European Judicial Network in Civil and Commercial Matters

Practice Guide

Jurisdiction and applicable law in international disputes between the employee and the employer

2020 Updated version

This document was approved by the European Judicial Network on 6 November 2020. It is available for information purposes, pending its final formatting and publication.

The purpose and legal status of the Practice Guide

This Practice Guide seeks to give an overview of the relevant rules of EU private international law in relation to employment contracts, including posting of workers. Its purpose is to assist practitioners, but it does not meant to be legally authoritative, nor does it purport to be comprehensive. The content of this Guide, based largely on the case-law of the Court of Justice of the European Union (hereinafter: CJEU or the Court of Justice), is without prejudice to the interpretation by the CJEU of the legal instruments referred to in this Guide. The Guide is horizontal in that it applies to all sectors of employment, but it takes special account of sectors in which cross-border mobility of workers is of particular relevance, such as air transport and other modes of transport.

1. Introduction

Regulation (EU) No 1215/2012[1] (Brussels Ia Regulation) and the Regulation (EC) No 593/2008[2] (Rome I Regulation) are instruments of EU law which contain special provisions to determine respectively (1) the Member State(s) whose courts have jurisdiction over disputes relating to individual contracts of employment and (2) the applicable law of the employment contract. These special provisions derogate from general principles on jurisdiction and applicable law with the aim of protecting employees as the weaker party to the contract. Generally, as regards jurisdiction, those special provisions allow the protected party to be sued only in the courts of his/her own domicile, but gives that party a choice of jurisdiction when he/she is the claimant. Parties to an individual employment contract have, in principle, contractual autonomy to choose the applicable law and, to a more limited extent, jurisdiction (see Sections 3 and 4 below). This means that, in the event of a dispute, the terms of the employment contract always represent the starting point when determining the applicable law and the jurisdiction.

In disputes between the employee and the employer, in the Brussels Ia Regulation and the Rome I Regulation the main connecting factor linking the dispute with a particular court and a particular applicable law is the 'place where or from where the employee habitually carries out his work'. This means that even when work is carried out in or across more than one country, the employee has access to the courts in the Member State where or from where he/she habitually carries out his/her work and he/she will be protected by non-derogable provisions of that Member State's law. Additional protection applies in posting situations pursuant to the Posting of Workers Directive (see Section 5 below). According to Recital 7 of Rome I Regulation there should be consistent interpretation of scope and provisions of both Rome I and Brussels I (now Brussels Ia) Regulations.

[1] 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, OJ L 351, 20.12.2012, p. 1. It replaced Regulation 44/2001/EC (Brussels I) and applies to proceedings commenced on or after 10 January 2015; Regulation 44/2001/EC continues applying to the proceedings initiated before that date. Regulation 44/2001/EC was in turn preceded by Brussels Convention of 1968. Case-law of the Court of Justice developed under Brussels I Regulation and Brussels Convention retains its relevance for Regulation Brussels Ia. The rules of Brussels Ia Regulation apply to Denmark by virtue of a parallel international agreement. The case-law developed under the 1988 and 2007 Lugano Conventions is also relevant for interpretation of Brussels Ia Regulation, and vice-versa.

[2] 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), OJ L, 4.7.2008, p. 6. The Rome I Regulation replaces the 1980 Rome Convention. The 1980 Rome Convention still applies: (1) to contracts concluded before and on 17 December 2009; (2) to Denmark by virtue of its opt-out from EU civil justice legislation; (3) to some overseas territories of the Member States which are not considered EU territories under the Treaty on the Functioning of the EU.

2. Scope

➔ **What type of relationships are covered?**

The rules of Brussels Ia and Rome I Regulations cover only civil and commercial matters, and do not concern matters such as revenue, customs and administrative matters or liability of the State for acts and omissions in the exercise of state authority. However, commercial acts performed by a State as a private party do fall within the scope of 'civil and commercial matters'[3].

The Brussels Ia and Rome I regimes catch only determination of jurisdiction of the courts and of applicable law in employment contracts with a cross-border element, and exclude substantive labour law matters.

The Guide further focuses only on jurisdiction and applicable law for individual employment contracts in view of the need to protect employees as the weaker party. Special rules discussed in this Guide do not apply therefore to collective agreements.

➔ **How to determine whether the party is 'an employee' within the meaning of the Brussels Ia Regulation and the Rome I Regulation and thus can benefit from the protective regimes foreseen in these Regulations?**

The terms 'employee', 'employer' and 'employment contract' are not defined in the Regulations themselves. The *Jenard-Möller report* accompanying the 1988 Lugano Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters states (paragraph 41) that 'although there is as yet no independent concept of what constitutes a contract of employment, it may be considered that it presupposes a relationship of subordination of the employee to the employer'.

According to the CJEU case law[4], the relevant factors to identify an individual employment relationship for the purposes of these Regulations are the following:

- The creation of a lasting bond which brings the worker to some extent within the organisational framework of the business of the employer;
- A relationship of subordination of the employee to the employer, which lasts for a certain period of time;
- The worker receives remuneration for his or her services.

In the *Holterman Ferho* case[5], the CJEU ruled that protective rules for individual contracts for employment apply to a person which, in his capacity as director and manager, for a certain period of time performed services for and under the direction of that company in return for which he received remuneration, that being a matter for the referring court to determine. On the other hand, in a judgment

[3] In this regard, for example, an employee at an embassy may rely on the provisions of Brussels Ia (recast) where the functions carried out by the employee do not fall within the exercise of public powers, see case C-154/11, *Mahamdia*.
[4] All cases of the CJEU are available at its website, at http://curia.europa.eu/.
[5] Case C-47/14, judgment of 10 September 2015, *Holterman Ferho Exploitatie BV and Others. v Spies von Büllesheim*, ECLI:EU:C:2015:574.

in *Bosworth* case[6] the CJEU ruled that a contract between a company and a person performing the duties of director of that company does not create a relationship of subordination and cannot be treated as an 'individual contract of employment', where, even if the shareholder(s) of that company have the power to procure the termination of that contract, the director is able to determine the terms of that contract and has control and autonomy over the day-to-day operation of that company's business and the performance of his own duties.

➔ **Are employees in third countries covered?**

Employees working in or from a third country fall within the scope of the Brussels Ia Regulation when the employer is domiciled or deemed to be domiciled in a Member State. Employees working in or from a third country come within the scope of Rome I Regulation, i.e., the Member State court having jurisdiction will apply the Rome I Regulation to determine applicable law also in such cases.[7] Employees whose habitual place of work is in a third country will be protected by the mandatory rules of that country. According to Article 8(2) of the Rome I Regulation the habitual place of work is not deemed to have changed if he/she is temporarily employed in a Member State.

Employees contractually assigned to a base established in a third-country but whose habitual place of work is in fact in a Member State will benefit from the protective rules established in the Brussels Ia and Rome I Regulations and thus be protected by the mandatory rules of that Member State.

➔ **What about 'bogus self-employment'?**

A bogus self-employed person is a worker who meets the criteria of an 'employee' but is declared self-employed. The question arises whether such workers, in the case of a dispute with the de facto employer, benefit from the protective rules established in the Brussels Ia and Rome I regulations. A case-by-case assessment has to be made to determine whether such workers are integrated into the framework of the business of the company for which they work and what the nature is of their relationship with the company (for instance whether there is subordination). Thus, in situations of 'bogus' self-employment, the application of the Regulations will be triggered if the criteria for determining that the person is in fact an employee are fulfilled, irrespective of the expressions used by the parties in the contract.

➔ **What types of employment claims are covered?**

The Brussels Ia Regulation determines the jurisdiction of the courts over disputes 'in matters relating to individual contracts of employment' (Article 20). The Regulation does not specify which type of employment disputes are covered. However, the case-law relating to the Brussels Convention suggests that it applies to all disputes arising out of a contract of employment (on the basis that traditionally the individual contract of employment is regarded as falling within the field of private law obligations), at least to the extent that the dispute does not involve claims by or against public authorities in some capacity other than as employer[8]. Disputes relating to social security, which arise between

[6] Case C-603/17, *Peter Bosworth and Colin Hurley v Arcadia Petroleum Limited and Others*, judgment of 11 April 2019, ECLI:EU:C:2019:310.
[7] See Article 2 Rome I.
[8] Case 25/79, *Sanicentral GmbH v Rene Collin*, judgment of 13 November 1979, ECLI:EU:C:1979:255.

administrative authorities and employees are excluded from the scope of the Regulation (see Article 1(2)(c) and the *Jenard Report* accompanying the Brussels Convention[9]).

[9] OJ C 59, of 5.3.1979, pp. 1-65, at p. 12.

3. Which court is competent to hear the employment dispute?

As a general principle, the Brussels Ia Regulation leaves **only very limited party autonomy to choose the court** in employment disputes. Parties can conclude a choice of court agreement only in two cases: after the dispute has arisen or if the agreement allows the employee to bring proceedings in courts other than the one which would otherwise be available for the employee under the rules of the Regulation (see Article 23). The agreed clause must therefore widen the choice available to the employee. **A clause in an employment contract which restricts the choice of court by the employee will not be enforceable against the employee.**[10]

The rationale behind these limitations is the protection of the employee as the weaker party by ensuring that the choice offered by the Regulation to the employee as to the courts in which he/she can sue the employer is not limited and to prevent the employer from imposing restrictions on the employee's rights under the Regulation.

In line with that protective policy, the Regulation differentiates between the claims brought by the employee and the claims brought by the employer.

➔ **Where can the employer sue the employee?**

In case of a dispute, the employer can **sue the employee** only in the Member State where the employee is domiciled (Article 22).

➔ **Where can the employee sue the employer?**

In case of a claim by the employee **against the employer**, pursuant to Article 21 of Brussels Ia the employee has the choice to sue the employer:

- at the place of domicile of the employer (or of a deemed domicile of a branch (Article 20(2)[11]); or
- at the place where or from where the employee habitually carries out his/her work; or
- where the place of habitual work is not situated in any one country, the place where the business which engaged the employee is or was situated.

The concept of 'the place where or from where the employee habitually carries out his/her work' is determined on the basis of uniform criteria laid down by the Court of Justice to ensure its uniform interpretation and should be applied based on case-by-case assessment. In disputes between an airline operator and air crew members the concept of 'home base' within the meaning of EU aviation safety rules plays a significant role among the relevant indicia when it comes to determining the place where or from where the employee habitually carries out his/her work, although it cannot be equated with it.[12]

[10] See for example, cases C-168/16 and 169/16, *Nogueira and Others*, para 54.
[11] Article 20(2) of the Brussels Ia Regulation covers a situation where the employer is not domiciled in the EU but has a branch, agency or establishment within an EU Member State, and provides that such employer, for the disputes arising from the operation of such a branch, agency or establishment, is deemed to be domiciled in that Member State.
[12] See below, section 7 "Jurisprudence of the Court of Justice", cases C-168/16 and C-169/16, *Nogueira and Others*.

The Brussels Ia Regulation now extends the jurisdiction of Member State courts to employment disputes brought against an employer which is not domiciled in the EU, when the work is habitually carried out in a Member State.

➔ **Where is the employer domiciled?**

The Brussels Ia Regulation (Article 63) provides that a company or other legal person is domiciled at the place where it has its:

- statutory seat; or
- central administration; or
- principal place of business.

The company is thus domiciled in the EU even when only one of those criteria is fulfilled.

Where an employer is not domiciled in a Member State but has a 'branch, agency or other establishment' in a Member State, the employer shall, in disputes arising out of the operations of that branch, agency or establishment, be deemed to be domiciled there (Article 20(2)).

4. Which law is applicable to the employment dispute?

The Rome I Regulation establishes rules for determining the law applicable to international employment contracts, which aim on the one hand at giving parties the freedom to choose the applicable law, while at the same time protecting the employee as the weaker party to the contract.

The law determined in accordance with Article 8 of the Rome I Regulation shall apply irrespective of whether it is the law of a Member State or that of a third country.

➔ **Limited party autonomy**

The parties are free to choose any law to govern their contract (Article 8(1), first sentence).[13]

However, even if the choice has been made, the employee will nevertheless be protected by more generous provisions that cannot be derogated from of the law determined pursuant to paragraphs (2), (3) or (4) of Article 8 (see below, hierarchy of the connecting factors).

Thus, Rome I allows the agreed law to apply but ensures that certain rules of another law cannot be derogated from. The criteria to determine that law are similar to the Brussels Ia Regulation. The connecting factor in Brussels Ia and Rome I Regulations is almost identical (place where or from where the employee habitually carries out his/her work), with the nuance that in Rome I Regulation there is a certain hierarchy of connecting factors set out explicitly. If non-derogable provisions of the law determined by those criteria, for example on minimum wage or periods of leave, are more favourable to the employee, they will apply irrespective of the law chosen by the parties.

➔ **What is covered by the applicable law?**

Article 12 of the Rome I Regulation contains a non-exhaustive list of matters which are governed by the applicable law determined in accordance with this Regulation. Among the issues governed are: interpretation, performance, the consequences of a breach of obligations, including damages, the various ways of extinguishing obligations, and the consequences of nullity of the contract.

The Regulation also contains conflict rules for determining the existence and validity of a contract or any term thereof (Article 10), the formal validity of a contract (Article 11) and incapacity (Article 13).

➔ **Hierarchy of connecting factors**

In contrast to the Brussels Ia Regulation, the Rome I Regulation explicitly establishes a hierarchy among the different connecting factors which determine the applicable law in the absence of a choice by the parties, or, where a choice of applicable law was made, the non-derogable provisions which will take precedence over the law chosen by the parties.

Thus, the law which would apply to a contract of employment <u>in the absence of choice</u> is:

- the law of the country in which the employee habitually carries out his/her work in performance of the contract;

failing that:

[13] This choice can be made explicitly or clearly demonstrated by the terms of the contract or the circumstances of the case, see Article 3 Rome I. The relevant factors to determine such a choice can be, e.g., the legal basis of the employment contract, the language used in the contract, the content of the contract, the nationality of the parties. However, it is important that the choice can be demonstrated clearly.

- the law of the country from which the employee habitually carries out his/her work in performance of the contract;

failing that:

- the law of the country where the place of business through which the employee was engaged is situated.

The case-law of the CJEU clarifies what elements are relevant for determining which of these connecting factors applies — see description of this case-law below.

➔ **Closer connection to another country (escape clause)**

Article 8(4) of the Rome I Regulation contains an escape clause, allowing the courts not to apply the law of the place where the work is habitually carried out or the law of the place of the business through which the employee was engaged, and apply the law of another country where it appears from the circumstances of the case as a whole that the contract is more closely connected with that other country (in particular case C-64/12, *Schlecker v Boedeker*, see below in Section 5).

➔ **Overriding mandatory provisions**

Regardless of the result of determination of applicable law under Article 8, Article 9 of Rome I Regulation envisages application of 'overriding mandatory provisions' of the forum state or a state in which the obligations under the contract have to be or have been performed. This concept is to be distinguished from 'provisions which cannot be derogated from by agreement' and should be interpreted more restrictively (Recital 37 Rome I). Article 9 has the purpose of enabling the court to take account of considerations of public interest in exceptional circumstances.[14]

[14] On the concept of the "overriding mandatory provisions" in the employment context, see case C-135/15, *Nikiforidis*, judgment of 18 October 2016. The provision in question was mandatory reduction of pay of public servants.

5. What if the employee has been posted to another country under the Posting of Workers Directive?

➔ Jurisdiction

As regards access to court, the Posting of Workers Directive 96/71/EC[15] lays down an additional forum where the employee can sue his/her employer, i.e. in the country where the employee is/was posted (Article 6). Article 11(1) of Directive 2014/67/EU on the enforcement of the Posting of Workers Directive[16] states that such a forum can only be used to enforce the obligations under the Posting of Workers Directive and the Directive 2014/67/EU.

➔ Applicable law

Article 8(2) of the Rome I Regulation establishes 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.

The Posting of Workers Directive does not derogate from the Rome I Regulation (or previously the Rome Convention) regarding the choice of law governing the employment contract. It specifies that regardless the law applicable, the employees benefit from the core terms and conditions of employment according to the law of the host Member State if they are more favourable to the employee than the relevant terms and conditions of employment stemming from law of his/her habitual place of work (Article 3(1) of the Posting of Workers Directive 96/71/EC as amended by Directive (EU) 2018/957). The range of terms and conditions which have to be guaranteed to the posted worker has been extended by Directive 2018/957/EU in cases of long-term posting (exceeding 12 months or 18 months in justified cases; Article 3(1a) of the Posting of Workers Directive 96/71/EC, introduced by Directive (EU) 2018/957).

Additionally, the Posting of Workers Directive establishes that other terms and conditions of employment than those referred to in Article 3(1) can be applied in case of public policy provisions, which coincides with the overriding mandatory provisions as defined in Article 9 of the Rome I Regulation. National rules which set these overriding provisions in the country where the worker is posted take precedence over the rules of the law of the country where the work is habitually carried out, when such national rules are more favourable to the employee. Recital 34 of the Rome I Regulation clarifies that Article 8 does not prejudice the application of the overriding mandatory rules according to Directive 96/71.

[15] 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 OJ L 18, 21.1.1997, p. 1. It was amended by Directive (EU) 2018/957 of the European Parliament and of the Council of 28 June 2018, OJ L 173, 9.7.2018, p. 16.

[16] 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'), OJ L 159, 28.5.2014, p. 11.

6. Jurisprudence of the Court of Justice

The Court of Justice has given guidance on the employment provisions in the Brussels Ia Regulation and the Rome I Regulation in a number of cases.

- Habitual place of work: *Mulox, Rutten, Weber, Koelzsch, Voogsgeerd* and *Nogueira* cases.
- Place of hiring: *Voogsgeerd.*
- Escape clause in Rome I: *Schlecker.*
- Assignability of employment claims and issues of standing to bring proceedings: *Sähköalojen ammattiliitto ry.*
- Exclusive jurisdiction clauses and the concept of a branch: *Mahamdia.*

➔ What is the habitual place of work?

The main connecting factor in the Brussels Ia Regulation and the Rome I Regulation is **the place where or from where the employee habitually carries out his/her work.** As the concept is common both to the Rome I and the Brussels Ia Regulations, it has been interpreted and applied in parallel in the case law.

The question of what constitutes the 'habitual' carrying out of an employee's work is a question of fact for the national court to determine in the light of the CJEU case law and all the circumstances of a given case. The Court of Justice has given guidance to determine the place where an employee must be considered to be 'habitually carrying out work'. The criteria also apply when the working activities are performed in or across several Member States, which is typical in the areas such as international transport.

To determine the habitual place of work, the national court must take account of all the factors which characterise the activity of the employee. This 'circumstantial method' is important to prevent the concept of 'place where, or from which, the employee habitually performs his work' from being exploited or used for the achievement of circumvention strategies.

Following the interpretation of the concept of habitual place of work in the Court's case-law, the connecting factor of 'the place where the business through which the employee was engaged' is of relevance very rarely.

Case C-125/92, *Mulox*[17] on the Brussels Convention[18]

Facts of the case: a Dutch national, resident in France, was employed by an English company as an international sales manager, selling in Germany, Belgium, the Netherlands, etc., and in France. The employee used his home in France as his office and base of operations. He brought proceedings against the employer in France.

[17] C-125/92, *Mulox IBC Ltd v Hendrick Geels*, judgment of 13 July 1993, ECLI:EU:C:1993:306. Note that the case was decided by reference to the provisions of the Brussels Convention of 1968 which did not include specific provisions in relation to employment contracts; the convention was updated in 1989 to incorporate special provisions and *Rutten* (C-383/95) and *Weber* (C-37/00) cases were decided by reference to these provisions.

[18] The original version of the Brussels Convention did not contain special provisions on employment contracts.

Court of Justice: where an employee carries out his/her working activities in more than one state, the place of performance of the contractual obligation for the purposes of Article 5(1) of the Brussels Convention is the place where *or from which* the employee principally discharges his/her obligations towards his/her employer.

To determine that place the CJEU directed the national court to take account of the fact that the work entrusted to the employee was carried out from an office in the Member State where the employee had become resident, from which he performed his work and to which he/ returned after each business trip.

Case C-383/95, *Rutten*[19], on the amended version of the Brussels Convention that took into account employment contracts

Facts of the case: a Dutch national was working for an English company; he spent two thirds of his working time in the Netherlands and the other third in various other European countries, including England. After each business trip he returned to the Netherlands where he had his office. He brought proceedings against his employer in the Netherlands.

Court of Justice: the habitual place of work is the place where the employee has established the effective centre of his/her working activities and where, or from which, he/she in fact performs the essential part of his/her duties vis-à-vis his/her employer. The Court of Justice directed the national court to take account of the fact the employee carried out almost two thirds of his work in one Member State where he thus spent most time, in which he had an office where he organised his work for his employer and to which he returned after each business trip abroad.

Case C-37/00, *Weber*[20], on the Brussels Convention

Facts of the case: Weber, a German national residing in Germany, was employed by a Scottish company as a cook on mining vessels working in the North Sea. He worked at least part of his time on the Netherlands continental shelf and part in Danish territorial waters. He brought proceedings against his employer in the Netherlands. Weber had not established a centre of his working operations (in contrast to *Rutten*, there was no office in a Member State constituting the effective centre of his professional activities and from which he carried out the essential part of his duties vis-à-vis his employer).

Court of Justice: The Court held that, in these circumstances, the relevant criterion for establishing an employee's habitual place of work is 'temporal' — in principle, the place where the employee spends most of his/her working time, engaged on his/her employer's business. The relevant period over which to judge where he/she had spent most of his/her working time is the duration of the entire period of employment.

Case C-29/10, *Koelzsch*[21], on the applicable law under the 1980 Rome Convention

[19] C-383/95, *Petrus Wilhelmus Rutten v Cross Medical Ltd.*, judgment of 9 January 1997, ECLI:EU:C:1997:7.
[20] C-37/00, *Herbert Weber v Universal Ogden Services Ltd*., judgment of 27 February 2002, ECLI:EU:C:2002:122.
[20] C-29/10, *Heiko Koelzsch v État du Grand Duchy of Luxemburg*, judgment of 15 March 2011, ECLI:EU:C:2011:151. The case was decided under the Rome Convention of 1980,but the employment provisions and concepts applied are relevant to the Rome I Regulation, which applies to contracts made on or after 17 December 2009.

Facts of the case: Koelzsch was a truck driver who was habitually resident in Germany but had a contract of employment with a company based in Luxembourg. His contract of employment designated Luxembourg law as the applicable law. His work involved transporting goods mainly from Denmark to Germany, but also to other Member States. Koelzsch was dismissed and he challenged the dismissal as contrary to German law.

Court of Justice: the Court ruled that the tests for determining the place where the employee 'habitually carries out his work' also apply where the employee carries out work in several Member States and that this connecting factor must be given a broad interpretation; the *Mulox*, *Rutten* and *Weber* case law on the Brussels I regime also applies to the Rome I regime. In cases where the contract involves transport tasks, in order to identify the applicable law, reference must be made to the country from which the employee carries out his/her transport tasks, receives instructions concerning his/her tasks and organises his/her work, the place where his/her tools are situated, the places where the transport is principally carried out, where the goods are unloaded and the place to which the employee returns after completing his/her tasks.

***Case C-384/10, Voogsgeerd*[22], on the applicable law under the 1980 Rome Convention**

Facts of the case: at the headquarters of Naviglobe in Antwerp, Voogsgeerd entered into a permanent contract of employment with another company, Navimer, established in Luxembourg. Luxembourg law was chosen as applicable to the contract. Nevertheless, when the claimant received a notice of dismissal, he challenged it before a court in Antwerp on the grounds that it was in breach of Belgian law which, he argued, should apply to the contract by virtue of the fact that he/she was hired through a company established in Antwerp.

Court of Justice: the Court held that the hierarchy of connecting factors under Article 6 of the Rome Convention and under Article 8 of the Rome I Regulation means that, for the purposes of determining the applicable law, the court seised of the case must first establish whether the employee, in the performance of his/her contract, habitually carries out his/her work in the same country, which is the country in which or from which, in the light of all the factors which characterise that activity, the employee performs the main part of his/her obligations towards the employer. Where the place from which the employee carries out his/her transport tasks and also receives the instructions concerning his/her tasks is always the same, that place must be considered to be the place where he/she habitually carries out his/her work.

***Joined cases C-168/16 and C-169/16, Nogueira and others*[23], on the Brussels I Regulation**

Facts of the case: The cases concerned a number of Portuguese, Spanish and Belgian nationals, who worked as cabin crew members aboard planes of Ryanair, an airline having its head office in Ireland and having its planes registered in Ireland. The relevant employment contracts designated Irish law to be applicable, Irish courts to have jurisdiction, and Charleroi airport as the 'home base' of those employees. After termination of the employment relationships, the employees brought proceedings before a Belgian court with a view to obtaining additional payment they considered was due to them. The Belgian court asked the Court of Justice whether the concept of 'place where the employee habitually carries out his work', as provided for in Article 19(2)(a) of the Brussels I Regulation, can be equated with that of 'home base', as provided for in Annex III to Council Regulation No 3922/91. The

[22] C-384/10, *Jan Voogsgeerd v Navimer SA*, judgment of 15 December 2011, ECLI:EU:C:2011:842.
[23] Joined Cases C-168/16 and C-169/16, *Sandra Nogueira and Others v Crewlink Ireland Ltd and Miguel José Moreno Osacar v Ryanair Designated Activity Company*, judgment of 14 September 2017, ECLI:EU:C:2017:688.

home base is assigned to each air crew member by the employer and is defined as 'the place from which the air crew systematically starts its working day and ends it by organising its daily work there and close to which employees have, during the period of performance of their contract of employment, established their residence and are at the disposal of the air carrier'.

Court of Justice: since the disputes in the main proceedings concern employees employed as members of the air crew of an airline or assigned to the latter, the court of a Member State, when it is not able to determine with certainty the 'place where the employee habitually carries out his work', must, in order to assess whether it has jurisdiction, identify 'the place from which' that employee principally discharged his/her obligations towards his/her employer. To determine it, the national court must refer to a set of indicia to take account of all the factors which characterise the activity of the employee. This 'circumstantial method' is important to prevent a concept such as that of 'place where, or from which, the employee habitually performs his work' from being exploited or contributing to the achievement of circumvention strategies. As regards work relationships in the transport sector, the courts must, in particular, determine in which Member State is situated (i) the place from which the employee carries out his transport-related tasks, (ii) the place where he/she returns after his/her tasks, receives instructions concerning his/her tasks and organises his/her work, and (iii) the place where his/her work tools are to be found.

The concept of 'place where, or from which, the employee habitually performs his work' cannot be equated with any concept referred to in another act of EU law, including the 'home base', because of their different objectives. However, the concept of 'home base' does constitute a significant indicium for the purposes of determining that place. Its relevance would be undermined only if a case displayed closer connections with a place other than the 'home base'.

In the judgment the Court also noted that the place where, or from which, the employee habitually carries out his/her work, cannot be equated with the territory of the Member State of 'nationality of the aircraft' of the airline, within the meaning of Article 17 of the Chicago Convention.

In conclusion, the connecting factor of where or from where the employee 'habitually carries out his work' must be applied with priority and must be interpreted broadly. The relevant factors to determine this include in particular the following:

- The place of actual employment;
- The nature of the work (for example international transport tasks);
- The factors that characterise the activity of the employee;
- The country in which or from which the employee effectively carries out his/ her tasks or the main part of his/her tasks, receives instructions concerning his/her tasks and organises his/her work;
- The place where the employee's work tools are situated;
- The place where the employee must report before discharging his/ her tasks or return after completing his/her tasks;
- In case of air crew, the home base will be a significant factor in identifying it.

➔ **What is the place of hiring?**

Case C-384/10, *Voogsgeerd,* on the Rome Convention

In the rare cases in which the place where or from where the employee is habitually carrying out his/her work cannot be determined, the contract is governed by the law of the country where the place of business through which the employee was engaged was situated. In *Voogsgeerd* the Court of Justice interpreted the Rome Convention but the judgment is also relevant to the same expression in the Brussels Ia and Rome I Regulations.

Facts of the case: *see above.*

Court of Justice: the Court held that the connecting factor of the place of hiring need only be used when the habitual place of work cannot be determined, that it may not include factors which are relevant for establishing the habitual place of work and that, being a subsidiary criterion, it must be given a restrictive interpretation. The Court also held that the place of business through which the employee was engaged must be understood as referring exclusively to the place of business which engaged the employee and not to that with which the employee is connected by his/her actual employment, and that the relevant factors to determine that place which engaged the employee are only those relating to the procedure for concluding the contract, whether in writing or not, such as the place of business which published the recruitment notice and that which carried out the recruitment interview. Furthermore, the Court held that a 'place of business' does not need to have separate legal personality and could, for example, be an office, provided that it has a degree of permanence and that, in principle, it belongs to the undertaking which engages the employee and forms an integral part of its structure. Exceptionally, the circumstances of the case may show that an undertaking other than that which is formally referred to as the employer is the 'place of business', even though the authority of the employer has not been formally transferred to that undertaking, provided that one company acted for the other so that the place of business of the first could be regarded as belonging to the second and objective factors make it possible to establish that there exists a real situation in respect of the employee different from that which appears from the terms of the contract.

In conclusion, the relevant factors to determine 'the place of business through which the employee was engaged' are limited to those relating to the procedure of concluding the contract, such as the following:

- The place of business which published the recruitment notice;
- The place of business which carried out the recruitment interview;
- The actual location of that place of business.

➔ What is the escape clause in the Rome I Regulation?

Case C-64/12, *Schlecker*[24]

Even when the habitual place of work and, in its absence, the place of business through which the employee was engaged can be determined, the law of another country may apply to a contract of employment where it appears from the circumstances of the case that the contract is more closely connected to that other country. These circumstances were considered in *Schlecker* case.

Facts of the case: the claimant was employed by Schlecker, a German undertaking with branches in a number of Member States, to manage the operations of the business in The Netherlands. After 12 years, the claimant was informed that her position was abolished and was invited to take over another

[24] C-64/12, *Anton Schlecker v Melitta Josefa Boedeker*, judgment of 12 September 2013, ECLI:EU:C:2013:551.

position in Germany. The claimant brought an action against the defendant claiming that Dutch law should apply to her contract and therefore the unilateral transfer back to Germany was unlawful.

Court of Justice: the Court held that priority must be given to the nexus between the contract and the place of habitual work and that a mere preponderance of factors pointing to another country does not automatically displace the application of that law. Nevertheless, even where the employee habitually carries out the work in performance of the contract for a lengthy period of time and without interruption in the same country, the court may, exceptionally, disregard the law of the country where the work is habitually carried out if it appears from the circumstances as a whole that the contract is more closely connected with another country. Among the significant factors suggestive of a close connection with a country are, in particular, the country in which the employee pays taxes on his/her income and where he/she 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.

In conclusion, in exceptional situations when other elements of the employment relationship suggest that the contract is more closely connected to a State other than that indicated by the factors provided in Article 8(2) and (3) of the Rome I Regulation, the escape clause can be applied even if it is otherwise possible to determine one of the previously mentioned connecting factors.

➔ **Does the law applicable to the contract of employment determine whether an employment claim can be assigned?**

Case C-396/13, *Sähköalojen ammattiliitto ry*[25]

In this case, the Court of Justice was asked, among other things, to rule on the question whether Article 14(2) of the Rome I Regulation determines the assignability of claims arising out of an employment relationship, irrespective of whether the provisions of another law also apply (in that case, Finnish law constituting overriding mandatory provisions in the context of Directive 96/71/EC on the posting of workers).

Facts of the case: the defendant, a Polish company, posted 186 Polish workers to their branch in Finland to work on a nuclear power plant. The employment contracts were concluded under Polish law, which prohibits the assignment of employment claims. The workers assigned their claims against the Polish company to the claimants, a trade union, under Finnish law. The trade union brought proceedings on behalf of the posted workers for the recovery of sums owned to them under certain provisions of the Finnish law applicable by virtue of Directive 96/71/EC.

Court of Justice: rather than entertaining the question on whether the assignability of a claim must be determined exclusively by Article 14(2) of the Rome I Regulation, the Court considered the standing of the trade union to bring proceedings on behalf of the workers. It held that this is a procedural question and, in this case, it was governed by Finnish procedural law as the applicable *lex fori*. The rules on the assignability of employment claims set out in the Polish Labour Code were irrelevant with regard to standing and did not prevent the trade union from bringing proceedings.

➔ **What about party autonomy to conclude choice of court agreements?**

Case C-154/11, *Mahamdia*[26], on the Brussels I Regulation (44/2001/EC)

[25] C-396/13, *Sähköalojen ammattiliitto ry v Elektrobudowa Spolka Akcyjna*, judgment of 12 February 2015, ECLI:EU:C:2015:86.

Facts of the case: Mr Mahamdia, who had Algerian and German nationality and lived in Germany, concluded with the Ministry of Foreign Affairs of the People's Democratic Republic of Algeria a contract of employment for work as a driver at the Algerian Embassy in Berlin. The contract contained an exclusive agreement on jurisdiction in favour of the Algerian courts. Mr Mahamdia brought the proceedings against the employer in Germany.

Court of Justice: the Court recalled that Article 21 of the Brussels I Regulation (now Article 23 of Brussels Ia Regulation) restricts the conclusion of an agreement on jurisdiction by the parties to a contract of employment. Such an agreement can be concluded after the dispute has arisen or, if it was concluded beforehand, must allow the employee to bring proceedings before courts other than those which would have jurisdiction in accordance with the rules of the Regulation (i.e. in addition to those provided for in Articles 18 and 19 of the Regulation[27]). The effect of the agreement is thus not to exclude the jurisdiction of the latter courts but to extend the employee's possibility of choosing between several courts with jurisdiction.

[26] C-154/11, *Ahmed Mahamdia v People's Democratic Republic of Algeria*, judgment of 19 July 2012, ECLI:EU:C:2012:491.

[27] Now Articles 21 and 22 Brussels Ia Regulation Under the Brussels Ia Regulation, the rules on the conclusion of an agreement on jurisdiction by the parties to a contract of employment remain the same as in Regulation 44/2001/EC.

7. Overall Conclusions

A court seized with a claim against the **employer** over an individual contract of employment has to make the following analysis:

Jurisdiction

Does the dispute relate to an individual contract of employment?

If so, do I have jurisdiction pursuant to Section 5 of Regulation (EU) 1215/2012?

- ➔ Is there a valid choice of court agreement fulfilling the conditions of Article 23?
  - ➔ Yes.
  - ➔ No. Go to Article 21 and check whether the court can establish that the defendant (employer) is being sued at the place of:
    - his/her domicile; or
    - at the place where or from where the employee habitually carries out his/her work; or
    - if no such place, at the place where the business which engaged the employee is situated.

If not:

- ➔ do I have jurisdiction pursuant to other rules of Regulation (EU)1215/2012?

Applicable law

Which law do I need to apply to the individual employment contract?

Does the contract contain a choice of law clause?

- ➔ YES: the court applies Article 8(1) of Regulation 593/2008 (chosen law but subject to the application of the non-derogable rules of the law that is objectively applicable if they protect the employee better); go to 'NO', in order to establish which law is objectively applicable).
- ➔ NO: the court must determine the law objectively; go first to Article 8(2): can the court establish the habitual place of work?
  - ➔ YES:
    - the court applies the law of the country in which or from which the employee habitually carries out his/her work; or
    - in exceptional cases, where the contract is more closely connected with another country, the court applies the law of that other country (Article 8(4)).
  - ➔ NO: go to Article 8(3): can the court establish the place of business through which the employee was hired?
    - YES:
      - the court applies the law of the country of the place of business through which the employee was hired; or
      - in exceptional cases, where the contract is more closely connected with another country, the court applies the law of that other Country (Article 8(4)).
    - NO: go to Article 8(4).