a local subsidiary. In many other industries, for example IT and fashion, the traditional, vertically-integrated firm is increasingly giving way to flexible forms of business organisation. Members of the modern economic enterprise are often not connected by bonds of ownership, but are independent firms bound together through long-term cooperative contractual and quasi-contractual relations or informal alliances. In such modern economic enterprises, it is not uncommon for a dominant member of the contractual business network located in a developed country to procure goods and services from other network members located in developing countries. There are many reports of workers of subsidiaries and network members located in developing countries working for low wages and poor conditions, often the result of downward spirals triggered by regulatory competition.⁵⁴ There are several reasons, including the doctrines of separate legal personality and limited liability, regulatory failures in developing countries and the territorially-limited jurisdictions of public authorities, why such wrongs are often not remedied and any legal responsibility does not extend beyond the local firm directly employing the workers in question.

6. CONCLUSION

⁵² *Uber BV v. Aslam* [2018] ICR 453 (EAT).

⁵³ [2017] IRLR 4 [87] (ET) (footnotes omitted).

⁵⁴ Many examples are reported on the Business and Human Rights Resource Centre website: <<https://www.business-humanrights.org>> accessed 16 April 2018.

Laval is a rich case that tells us a lot about the economic and social constitution of the EU and the role of law in shaping that constitution. But because of its European context, *Laval* tells us little, if anything, directly about the global labour market. *Laval* offers important lessons for any international economic organisation that may wish to implement the free movement of services that exists within the EU, but the prospect of this happening is currently remote. Otherwise, *Laval* is of little, or no, relevance for the more pressing problems that the global labour market is confronted with, e.g. the ‘Uberisation’ brought about by the rise of platform capitalism and shared economy and labour abuses within transnational corporations and transnational contractual business networks, and the role of law in creating and resolving such problems.