The Role of Foreseeability in Private International Employment Law

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1 Abstract

The EU's private international employment law rules contain several measures intended to protect employees. Hence, unlike in the case of general contracts, one party (the employee) is given more forum shopping alternatives than the other (the employer), party autonomy is limited for employment contracts, and the objectively applicable law is based on the idea that the law of the place where labour is performed shall govern the contract. In this article, I argue that these protective measures are illusory and undermined in practice by the lack of foreseeability that is built into the choice of law rules. The conclusion of the article is that although it might be important to include protective measures in choice of law rules, the overarching principle for private international law rules should be to guarantee foreseeability. Paradoxically, EU private international employment law is highly unforeseeable, which, I argue, undermines the employee protection measures that are inserted into the EU private international employment law rules.

2 What is weak party protection in private international law?

Private international law is traditionally understood as being the rules that govern jurisdiction, choice of law and foreign judgments.[1] In this regard, private international law rules are primarily formal and not meant to settle a case.[2] Instead, justice in the case at hand is left to be meted out in accordance with the governing substantive law. However, the fact that private international law rules are formal does not mean that they are also neutral. Just like any other rules of law, private international law rules will tend to favour one of the parties. Values in modern private international law rules often mirror the substantive law of the forum. One example of this is seen in the EU's private international law rules for employment contracts.

Protection of the employee as the weaker party is a general and important underlying purpose of substantive employment law worldwide.[3] However, the ways in which the employee is protected vary between jurisdictions. It is not only the degree of protection that differs, but also the protection measures. In many countries, the labour law system is considered to be extraordinarily important and the construction of the protection measures is sometimes complex and may extend to both public law and collective labour law. Hence, employee protection can be reflected in public law unemployment benefits as well as in rules on collective bargaining. The underlying rationale for these substantive law measures is to protect the employee. That value

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1 See, e.g. van Calster, *European Private International Law*, 3rd ed. (Hart 2021), p. 1.

2 See, e.g. Zweigert, *Zur Armut des Internationalen Privatrechts an socialen Werten* (RabelsZ 1973), pp. 435, 452, 447 f., Mills, *The Confluence of Public and Private International Law: Justice, Pluralism and Subsidiarity in the International Constitutional Ordering of Private Law* (Cambridge University Press 2009), p. 10 ff. and Bogdan, 'On the so-called deficit of social values in private international law', in *Essays in Honour of Spyridon VI. Vrellis* (Nomiki Biblothiki 2014), p. 31–38, p. 31 f.

3 See, e.g. Davidov, *A Purposive Approach to Labour Law* (Oxford University Press 2016), p. 35 f.

has been adopted into EU private international law by implementing different weak party protection measures in the regulations on jurisdiction and applicable law. Put simply, those measures are 1) to limit party autonomy, 2) to give the employee more forum shopping alternatives, and 3) to locate the disputes to the country where the employee habitually carries out their work.

In my opinion, there is nothing wrong with trying to balance a typically uneven contractual relationship with additional private international law measures. However, when doing so, one must not forget the original role of private international law which, as mentioned above, is primarily to allocate the competent jurisdiction and indicate the applicable law. A generally accepted private international law value in that regard is foreseeability.[4] Foreseeability can play different roles in private international law and a lack of foreseeability can be burdensome for one or other party. Normally, the plaintiff will gain from foreseeability, as it will make pre-judicial assessment of the case clearer.[5]

A distinctive feature of employment law disputes is that the employee much more often acts as the plaintiff rather than as the

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4 See, e.g. Kegel and Schurig, *Internationales Privatrecht*, 9th ed. (Verlag C.H. Beck 2004), p. 143.

5 However, there are also examples of when a lack of foreseeability can benefit the plaintiff. One such example is the choice of law rule on environmental damages in Article 7 of the Rome II Regulation. That rule gives the person seeking compensation for a non-contractual obligation arising out of environmental damage the possibility of choosing either the law of the country where the damage occurred or that of the country in which the event giving rise to the damage occurred. In other words, the lack of foreseeability burdens the tortfeasor. A likely consequence of such a rule is that actors that may possibly cause environmental damages adjust in advance to more than one substantive national law. Consequently, the choice of law rule may prevent a race to the bottom between legislators that want to attract lucrative business by low environmental law standards.

defendant.[6] This is related to the substantive law nature of employment law. Generally, it is the employer, being in the stronger position, that can make decisions regarding the employment contract, that the employee may need judicial assistance to challenge. A typical example of a dispute is where an employer has decided to terminate an employment contract. In matters without any international connection, the employee can rely on substantive employment law to assess whether or not there is a case. However, disputes involving international elements contain another dimension, due to the simple fact that the employee must know what law will be applicable in order to make an assessment of whether or not there is a case. In other words, private international law foreseeability can be a premise for employment protection. This article seeks to investigate the role of foreseeability in relation to private international law protective mechanisms by analysing the functioning of EU private international employment law.

3 How does EU private international employment law protect employees?

3.1 Employee protection in the Brussels I Regulation

Whether or not an EU Member State's court has jurisdiction in a private international law matter is primarily determined by the Brussels I Regulation. In Section 5, the Brussels I Regulation contains special jurisdictional rules for employment contracts. The employment contract jurisdictional rules differ from those for general contracts with respect to the weak party protection of the employee. As with the general jurisdiction basis rule in Article 4, a plaintiff in an employ-

6 An indication that this premise is valid is that 62 out of the 69 judgments delivered in 2021 from the Swedish Labour Court had an employee plaintiff and a defending employer. Although the issues for the Swedish Labour Court include not only individual employment law matters but also collective labour law matters, the great imbalance in favour of employee-initiated cases illustrates that the employee side initiates court cases much more often.

ment dispute may sue a defendant where the defendant is domiciled. Unlike in the case of general contracts, the employer's possibility for forum shopping is limited. An employer may only bring proceedings where the employee is domiciled, in accordance with Article 22. Conversely, the employee is given some forum shopping alternatives.

According to Article 21 of the Brussels I Regulation, an employee may initiate proceedings either where the employer is domiciled or where the employee habitually carries out their work. If the employee does not carry out their work in any one country, the employee may initiate proceedings in the courts in the place where the business which engages or engaged the employee is or was situated. From the Court of Justice of the European Union (CJEU) case law, it is clear that this subordinated alternative may only be used in rare cases, due to the extensive interpretation of the place where the employee habitually carries out their work.[7] The unequal possibilities for forum shopping is one of two measures used in the Brussels I Regulation to protect the employee as the weaker party.

The reason behind granting the employee the possibility of initiating proceedings where their work is habitually carried out has a particular history. Originally, the EU jurisdictional rules contained no special provisions for employment contracts. Before jurisdictional rules for employment contracts were introduced, the CJEU held that the *forum solutionis* rule, which today can be found in Article 7 paragraph 1 of the Brussels I Regulation, should be interpreted in light of the choice of law rule for employment contracts when determining the jurisdiction in employment matters. In general contractual disputes, the *forum solutionis* rule offers the plaintiff the possibility to initiate proceedings in the country where the place of performance of the obligation in question is situated. For employment contracts, the CJEU established an interpretation which meant that the place where the employee habitually carried out their work was the place where

7 The subordination of the prerequisite follows from CJEU's case law on the parallel *loci laboris* notion in the Rome I Regulation in its judgment in C-384/10, *Voogsgeerd*, EU:C:2011:842. See further below in Section 3.2.3.

the obligation in question was to be performed. The CJEU justified this conclusion with the argument that it is desirable that disputes should, in so far as possible, be brought before the courts of the state whose laws govern the contract.[8] When doing this, the court referred to the *lox loci laboris* rule in the Rome Convention.[9] Later, the case law was converted into special jurisdictional rules that can now be found in Section 5 of the Brussels I Regulation. In other words, the *forum loci laboris* rule relies on the premise that *lex loci laboris* is normally applied.

In addition to giving the employee more forum shopping alternatives than the employer, Article 23 limits forum selection clauses in employment agreements. Any forum selection clause is valid only if it is entered into after the dispute has arisen or if it 'allows for the employee to bring proceedings in courts other than those indicated in this Section'. Forum selection clauses that seek to deviate from the jurisdiction prescribed for in the Brussels I Regulation may only be interpreted to the benefit of the employee. In the judgment in *Noguiera and Others*,[10] the CJEU made it clear that a forum selection clause in an employment contract does not have a derogative effect on the employee's right to bring proceedings in the Member State where their work is habitually carried out. The background to that case was that the employer, the flight carrier company Ryanair, had included forum selection clauses pointing to Irish courts as having exclusive jurisdiction for employees working in Belgium. The judgment made it clear that even if it is possible to include forum selection clauses in international employment clauses, they will only give the employee an additional alternative to the forum shopping alternatives offered in the Brussels I Regulation – a forum selection clause entered into before a dispute has arisen can never be binding on the employee.

So far, it is clear that the employee protection mechanisms in Section 5 of the Brussels I Regulation constitute a deviation from the party-neutral general jurisdiction rules. An employee is generally

8 Case C-133/81, *Ivenel*, EU:C:1982:199, para. 12.

9 Case C-133/81, *Ivenel*, EU:C:1982:199, para. 13.

10 Joined cases C-168/16 & C-169/16, *Noguiera and Others*, EU:C:2017:688.

offered forum shopping alternatives, whereas the employer can only initiate proceedings where the employee is domiciled and there are no possibilities for deviating from this through forum selection clauses. Hence, it is quite clear that the balance of the jurisdictional rules favours the employee. However, the value of the jurisdictional benefit for the employees must be seen in light of the choice of law rules.

For an employee to use the forum shopping alternatives effectively, the choice of law must be foreseeable. Regardless of which EU Member State is competent in an international employment law matter, all Member States will apply the same choice of law rules. For contractual matters, including employment contracts, all Member States apply the Rome I Regulation, which contains a special provision on employment contracts, including the mechanism intended to protect the weaker party.[11] The next section of this article will therefore deal with the foreseeability of the choice of law rules for employment contracts in the Rome I Regulation.

3.2 Employee protection in the Rome I Regulation

3.2.1 *Introduction*

Article 8 of the Rome I Regulation contains the choice of law rules for employment contracts. Although the substantive employment protection is left to applicable law, the choice of law rule contains several employee protection mechanisms that are intended to favour the employee as the weaker party. Weak party protection was mentioned as a guiding principle alongside the principles on acceptance of party autonomy and the proper law of the contract when the choice of law rules were revised in connection with the Rome Convention being converted into the Rome I Regulation.[12] In this conversion,

11 It can be noted that Denmark applies the 1980 Rome Convention instead of the Rome I Regulation. However, the equivalent choice of law rules for employment contracts are the same, excepting editorial amendments.

12 Commission of the European Communities, Green paper on the conversion of the Rome Convention of 1980 on the law applicable to contractual obligations into a Community instrument and its modernization, COM (2002) 654 p. 10.

the choice of law rule for employment contracts survived without any material changes from the wording in its predecessor in Article 6 of the Rome Convention.

The choice of law rule for employment contracts in Article 8 of the Rome I Regulation contains two explicit employee protection measures. First, it follows from paragraph 1 that party autonomy is limited. A choice of law made by the parties may not deprive the employee of the protection that is granted in provisions that cannot be derogated from in the law that would have been applicable in the absence of the parties' choice. Second, the proper law of an employment contract is, according to paragraph 2, primarily the law of the country where the employee habitually carries out their work. The rationale for locating the law applicable to an employment contract to the place where work is conducted is protecting the employee.[13]

3.2.2 *Limited party autonomy*

It follows explicitly from Article 8 paragraph 1 that the law that the parties have chosen themselves (the subjectively applicable law) shall be applied. According to the subsequent sentence of the paragraph, 'such a choice of law may not, however, have the result of depriving the employee of the protection afforded to him by provisions that cannot be derogated from by agreement under the law that, in the absence of choice, would have been applicable' (the objectively applicable law). In other words, the objectively applicable law will break through the subjectively applicable law.

From an application perspective, the limited party autonomy provision means that if an employment contract contains a choice of law clause, a court needs to determine what law would have been applicable if the parties had not subjectively chosen an applicable law. If the court concludes that the objectively applicable law differs from the subjectively applicable law, the court needs to research whether

13 Report on the Convention on the law applicable to contractual obligations by Mario Giuliano, Professor, University of Milan, and Paul Lagarde, Professor, University of Paris I, O.J. 1980, C 282, 1–50, at 25.

there are provisions in the objectively applicable law that offer the employee protection that cannot be derogated from.

The rule that the objectively applicable law shall break through does not mean that the subjectively applicable law is a nullity. Already in the 1980 Guiliano/Lagarde report on the convention on the law applicable to contractual obligations, it was confirmed that ‘the law which was chosen continues to be applicable’.[14] Advocate General Manuel Campos Sánchez-Bordona followed this line of argumentation in his opinion in the joined cases *Gruber Logistics*.[15]

The underlying legal issue in the *Gruber Logistics* cases concerned whether lorry drivers employed by Romanian companies were entitled to minimum wage according to Italian or German law, respectively, despite the fact that Romanian law was chosen for the employment contracts. In its judgment, the CJEU confirmed that the law that the parties had chosen in their employment contract should be applied as a starting point and that the law that would have been applicable if no choice of law would have been made should break through in issues where the latter law offers employee protection that cannot be derogated from by agreement under that law. The court reiterated the wording of the Rome I Regulation as it confirmed that whether or not a provision in the objectively applicable law can be derogated from shall be decided in accordance with that law.

Unfortunately, the *Gruber Logistics* judgment left the trickiest part of the parallel application methodology prescribed in Article 8 undiscussed. For the objectively applicable law to break through, it is not enough that the provision is mandatory. In addition, it must also offer the employee protection. How do we know whether the employee is offered protection by the provision in the objectively applicable law? The lack of discussion of this issue in the judgment can be explained

14 Report on the Convention on the law applicable to contractual obligations by Mario Giuliano, Professor, University of Milan, and Paul Lagarde, Professor, University of Paris I, O.J. 1980, C 282, 1–50, at 25.

15 Opinion of Advocate General Sánchez-Bordona in joined cases C-152/20 & C-218/20, *Gruber Logistics*, EU:C:2021:323, para. 43.

by the simple fact that the Romanian courts did not ask about it. Nevertheless, it is an interesting issue that deserves some attention.

As long as the employee protection mechanism in both the subjectively applicable law and the objectively applicable law are equivalent, paragraph 1 of Article 8 is unproblematic. A lower minimum wage in the subjectively applicable law can simply be replaced by the rules granting a higher minimum wage in the objectively applicable law. When the two substantive laws' employment protection mechanisms are based on different ideas, it is harder to make a comparison. That might be the case if the matter concerns a wrongful dismissal and the subjectively applicable law offers a stronger right for the employee to return to the job, whereas the objectively applicable law offers better compensation.[16] In such a situation, one can let either the court or the employee as the protected party determine if the objectively applicable law should break through the subjectively applicable law.

None of the above solutions is perfect. Letting the court make the evaluation is problematic, as there is no objective way to evaluate different employment protection mechanisms.[17] A consequence of such an evaluation is that the outcome of a case will differ depending on where it is settled. The classic private international idea of uniform decisions, i.e., that a case should have the same outcome regardless of where it is adjudicated, will therefore be diluted. If one instead lets the employee decide whether the objectively applicable law shall break through, e.g. based on how the complaint is construed, the idea of uniform decisions will persist, as the choice of law method will be made in the same manner regardless of where it is adjudicated. Such a method will of course be casuistic, but it has the advantage of simplifying the comparison for the court and making the parallel application more foreseeable for the plaintiff employee.

16 See also Nesvik, *Beskyttelse av arbeidstakeren i international privatrett* (Universitet i Oslo 2018), p. 255 ff.

17 For a contrary opinion (that the court shall make the assessment in accordance with *lex fori*), see Deinert, *International Labour Law under the Rome Conventions* (Nomos/Hart 2017), p. 126 ff.

Regardless of who makes the evaluation of whether the objectively applicable law should break through the subjectively applicable law, the subsequent issue remains of how the parallel application should be done. Should the objectively applicable law substitute for or complement the subjectively applicable law?

It is quite clear that partial substitution is the more reasonable alternative when the substantive law protection mechanisms are based on the same ideas. As an example, one cannot have minimum wage in accordance with two different standards at the same time. This was the situation in *Gruber Logistics*. In its judgment, the CJEU held that the higher minimum wage under non-derogable rules in the objectively applicable law should prevail over the lower minimum wage under subjectively applicable Romanian law.

It is trickier to evaluate how two different types of substantive employment protection mechanisms should be applied.[18] The example above, where one country's law prescribed that in the event of a wrongful dismissal the employee should have the job back, whereas the other country's law prescribed compensation, again illustrates the problem. A recent judgment from the French Court of Cassation dealt with this issue.[19] In that case, an employee had been working in France for a long time for a Moroccan company, when he was ordered to relocate to Morocco. The employee argued that the relocation decision was to be seen as a wrongful dismissal under French law. Moroccan law was chosen for the employment contract, but French law was to break through as the objectively applicable law. However, what was at issue in the case was how to make a comparison on the substitution. Should the substitution extend not only to the legal basis, but also to the consequences of a breach? The French Court of Cas-

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18 See also Franzen, 'Conflicts of Laws in Employment Contracts and Industrial Relations', in Blanpain (ed.), *Comparative Labour Law and Industrial Relations in Industrial Market Economies*, 11th ed. (Kluwer Law International 2014), p. 259 f.

19 Judgment of 8 December 2021 in case no. 20-11.378, *Cour de Cassation*, FR:CCASS:2021:SO01415.

sation argued that the comparison required an overall assessment. Therefore, the legal consequences of the dismissal were also subject to French law.

An aspect of partial substitution that has been observed in legal literature is that parallel application risks leading to double compensation and giving the employee a stronger protection than they would have been granted under any of the laws at hand.[20] A lexical interpretation of the parallel application rule in paragraph 1 of Article 8 indicates that the subjectively and objectively applicable laws are treated differently. Whereas provisions that cannot be derogated from and which also offer the employee protection in the objectively applicable law shall be applied, Article 8 is silent on how the subjectively applicable law shall be applied. Hence, there is nothing to prevent a court from substituting protection under the subjectively applicable law, in order to let the objectively applicable law's provisions prevail. In other words, adjustments to the subjectively applicable law could be a solution to avoid invidious results. In a situation where the employee claims compensation for wrongful dismissal under the objectively applicable law, a court can simply substitute the right to restitution under the subjectively applicable law. Nonetheless, it is likely that the rule in some cases may lead to double compensation to the employee.

As long as the issue is left unresolved, there is an uncertainty regarding what law will actually be applied. This might cause a potential employee plaintiff to abstain from filing a lawsuit.

3.2.3 *The lex loci laboris*

The party autonomy limitation is not the only employee protection mechanism in Article 8. The presumption rule that primarily points out the law applicable in the absence of the parties' own choice is also justified, based on weak party protection. Article 8 paragraph 2 states that an employment contract shall be subject to 'the law of the

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20 Grušić, *European Private International Law of Employment* (Cambridge University Press 2015), p. 149.

country in which or, failing that, from which, the employee habitually carries out his work in performance of the contract'. This presumptive rule on the application of the law in the place where labour is performed (*lex loci laboris*) is the starting point for the objectively applicable law under the Rome I Regulation.

The *lex loci laboris* rule is central to Article 8 of the Rome I Regulation and the reason behind this rule is to protect the employee as typically the weaker party in an employment relationship.[21] The *lex loci laboris* rule should be interpreted in the context of the system that EU private international law is meant to create. Generally, identical – and sometimes also similar – notions in various private international law regulations are to be interpreted in the same way. That this parallel interpretation applies follows explicitly from paragraph 7 of the preamble to the Rome I Regulation.[22] Hence, one can talk about a *loci laboris* prerequisite.

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21 Preamble, para. 23 to the Rome I Regulation.

22 The place for the performance of labour is, as has already been mentioned, not only central for determining the law applicable to the country of employment. It is also central when establishing jurisdiction under the Brussels I Regulation (1215/2012). According to Art. 21 para. 1 b) i), an employee has the right to initiate proceedings against the employer in the Member State where work is performed. The prerequisite prescribing application of the *lex loci laboris* is closely related to the equivalent prerequisite in the Brussels I Regulation. Consequently, the CJEU has expressed the opinion that the two prerequisites are to be interpreted together. See, e.g. case C-29/10, *Koelzsch*, EU:C:2011:151, paras. 32–33, 41–42 and 45, where the court interprets the prerequisites on place of performance of labour in parallel between the jurisdictional rules and the choice of law rules. Because of the parallel interpretation, it is also necessary to take the case law established under the Brussels regime into consideration when determining the law applicable under the Rome I Regulation. Just as the Rome I Regulation has a predecessor in the 1980 Rome Convention, the Brussels I Regulation from 2012 is based on the Brussels Convention and the Brussels I Regulation from 2001, as well as on the Lugano Convention, between the EU Member States on the one side and Norway, Iceland and Switzerland on the other.

According to the CJEU, 'the interpretation of that provision must be prompted by the principles of *favor laboratoris* in that the weaker parties to contracts must be protected "by conflict-of-law rules that are more favourable"'.[23] The premise for the rationale of the rule is that the employee typically has a greater interest in having the *lex loci laboris* applied. Application of the *lex loci laboris* would guarantee the employee adequate protection and the law of that country should therefore break through the law chosen by the parties themselves.[24]

The weak party protection idea has practical importance for the application of the choice of law rules. First, it is with reference to the idea of weak party protection that the place where work is habitually carried out shall be interpreted extensively when work is carried out in several countries.[25] The CJEU has pointed out several times that it is important for this reason to determine a country where, or from which, the employee habitually carries out his or her work. This extensive interpretation of the *lex loci laboris* means that the subsidiary presumptive rule in Article 8 paragraph 3 of the Rome I Regulation shall not be used simply when it is hard to determine the country where the work is habitually carried out.[26] In its judgment in *Voogsgeerd*, the CJEU made it clear that the subsidiary presumptive rule should not be applied in a case regarding an employee who carried out his work on international waters but from a Belgian harbour. The extensive interpretation of the place where the employee habitually carries out their work thus leaves application of Art. 8 para. 3 only to situations when an employee exclusively works on international terri-

23 Case C-29/10, *Koelzsch*, EU:C:2011:151, para. 46.

24 Report on the Convention on the law applicable to contractual obligations by Mario Giuliano, Professor, University of Milan, and Paul Lagarde, Professor, University of Paris I, O.J. 1980, C 282, 1–50, at 25.

25 Joined cases C-168/16 & C-169/16, *Noguiera and Others*, EU:C:2017:688, para. 57; case C-64/12, *Schlecker*, EU:C:2013:551, para. 31; case C-29/10, *Koelzsch*, EU:C:2011:151, para. 43 and case C-384/10, *Voogsgeerd*, EU:C:2011:842, para. 35.

26 Case C-384/10, *Voogsgeerd*, EU:C:2011:842, paras. 33–37.

tory. In practice, that might be, e.g. work performed on oil platforms located in international territory.

Second, with respect to the protective rationale, the *loci laboris* prerequisite is an independent legal notion. Therefore, it is not equal to similar prerequisites under other regulations. In the judgment in *Noguiera and Others*, the CJEU made it clear that the legal concept of a 'home base' for flight crew is not automatically the same as the place where labour is performed in EU private international law.[27] Consequently, the prerequisite must be interpreted independently and with account being taken of the facts in each specific case.

Koelzsch dealt with the question of how the place where work is habitually carried out should be determined when an employee carries out work in several countries.[28] The employment contract in question contained a choice of law clause prescribing application of the laws of Luxembourg. In its judgment, the CJEU stated the *lex loci laboris* should be determined to be the country 'to which the work has a significant connection'.[29] Further, the CJEU in its judgment stated that it is in the labour country that the employment activities are most affected by business and the political environment. Therefore, the CJEU concluded that 'compliance with the employment protection rules provided for by the law of that country must, so far as is possible, be guaranteed'.[30]

The wording of the choice of law rule in Article 8 of the Rome I Regulation has been changed, compared with that of its predecessor Article 6 of the Rome Convention. In the older Rome Convention it was stated that the *lex loci laboris* was the 'country in which the employee habitually carries out his work'. For mobile workers, the CJEU concluded that this prerequisite was to be interpreted as being

27 Joined cases C-168/16 & C-169/16, *Noguiera and Others*, EU:C:2017:688, para. 62. It can be noted that 'home base' is a specific concept in EU regulation no 3922/91. That concept is not synonymous with the independent notion of 'habitually carries out work' in EU private international law.

28 C-29/10, *Koelzsch*, ECLI:EU:C:2011:151.

29 Case C-29/10, *Koelzsch*, EU:C:2011:151, para. 44.

30 Case C-29/10, *Koelzsch*, EU:C:2011:151, para. 42.

the country from which the work is habitually carried out.[31] To avoid applicability issues for employees working in more than one country, the Rome I Regulation clarified that the *lex loci laboris* should be the country 'in which, or failing that, from which the employee habitually carries out his work'.

In several judgments, the concept of *loci laboris* has been interpreted in relation to employees performing work in multiple countries.[32] In those judgments, the court has indicated what factors shall be decisive in the assessment of where the work is habitually carried out. In that assessment one must 'take account of all the factors which characterize the activity of the employee'.[33] The assessment will consequently be dependent on what type of work is done by the employee.

As regards work in the transport sector, the CJEU has repeatedly held that a number of factors are relevant when determining where the work is habitually carried out. According to the CJEU, relevant factors for determining where, are: '(i) the place from which the employee carries out his transport-related tasks, (ii) the place where he returns after his tasks, receives instructions concerning his tasks and organises his work, and (iii) the place where his work tools are to be found'.[34]

Even if it might seem tempting to use the aforementioned indicia factors as prerequisites, such application is not allowed. The CJEU has underlined in its interpretation that the rule may not be

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31 See e.g. case C-125/92, *Mulox*, EU:C:1993:306, paras. 24–26.

32 Case C-125/92, *Mulox*, EU:C:1993:306; case C-383/95, *Rutten*, EU:C:1997:7; case C-37/00, *Weber*, EU:C:2002:122; case C-29/10, *Koelzsch*, EU:C:2011:151; case C-384/10, *Voogsgeerd*, EU:C:2011:842; joined cases C-168/16 & C-169/16, *Noguiera and Others*, EU:C:2017:688 and joined cases C-152/20 & C-218/20, *Gruber Logistics*, EU:C:2021:600.

33 Case C-29/10, *Koelzsch*, EU:C:2011:151, para. 48.

34 Joined cases C-168/16 & C-169/16, *Noguiera and Others*, EU:C:2017:688, para. 63, with further references.

exploited or circumvented.[35] Evasion of private international law is often referred to as *fraude à la loi*. When a party or parties evade private international law rules, it is often justified to apply a rule *contra legem* to preserve the rationale of the rule. Regarding the place where the work is habitually carried out, it is not a matter of *contra legem* application, but the idea of *fraude a la loi* can still justify the employment protection rationale prevailing over artificial or sought indicia.

It is only those provisions that are meant to break through the subjectively applicable law. The subjectively applicable law will continue to be applied for all other matters.[36]

4 How does foreseeability affect the private international law protection measures?

4.1 What is foreseeability in private international law?

Foreseeability is generally crucial to private international law rules.[37] In private international law, foreseeability is often treated as synonymous with predictability and certainty; the opposite being flexibility, which is also an important value.[38] Although foreseeability is important in law generally, the international aspect further emphasises its importance. When a dispute can potentially be subject to jurisdiction in several different countries, it is rarely desirable for the plaintiff to be able to gain greatly from forum shopping. It is one thing if the plaintiff forum shops on procedural differences, but if the entire outcome and even the law applicable to the matter differs from country to country, international disputes risk being an arbitrary lottery. To

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35 Joined cases C-168/16 & C-169/16, *Noguiera and Others*, EU:C:2017:688, para. 62.

36 Joined cases C-152/20 & C-218/20, *Gruber Logistics*, EU:C:2021:600.

37 See, e.g. Bogdan, *Private International Law as Component of the Law of the Forum*, RCADI, vol. 348, 2011, p. 65 f.

38 Roosevelt III, 'Certainty versus flexibility in the conflict of laws' in Ferrari & Fernandez Arroyo (eds.), *Private International Law* (Edward Elgar Publishing 2019), 6–26, at 7 f.

avoid such an undesirable arbitrary situation, it is important to strive for uniformity of decisions. Uniformity is most easily achieved by having foreseeable choice of law rules.[39]

The systemic value of uniformity and the party aspect of foreseeability must be balanced against flexibility. Flexibility is also important in private international law, as it is an opportunity to avoid unreasonable effects of an overly rigid system.[40] Theoretically, a flexible system might give better *in casu* justice, as the judge can decide what is fair given the specific circumstances in the case.[41]

The traditional balance between foreseeability and flexibility must also be seen from a party perspective. Foreseeability is important from a practical party perspective. For a potential plaintiff to assess whether there is a 'case' in an international dispute, foreseeable choice of law rules are fundamental. If the choice of law rules are not foreseeable, the potential plaintiff may be reluctant to initiate proceedings.

A simple and typical example could be a dispute over an employer's decision to terminate an employment contract.[42] Assume that such a termination is allowed under the laws of country A, but not those of country B. For a plaintiff employee in such a situation, it will be important to know that the laws of country A will be applicable. Uncertainty regarding what law will apply could therefore affect the plaintiff employee and be a weapon in the hands of the defendant employer.

The fact that it is typically the employee who is the plaintiff in employment disputes highlights even further the importance of foreseeability from a party perspective. Whereas the employer often has the power to, e.g. discipline an employee in substantive labour law by

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39 See, e.g. von Savigny, *System des häutigen Römischen Rechts*, Book 8 (1849), p 114 f.

40 Mills, 'The Identities of Private International Law: Lessons from the U.S. and EU Revolutions', Duke J. Comp. & Int'l Law (2013), 445–475, at 449 ff.

41 Roosevelt III, 'Certainty versus flexibility in the conflict of laws' in Ferrari & Fernandez Arroyo (eds.), *Private International Law* (Edward Elgar Publishing 2019), 6–26, at 8.

42 See, e.g. the facts in case C-29/10, *Koelzsch*, ECLI:EU:C:2011:151.

taking actions such as dismissal, the employee needs to go to court to obtain their legal rights.

In conclusion, one could say that private international law rules are generally about balancing foreseeability and flexibility and that there are strong rationales for both these values. In the following sections, I will analyse how foreseeability affects the EU private international employment law rules.

4.2 Are the jurisdictional rules foreseeable?

The limitation of party autonomy in the Brussels I Regulation does not *per se* affect the idea of protecting the employee. Here, the lack of foreseeability seems to burden the employer. However, the jurisdictional rules cannot be analysed separately. Instead, they must be seen in context with the choice of law rules. For an employee who wants to make use of the right to forum shop in a dispute over an international employment contract, it is crucial to foresee what country's law will be applicable to the dispute. Therefore, I argue, the weak party protection in the jurisdictional rules is dependent on the choice of law rules being foreseeable.

4.3 The escape clause undermines the *lex loci laboris*

Article 8 paragraph 4 explicitly prescribes where the presumptions in paragraphs 2 and 3 are to be set aside: '[w]here it appears from the circumstances as a whole that the contract is more closely connected with a country other than that indicated in paragraphs 2 or 3, the law of that other country shall apply'. The escape clause in Article 8 differs from the other escape clauses in the Rome I Regulation by not prescribing that the contract be 'manifestly more closely connected'

to the other country.[43] This difference means that the presumptive rules in Article 8 appear weaker than the presumptions in Articles 4, 5 and 7.

The possibility of setting presumptive rules aside in choice of law matters under the Rome I Regulation was adjudicated in the Grand Chamber judgment in the *Intercontainer* case.[44] In that case, which did not concern an employment contract, but rather a train freight contract, the CJEU made some general statements on how to determine the applicable law. First, the court held that the presumptive rule must always be taken into consideration in order to meet 'the general requirement of foreseeability of the law and thus of legal certainty in contractual relationships'.[45] Second, the court held that the possibility of using the escape clause serves to balance legal certainty and 'certain flexibility in determining the law which is actually most closely connected with the contract in question'.[46] A conclusion that can be drawn from the reasoning of the court is that the escape clause exists to avoid unreasonable consequences of the presumptive rules.

In *Schlecker*, the escape clause in the choice of law article for employment contracts was interpreted.[47] The CJEU held that the *lex loci laboris* may be set aside when it appears from the circumstances as a whole that the contract is more closely connected to another country. In this particular case, that meant that despite the fact that

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43 Escape clauses prescribing a 'manifestly more closely connected' contract are found in Art. 4 para. 3 (for general contracts), Art. 5 para. 3 (for contracts of carriage) and Art. 7 para. 2 (for insurance contracts). Introducing a prerequisite of a manifestly closer connection was suggested by the Max Planck Institute for Comparative and International Private Law already in 2007, see *Max Planck Institute for Comparative and International Private Law: Comments on the European Commission's Proposal for a Regulation of the European Parliament and the Council on the Law Applicable to Contractual Obligations (Rome I)* (RabelsZ, 2007), 225–344, at 297.

44 Case C-133/08, *Intercontainer*, EU:C:2009:617.

45 Case C-133/08, *Intercontainer*, EU:C:2009:617, para. 62.

46 Case C-133/08, *Intercontainer*, EU:C:2009:617, para. 59.

47 Case C-64/12, *Schlecker*, EU:C:2013:551.

an employee had carried out her work in the Netherlands for more than ten years, there was a closer connection to Germany. Most of the connecting factors that the CJEU held to be determining and indicating a closer connection to Germany related to the fact that the employee was a resident there.[48] Among specific connecting factors mentioned by the court were the country where the employee paid taxes on her income and where she was covered by a social security scheme, as well as 'parameters relating to salary determination and other working conditions'.[49]

The fact that the *lex loci laboris* presumption in Article 8 paragraph 2 can be set aside as soon as there is a closer connection to another country means, in practice, that the issue of the applicable law will be uncertain in almost all international employment contracts. This private international law uncertainty blurs the legal relationship between the parties, as it will be uncertain what substantive law will apply to an employment contract. In practice, this might lead to a situation where a claim from a plaintiff needs to be protected under both the *lex loci laboris* and the law of the country to which the employment contract is potentially considered to have a closer connection.

The facts of the already mentioned *Koelzsch* case can illustrate the double-protection problem described above. In the *Koelzsch* case, the employer's termination of the employment contract was illegal according to the *lex loci laboris*, which was German law. However, according to Luxembourg law, the termination was legal. In a pre-court phase, the private international law uncertainty could play an important role, as the employer could simply state that the laws of Luxembourg should be applied, due to a closer connection to that country. In similar situations, the private international law uncertainty will be bridged only if the employee has a claim under the two relevant substantive employment laws. Hence, the escape clause

48 See also van Hoek, 'Re-embedding the transnational employment relationship: a tale about the limitations of (EU) law?', CML Rev. (2018), 449–488, at 456.

49 Case C-64/12, *Schlecker*, EU:C:2013:551, para. 41.

in paragraph 4 undermines the employment protection idea of the application of the *lex loci laboris*. Such a situation is not desirable.

The easiest solution to the problem with the escape clause is to make it explicitly applicable only in exceptional cases. Introducing a requirement that the connection needs to be 'manifestly' closer would eliminate the worst cases of uncertainty.

4.4 The unclarities on how to apply the dépeçage method undermine the party autonomy restriction

The lack of clarities on how to perform parallel application of the substantively and objectively applicable laws described above undermine the protection measure. For the protection measure to have its intended purpose, its application must be clarified. As long as it is unclear if it is the court or the employee that shall determine whether the objectively applicable law offers protection and whether double compensation can be granted, the protection offered is illusory. As with the uncertainty caused by the escape clause, the uncertainty regarding how to make the parallel application might lead a cautious employee plaintiff to abstain from filing a lawsuit. Such a plaintiff might only initiate proceedings if there is double protection, i.e. when both the objectively and subjectively applicable laws prescribe a certain solution. Of course, this situation is not satisfactory and raises issues related to the rationale of private international law.

Again, the main function of the choice of law rules is to determine the applicable law. The role of foreseeability in fulfilling this purpose cannot be overemphasised. The parallel application method could be clarified by the CJEU, but the best way to protect the employee would – in my opinion – be to let the employee decide whether the objectively applicable law should break through the subjectively applicable law at a certain point.

5 Conclusion

In this article, I have argued that the lack of foreseeability undermines the weak party protection mechanisms for international employment contracts, which may lead to reluctance to file lawsuits in employment law disputes. As most such disputes are initiated by employees, the private international law uncertainty undermines the employment protection rationale. There is not necessarily anything wrong with choice of law rules explicitly favouring a weaker party. However, one must bear in mind that private international law rules are formal. No dispute shall be settled solely on the application – or worse still, the non-application – of private international law rules. Instead, private international choice of law rules must leave certain issues to national substantive law. A guiding star when drafting private international law rules must therefore always be to strive for foreseeability, especially if the rationale is to protect a typically weaker party that also happens most often to be the claimant.