

# EMPLOYMENT CONTRACTS AND THE ROME CONVENTION: THE KOELZSCH RULING OF THE EUROPEAN COURT OF JUSTICE

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**Riassunto:** Con la decisione resa il 15 marzo nel caso Koelzsch, la Corte di giustizia dell'Unione europea si è espressa sull'interpretazione dell'art. 6 § 2 della Convenzione di Roma in materia di legge regolatrice dei contratti di lavoro in assenza di scelta, le cui norme protettive prevalgono sull'applicazione della legge scelta. Nel caso di specie, il lavoratore era un conducente di camion addetto ai trasporti internazionali, per cui la natura della sua attività rendeva la questione controversa. Alla luce della propria precedente giurisprudenza resa nel contesto della Convenzione di Bruxelles e del regolamento Bruxelles I, e in considerazione del fatto che l'art. 6 persegue l'obiettivo di tutelare adeguatamente il lavoratore, la Corte ha affermato che il criterio di collegamento della «legge del paese in cui il lavoratore, in esecuzione del contratto, compie abitualmente il suo lavoro» deve essere interpretato in senso ampio. Di conseguenza, viene ridotto lo spazio operativo del criterio sussidiario della «legge del paese dove si trova la sede che ha proceduto ad assumere il lavoratore».

La nota, avendo illustrato e commentato il caso di specie e la decisione della Corte, fornisce alcuni suggerimenti sul contributo che la decisione può fornire nella determinazione della legge regolatrice dei rapporti di lavoro quando è difficile individuare il paese di compimento dell'attività lavorativa, sia in applicazione della Convenzione di Roma che del regolamento Roma I che l'ha sostituita.

**Parole chiave:** rapporti di lavoro, obbligazioni contrattuali, legge applicabile in assenza di scelta, Convenzione di Roma, regolamento Roma I.

**Abstract:** With its decision of 15 March 2011 in the Koelzsch proceedings, the Court of Justice of the European Union expressed itself on the interpretation of Article 6(2) of the Rome Convention, which determines the law governing employment contracts in the absence of a choice, whose protective rules prevail over the application of the chosen law. In this case, the employee being an international truck driver, the nature of his activity rendered the question a controversial one. In the light of its case law, albeit ruled in the context of the Brussels Convention and the Brussels I Regulation, and having taken into account that the objective of Article 6 is to guarantee the employees adequate protection, the Court stated that a broad meaning of the connecting factor «the law of the country in which the employee habitually carries out his work in performance of the contract» needed to be adopted. Consequently, this reduces the operative space for the subsequent connecting factor of «the place of business through which [the employee] was engaged».

This note, having illustrated and commented the case at hand and the decision of the Court, draws some suggestions on its contribution in determining the law governing employment relationships when establishing the country where the work is performed may be difficult, both under the Rome Convention as well as under the Rome I Regulation that has replaced it.

**Key words:** employment relationships, contractual obligations, applicable law in absence of a choice, Rome Convention, Rome I Regulation.

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## I. Introduction

1. The reference for a preliminary ruling from the Cour d'appel de Luxembourg in the proceedings *Heiko Koelzsch v Etat du Grand-Duché de Luxembourg* has given the Court of Justice of the European Union the opportunity to express itself for the second time, in its decision of 15 March 2011<sup>1</sup>, on the interpretation of the Convention on the Law Applicable to Contractual Obligations of 19 June 1980 (the Rome Convention), and for the first time on its Article 6 which determines the law governing employment contracts.

As already in the first proceedings<sup>2</sup>, this time again the Court was asked to clarify the provisions indicating the applicable law in the absence of a choice by the parties. The question is of particular importance for the relationship between employees and employers; although Article 6 of the Rome Convention —like the corresponding Article 8 of the Rome I Regulation into which, as is well known, the Convention has recently been transformed<sup>3</sup>— maintains in respect to that category of relationships, as in respect to all contracts, the possibility to choose the applicable law<sup>4</sup>, it guarantees that this choice does not deprive the employee of the protection provided by the mandatory rules of the law which would be applicable in the absence of a choice<sup>5</sup>. Thus it is always necessary to identify which law would govern the contract according to the «objective» connecting factors in order to compare its substantive content to that of the law selected by the parties<sup>6</sup>.

<sup>1</sup> Judgment of the Court (Grand Chamber), 15 March 2011, c. C-29/10, *Heiko Koelzsch v État du Grand-Duché de Luxembourg*.

<sup>2</sup> Judgment of the Court (Grand Chamber), 6 October 2009, c. C-133/08, *Intercontainer Interfrigo SC (ICF) v. Balkenende Oosthuizen BV and MIC Operations BV*; see A. HERNÁNDEZ RODRÍGUEZ, «El derecho aplicable al contrato en ausencia de elección por las partes: el asunto *Intercontainer Interfrigo* y su repercusión en el reglamento Roma I», *Cuadernos de derecho transnacional*, 2011, p. 302; J. RE, «La Corte di giustizia e l'art. 4 della Convenzione di Roma: il caso ICF», *Rivista di diritto internazionale privato e processuale*, 2010, p. 407.

<sup>3</sup> 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), which has replaced the Rome Convention. This Regulation applies to contracts concluded after 17 December 2009. It does not apply to Denmark which continues therefore to apply the Rome Convention.

<sup>4</sup> On the party autonomy as a connecting factor see A.L. CALVO CARAVACA, «El reglamento Roma I sobre la ley aplicable a las obligaciones contractuales: cuestiones escogidas», in *Cuadernos de derecho transnacional*, 2009, p. 57 *et seq.* and the impressive bibliography in footnote 23.

<sup>5</sup> Also in connection with employment contracts the connecting factor of parties autonomy offers the advantage of joining predictability and flexibility of the applicable law. Moreover, the rigid recourse to the *lex loci laboris* can prove dangerous when the employee is sent to perform his activity in a country with poor social protection, whose content could even be difficult to ascertain. In cases as such it is precisely the choice of the law that can offer protection to the worker. Besides, this permits employees working in different countries for the same firm to be all submitted to the same law, and accordingly to receive uniform conditions. See M. FRENZEN, «Conflict of Laws in Employments Contracts and Industrial Relations», in R. BLANPAIN (ed.), *Comparative Labour Law and Industrial Relations in Industrialized Market Economies*, Alphen aan der Rijn, 2010, p. 230. The protection provided by Article 6 avoids that the choice permits the employer to take undue advantage of his contractual weight.

<sup>6</sup> This is the same safeguard provided by most domestic labour laws, in which the parties' autonomy is recognized only if it does not jeopardize the protection employees are provided by the mandatory law. The phrasing was inspired by the U.S.

In the case in question, though the parties had elected as applicable to their relationship the law of Luxembourg, the applicant in the main proceedings invoked the mandatory rules of German law. He held that Germany was to be identified as the country in which actually his working activities were carried out and that therefore, in accordance to Article 6(2)(a), the law applicable in the absence of a choice, whose protective rules should apply in any case, was to be that of that country. The applicant being an international truck driver, the nature of his activity rendered the question a controversial one; it is precisely with reference to the means of determining the place in which his work was carried out that, as shall be seen, the question for preliminary ruling was raised<sup>7</sup>.

## II. The request for a preliminary ruling and the Court's decision

### 1. The facts

2. The facts of the case were quite simple, even though the proceedings were lengthy and complex. Heiko Koelzsch, domiciled in Osnabrück, Germany, had worked as a lorry driver for the Gasa Spedition Luxembourg S.A. whose office was in Luxembourg (the company was subsequently taken over by the Danish Ove Ostergaard Lux S.A.) until his dismissal in March 2001. The employment contract, done in 1998, contained a clause conferring jurisdiction on the courts of Luxembourg as well as an indication of the law of Luxembourg as applicable to the contract. Mr Koelzsch applied to a labour court at Osnabrück requesting that his dismissal be declared unlawful; he raised the fact that he was an alternate member in Germany of the *Betriebsrat* (works council) of Gasa Spedition, and was therefore subject to Article 15, paragraph 1, of the German Kündigungsschutzgesetz (KSchG) which prohibits the dismissal of members, even alternate members, of a *Betriebsrat*. According to Mr Koelzsch, the law applicable in the absence of a choice, as established by Article 6(2) of the Rome Convention, should have been the German law since Germany was the place in which he carried out his work. He conveyed flowers and other plants on behalf of Gasa Spedition driving a company owned lorry permanently parked in the city of Osnabrück in Germany. He drove to Denmark to pick up goods he then delivered mainly to places in Germany and only occasionally to destinations in other European countries. He maintained that Article 15(1) of the KSchG constitutes a mandatory rule for the protection of employees' rights according to Article 6(1) of the Convention, and that, since his dismissal had infringed that rule, it was therefore to be considered illegal. The German judge however declared that he lacked jurisdiction, and the appeal against that decision was rejected.

Mr Koelzsch then resorted to the Tribunal de travail of Luxembourg, which, in its judgment of 4 March 2004, stated that the law of Luxembourg was the one governing the entire dispute. Since in the case at hand it was not possible to identify the place in which the work was carried out, according to the subsequent criterion set out in Article 6(2)(b) the relationship was governed by the law of the employer's place of business, which coincided with that indicated by the parties. The applicant's request

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Restatement of 1971, which states that «[t]he chosen law should not be applied» when its application «would be contrary to fundamental policy of state of otherwise applicable law» (Restatement of the Law Second, Conflict of Laws 2d, Ch. 8, as adopted and promulgated by the American Law Institute, St. Paul, Minn., 1971, 187). The only mandatory provisions whose application cannot be excluded under Article 6 (and 8 of the Rome I Regulation) are those protecting the worker. In evaluating the mandatory character of the provisions, account must be given also to those elements of the relationship that could lead to a substantial equivalence of the protection; see PH. COURSIER, *Le conflit de lois en matière de droit du travail*, Paris, 1993, p. 249 ss.; M.M. SALVADORI, «La protezione del contraente debole (consumatori e lavoratori) nella Convenzione di Roma», in G. SACERDOTI/M. FRIGO (Eds) *La Convenzione di Roma sul diritto applicabile ai contratti internazionali*, 2<sup>nd</sup> ed., Milano, 1994, p. 121., p. 142 s.; P.R. WILLIAMS, «The EEC Convention on the Law Applicable to Contractual Obligations», in *International and Comparative Law Quarterly*, 1986, p. 26.

<sup>7</sup> Identifying the governing law according Article 6(2) has raised a debate which has proved the uncertainties in its concrete functioning. See, among others, P. KAYE, *The New Private International Law of Contract of the European Community*, Aldershot, 1993, p. 233 ss., who underlines the importance of the contract provisions, also in the light of some case law, while R.M. MOURA RAMOS, «El contrato individual de trabajo», in A.L. CALVO CARAVACA/L. FERNÁNDEZ DE LA GÁNDARA (Eds), *Contratos internacionales*, Madrid, 1997, p. 1895, considers that the provision requests to ascertain «el centro de gravedad de esta relación».

was declared in part unreceivable and in part rejected. The decision was upheld by the Cour d'Appel on 26 May 2005 and by the Cour de Cassation on 15 June 2006.

Mr Koelzsch did not however give up, and brought an action against the Grand Duchy before the Tribunal d'arrondissement invoking the application of the 1988 law of Luxembourg concerning the civil liability of the State and of public authorities<sup>8</sup> and requesting compensation for damage caused by the maladministration of Luxembourg's judicial services. He held that the judicial authorities of Luxembourg had violated not only Article 6(1) and (2) of the Rome Convention by failing to apply the German mandatory rules but also the law of the European Union when rejecting his request to address to the Court of Justice a reference for a preliminary ruling. The Tribunal d'arrondissement however held the application groundless and, by decision of 9 November 2007, rejected it.

In the course of the proceedings instituted on Mr Koelzsch's appeal against that decision, the Cour d'appel de Luxembourg, having first addressed some preliminary questions, examined the merits of the applicant's request, and, in application of the First Protocol on the interpretation of the Rome Convention, decided to submit to the Court the following question for a preliminary ruling:

«Is the rule of conflict in Article 6(2)(a) of the Rome Convention ... , which states that an employment contract is governed by the law of the country in which the employee habitually carries out his work in performance of the contract, to be interpreted as meaning that, in the situation where the employee works in more than one country, but returns systematically to one of them, that country must be regarded as that in which the employee habitually carries out his work?».

## 2. The positions of the parties and the conclusions of the Advocate General

3. The question referred to the Court concerned the interpretation of the second paragraph of Article 6 of the Convention which states that the applicable law, in the absence of a choice, is the law «of the country in which the employee habitually carries out his work in performance of the contract, even if he is temporarily employed in another country» (a), or, if the employee «does not habitually carry out his work in any one country» the law «of the country in which the place of business through which he was engaged is situated» (b), unless «it appears from the circumstances as a whole that the contract is more closely connected with another country, in which case the contract shall be governed by the law of that country».

4. The government of the Grand Duchy insisted on resorting to the place of business criterion, maintaining that the provision set out in *lit. b*) of Article 6(2) had been included precisely for cases such as the one under consideration. Contrarily Mr Koelzsch, the Commission and the government of Greece—the only member State not directly concerned which intervened in the proceeding—recalled the previous cases in which similar expressions contained in the Brussels Convention and in Regulation No. 44/2001 had been interpreted by the Court and stressed that the criterion of the place where the employee «habitually carries out his work» can operate also when the working activity is performed in several member States.

5. The conclusions of the Advocate General, extensive and meticulous, indicated that the basic question was whether the case law of the Court, in which similar concepts had been interpreted in the context of the Brussels Convention and Regulation No. 44/2001, could also apply in the case at hand. The reply, in the light of hermeneutic methods that she defined as literal, historical, systematic and teleological, was in the affirmative even though accompanied by some pertinent cautionary remarks on the limits of an interpretative parallelism among the different instruments, a matter to which there will be occasion to return. Consequently the Advocate General suggested, «as a result of the requirements relating to a high level of protection for employees», that an interpretation be adopted broadening the scope of Article 6(2)(a) in order, as far as possible, to determine the applicable law by identifying the place in which the work was carried out and not by resorting to the law of the employer's place of business. She also indicated some criteria that the national judges could take into consideration in order to determine the country in which the employee «in fact performs the essential part of his duties vis-à-vis his employer».

<sup>8</sup> «Loi du 1<sup>er</sup> septembre 1988 relative à la responsabilité civile de l'Etat et des collectivités publiques».

### 3. The Court's reasoning

6. The Court's reasoning progressed as follows. First of all, it stated that the interpretation of the provision was to be autonomous in order to guarantee the attainment of the Convention's objectives (a). Then it recalled that, since the Convention had been concluded, as affirmed in its Preamble, in order to continue the work of unification of law set in motion by the adoption of the Brussels Convention, and that the rules laid down by that instrument for determining jurisdiction concerned the same matters and set out similar concepts, the case law whereby the Court had interpreted comparable expressions, albeit in the context of the Brussels Convention and the Brussels I Regulation, was relevant to the case at hand (b). Lastly, the interpretation must take into account that the objective of Article 6 of the Rome Convention is to guarantee the employees adequate protection (c).

#### A) An «autonomous» interpretation

7. The Court considered it advisable to give the phrases used in the text of the Convention an autonomous interpretation since an interpretation based on domestic legal systems would not «guarantee the full effectiveness of the Rome Convention». It could be recalled, but the Court did not, that the Convention itself provides in Article 18 that in the interpretation of its rules «regard shall be had to their international character and to the desirability of achieving uniformity in their interpretation and application»<sup>9</sup>.

Right from its adoption, the advisability was expressed of providing the Rome Convention, as had been done for the Brussels' one, with the advantage of the possibility of having recourse to a preliminary interpretation by the Court of Justice. States had however taken diverging positions on this matter so that, when the instrument was adopted, they limited themselves to making a joint declaration on the strong urging of the Commission<sup>10</sup>. Only in 1988 were the two protocols adopted that conferred on the Court the task of interpreting the Commission's provisions<sup>11</sup>; and it was only in 2004 that these instruments finally came into force.

8. In this decision the Court, as in its interpretation of the Brussels Convention, has made no reference to the criteria for the interpretation of international treaties, but appears instead to have made recourse to the same interpretation techniques it uses with reference to European Union law strictly speaking. This is a matter on which many authors have made interesting comments when the Court began interpreting the Brussels Convention<sup>12</sup>, and there is no doubt that precisely the conferral on the Court of Justice of the task of preliminary interpretation of the Rome Convention, as had been done with respect to the Brussels Convention, strengthened the organic link between the conventions and the European legal system<sup>13</sup>.

<sup>9</sup> This is a classic provision of international uniform law instruments, even though it has been formulated more cautiously than the «prototype» provisions on the subject, namely Article 7 of the Convention on the Limitation Period in the International Sale of Goods of 1974, and Article 7 of the Vienna Convention on the International Sale of Goods of 1980, contemporary of the Rome Convention. The instruments prepared under the auspices of UNCITRAL refer to the «need to promote uniformity» and not simply to the «desirability».

<sup>10</sup> In this Joint declaration, the governments declared that they desired «to ensure that the Convention is applied as effectively as possible» and that they were «[a]nxious to prevent differences of interpretation of the Convention from impairing its unifying effect». Accordingly, they declared themselves ready «to examine the possibility of conferring jurisdiction in certain matters on the Court of Justice of the European Communities and, if necessary, to negotiate an agreement to this effect».

<sup>11</sup> First Protocol of 19 December 1988 on the interpretation by the Court of Justice of the European Communities of the Convention on the law applicable to contractual obligations, opened for signature in Rome on 19 June 1980; Second Protocol of 19 December 1988 conferring on the Court of Justice of the European Communities certain powers to interpret the Convention on the law applicable to contractual obligations, opened for signature in Rome on 19 June 1980 (*OJ L* 48, 20 February 1989, p. 1 and p. 17).

<sup>12</sup> Among these see in particular W.M. HAUSCHILD, «L'importance des conventions communautaires pour la création d'un droit communautaire», *Revue trimestrielle de droit européen*, 1975, p. 4; A. GIARDINA, «The European Court and the Brussels Convention on Jurisdiction and Judgments», *International and Comparative Law Quarterly*, 1978, p. 263; H. RASMUSSEN, «A New Generation of Community Law, Reflections on the Handling by the Court of Justice of the Protocol of 1971 relating to the Interpretation of the Brussels Convention on Jurisdiction and Enforcement of Judgments», *Common Market Law Review*, 1978, p. 249.

<sup>13</sup> See the Report on the Protocols by A. TIZZANO, in *EC Official Journal*, 1990, C 219, p. 1; A. MIGNOLLI, «L'interpretazione della Convenzione di Roma da parte della Corte di giustizia delle Comunità europee», in G. SACERDOTI/M. FRIGO (Eds), *La Convenzione di Roma sul diritto applicabile ai contratti internazionali*, Milano, 1993, p. 132 *et seq.*

## B) The relevance of the case-law on the Brussels Convention and on the Regulation No. 44/2001

9. In the *ICF* decision, when interpreting for the first time a provision of the Rome Convention, the Court mentioned the link between the two conventions, but without drawing from this link any particular conclusions. It merely resorted to a systematic interpretation of the Rome Convention itself, making frequent references to the Giuliano-Lagarde Report which accompanied it. In this second decision, however, the Court referred to its own previous interpretative decisions. It may thus be interesting to retrace briefly this case law, in which the Court drew inspiration from the different instruments, and in turn with its rulings influenced amendments to those very instruments on the occasion of their revision or transformation into European acts.

10. The original text of the Brussels Convention, adopted in 1968, did not contain any specific rules on employment contracts. The Court of Justice, in the *Ivenel* case of 1982<sup>14</sup>, was requested of the meaning of the expression «the place of performance of the obligation in question» of Article 5(1) in the hypothesis of an employment contract featuring several claims concerning work carried out in several countries<sup>15</sup>. In its decision the Court made reference to the Rome Convention which, at that time, had not yet entered into force but was simply open to signature<sup>16</sup>, and to the accompanying Report, pointing out that its Article 6 intended to ensure «adequate protection for the party who from the socio-economic point of view was to be regarded as the weaker in the contractual relationship». It then indicated that an examination of the Brussels Convention, in particular the provisions conferring special or exclusive grounds of jurisdiction, showed that «the rules on jurisdiction, too, are inspired by concern to afford proper protection to the party to the contract who is the weaker from the social point of view». The Court had thus concluded that in the case of an employment contract, even if there were more than one claim, the obligation to be taken into consideration for the application of Article 5(1) of the Convention ought to be the obligation that characterizes the contract, namely the obligation to carry out the work in a specific place<sup>17</sup>. The Court subsequently specified its case law in its ruling of 1987 in the *Shenevai* case, some aspects of which however made those very principles inapplicable in that case<sup>18</sup>.

<sup>14</sup> Judgment of the Court, 26 May 1982, c. 133/81, *Ivenel*. The reference for a preliminary ruling from the French Cour de cassation concerned a case in which a salesman, employed by an undertaking, requested payment of retribution and compensation for work carried out in several States, for which the application of the criteria contained in Article 5(1) of the Brussels Convention would have led to the jurisdiction of several judges in different countries with respect to each individual obligation. The Court had therefore in a preliminary ruling affirmed that «in a case such as the one in point, where the national court has before it claims relating to obligations under a contract for representation, some of which concern remuneration due to the employee from an undertaking established in one State and others concern compensation based on the manner in which the work has been done in another State» ought to have been interpreted in such a way «that the national court is not compelled to find that it has jurisdiction to adjudicate upon certain claims but not on others», because this result would not achieve the objectives and general structure of the Convention, in particular «in the case of a contract of employment for which, as a general rule, the law applicable contains provisions protecting the worker and is normally that of the place where the work characterizing the contract is carried out».

<sup>15</sup> On this matter in general see the exhaustive study by P. FRANZINA, *La giurisdizione in materia contrattuale. L'art. 5 n. 1 del regolamento n. 44/2001/CE nella prospettiva della armonia delle decisioni*, Padova, 2006, and the analysis by A.L. CALVO CARAVACA, J. CARRASCOSA GONZÁLEZ, *Derecho internacional privado*, vol. II, 12<sup>th</sup> ed., Granada, 2011, pp. 590 et seq.

<sup>16</sup> The Court made recourse to the text of the Rome Convention, again not yet in force, also in order to establish whether the consequences of the non-fulfilment of the obligations established by a commercial agency contract fall under «contractual matters» under Article 5(1) of the Brussels Convention (judgment of the Court of 8 March 1988, c. C-9/87, *Arcado v Haviland*).

<sup>17</sup> In so doing the Court disregarded, with respect to obligations involving an employment contract, the so-called analytical method it had adopted in the *De Bloos* decision, according to which jurisdiction is to be assessed with respect to each individual obligation forming the basis of the legal proceedings, even in the case of several obligations referring to the same contract (Judgment of the Court of 6 October 1976, c. 14/76, *A. De Bloos, SPRL v Société en commandite par actions Bouyer*). The decision was not exempt from criticism; see, i.e., H. GAUDEMET-TALLON, in *Revue critique de droit international privé*, 1983, p. 120 ss., who affirms that it would be preferable if the Court had followed the conclusions of the Advocate General Reischl «qui permettaient de garder une solution générale, subtile certes, mais applicable à tous les contrats et qui, sans rompre de façon catégorique avec la jurisprudence De Bloos, évitait cependant la dispersion des fors compétents».

<sup>18</sup> Judgment of the Court of 15 January 1987, c. 266/85, *Hassan Shenavai v Klaus Kreischer*. The question concerned the recovery of architect's fees. The Court had decided that «the obligation to be taken into consideration in a dispute concerning proceedings for the recovery of fees commenced by an architect commissioned to draw up plans for the building of houses is

11. In another decision delivered in 1989 in the *Six Constructions* case, the Court had on the other hand stated that the solutions adopted with respect to conflicts-of-law by the Rome Convention could not automatically be transformed into criteria for establishing jurisdiction<sup>19</sup>. The Convention provides that when the connecting factor of the place of performance of the work cannot operate, recourse must be had to the law of the country in which the employer has his place of business. The Court held that when work—as in *Six Constructions*—is carried out in several countries, none of which is member of the Community, the adoption of a criterion such as that of the employer's place of business would give rise to a true *forum actoris*, in opposition not only to the general spirit of the Convention but also, in particular, to the need to protect employees. The Court did thus conclude that in cases of this sort the special jurisdiction provision does not operate; consequently the plaintiff must «bring his action before the courts of the place of the defendant's domicile in accordance with Article 2 of the Convention, which thereby provides a certain and reliable criterion».

12. Bearing in mind also this decision, on the occasion of the accession of Spain and Portugal to the Brussels Convention, both Article 5(1) of the Convention and Article 17 on the prorogation of jurisdiction were enriched by the addition of specific provisions concerning employment contracts<sup>20</sup>.

Both provisions were retained in the text of Regulation No. 44/2001, which has replaced the Brussels Convention, and moved to a new specific section (*Jurisdiction over individual contracts of employment*), with some drafting amendments aimed at clarifying their text<sup>21</sup>.

13. The concept of place in which the work is habitually carried out, paramount for establishing jurisdiction, has, however, given rise to considerable uncertainty, on account of which the Court had been asked to interpret that phrase in four cases, the first of which concerns the original text of the Brussels Convention, and the other three the amended text mentioned above. The latest of these cases, decided in 2003<sup>22</sup>, even though recalled by the Advocate General in her conclusions, and

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the contractual obligation which forms the actual basis of legal proceedings»; indeed in the case at hand those «particularities» typical of employment contracts which «create a lasting bond which brings the worker to some extent within the organizational framework of the business of the undertaking or employer, and they are linked to the place where the activities are pursued, which determines the application of mandatory rules and collective agreements» did not exist. Therefore the criterion of the place in which the characteristic obligation of the contract is to be performed, suggested in order to avoid a situation in which a number of courts have jurisdiction in respect of one and the same contract, was strictly limited in Community case law to employment contracts having the «particularities» indicated.

<sup>19</sup> Judgment of the Court of 15 February 1989, c. 32/88, *Six Constructions Ltd v Paul Humbert*. On this point see F. MOSCONI, «Giurisdizione e legge applicabile ai rapporti di lavoro con elementi di estraneità», in *I contratti di lavoro internazionali*, Torino, 1998, p. 30 *et seq.*

<sup>20</sup> The Convention on the accession of Portugal and Spain to the Brussels Convention, signed in Donostia-San Sebastian on 26 May 1989, entered into force on 1 February 1991. The addition made to Article 5(1)—now replaced by those included in regulation EC/44/2001—provided that in order to establish the existence of jurisdiction, the place of performance of the obligation was the place «where the employee habitually carries out his work». In the case in which the activity was not habitually carried out «in any one country», the employee might sue the employer in the country where was situated the place of business through which he was engaged, whereas the employer had to follow the general criterion of the domicile of the defendant. See J. CARRASCOSA GONZÁLEZ, *Artículo 5(1)*, in A.L. CALVO CARAVACA (Ed.), *Comentario al Convenio Comentario al Convenio de Bruselas relativo a la competencia judicial y a la ejecución de resoluciones judiciales en materia civil y mercantil*, Madrid, 1995, p. 79 *ss.* For what concerns Article 17, the need to protect employees was not expressed in a prohibition of agreements conferring jurisdiction, but in the provision that they would have no legal force if they were stipulated before the dispute arises, unless the employee himself invoked them. However the parties could agree on the jurisdiction of a different judge after the dispute arises. The same mechanisms are maintained in regulation EC/44/2001.

<sup>21</sup> See the commentaries by C. ESPLUGUES MOTA, G. PALAO MORENO, in U. MAGNUS/P. MANKOWSKI (Eds.), *Brussels I Regulation*, München, 2007, p. 326 *ss.*; F. SALERNO, *Giurisdizione ed efficacia delle decisioni straniere nel regolamento (CE) n. 44/2001*, 3<sup>rd</sup> ed., Padova, 2006, p. 159; J. CARRASCOSA GONZÁLEZ, «Derecho laboral internacional», in A.L. CALVO CARAVACA/J. CARRASCOSA GONZÁLEZ, *Derecho internacional privado*, *cit.*, p. 839 *s.*

<sup>22</sup> Judgment of the Court of 10 April 2003, c. C-437/00, *Giulia Pugliese v Finmeccanica SpA, Betriebsteil Alenia Aerospazio*. The reference for a preliminary ruling, addressed to the Court by the Landesarbeitsgericht München, concerned a dispute between Ms Pugliese, an Italian national, and Finmeccanica, a company established under Italian law. The dispute had arisen in connection with a contract of employment between Ms Pugliese and Aeritalia (subsequently acquired by Finmeccanica), which designated Turin as the place of work. The employee, temporarily placed on non-active status, carried out during that period work in Munich, on the basis of a separate contract of employment, for a German company, in which Aeritalia held some 21%

briefly by the Court itself, seems however hardly pertinent to the case at hand and will not therefore be discussed here.

**14.** In the first of these cases<sup>23</sup>, decided by the Court on 13 July 1993, a reference for a preliminary ruling on the interpretation of Article 5(1) of the Brussels Convention had been received by the Court from the Social Chamber of the French Cour d'Appel of Chambéry. The case concerned a dispute between a British company, Mulox IBC Ltd, whose registered headquarters were in London, and its former international marketing director, Hendrick Geels, a Netherlands national residing in Aix-les-Bains, France. Mr Geels had sued Mulox before the Conseil de Prud'Hommes, Aix-les-Bains, for compensation in lieu of notice and for damages after his dismissal; the French court ordered Mulox to pay a sum by way of compensation to Mr Geels. Mulox had appealed to the Cour d'Appel of Chambéry claiming that the French judges lacked jurisdiction because France could not be considered the place of performance of the contract; although Mr Geels had his office in Aix-les-Bains, he initially sold Mulox products in Germany, Belgium, the Netherlands and the Scandinavian countries, to which he travelled frequently, and only from January 1990 could he be considered as working in France.

The Cour d'Appel considered that the interpretation of Article 5(1) of the Convention was uncertain, and thus decided to ask the Court of Justice if that provision required «the obligation characterizing the employment contract to have been performed wholly and solely in the territory of the State of the court seised of the dispute», or if it was sufficient for its functioning that part of the obligation, and «possibly the principal part», had been performed in the territory of that country.

The Court recalled, once again, that the judicial authorities for the place in which the work is performed turned out to be the most appropriate for settling the dispute and for guaranteeing adequate protection of the weaker party to the contract because it is precisely in that place that the employee can, at lesser cost, apply to judges or defend himself before them.

The Court reaffirmed that when an employee carries out his working activities in more than one contracting State, the place of performance of the obligation that characterizes the contract is «the place where *or from which* the employee principally discharges his obligations towards his employer». This point is interesting, because it is a matter of a development with respect to interpretation that will lead the European legislator to introduce an amendment to the corresponding conflicts-of-law provision when, years later, the Rome Convention will be transformed into a regulation.

**15.** The second case submitted to the Court concerned once again the interpretation to be given to Article 5(1) of the Brussels Convention which had however, as already mentioned, been in the meantime amended and now took into account employment contracts. Also this second case concerned the dismissal of a Dutch citizen, Petrus Wilhelmus Rutten, a resident of Hengelo in the Netherlands, employed first by a Dutch company, Cross Medical BV, and subsequently by the parent company, Cross Medical Ltd, an English company whose office was located in London and which had taken over the Dutch branch. Also the kind of activity performed by the employee in this case was similar to that of the preceding one. In the course of the main proceedings Cross Medical Ltd had objected to the Dutch

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of the shares. The Italian employer had consented to this arrangement and had also assumed the obligation to provide accommodation in Munich and to bear the costs of two journeys home each year from Munich to the employee's native country. The Landesarbeitsgericht was uncertain if in such a case Munich was to be considered as the «habitual» place of work, relevant to determine jurisdiction in the dispute between Ms Pugliese and Finmeccanica. The Court replied that «the place where the employee performs his obligations to a second employer can be regarded as the place where he habitually carries out his work when the first employer... has ... an interest in the performance of the service by the employee to the second employer in a place decided on by the latter. The existence of such an interest must be determined on a comprehensive basis, taking into consideration all the circumstances of the case».

<sup>23</sup> Judgment of the Court of 13 July 1993, c. C-125/92, *Mulox IBC Ltd v Hendrick Geels*; see P. LAGARDE, in *Revue critique de droit international privé*, 1994, p. 573, who underlines that the Court has departed from the conclusions of the Advocate General Jacobs, who had suggested that «[i]n the rare cases in which it is not possible to identify a principal place of employment, it would be reasonable, notwithstanding what I said earlier about the need to avoid a multiplicity of forums, to allow the plaintiff to sue at any of the places which have an equal claim to be the principal place of employment», while the Court affirms that «in the absence of other determining factors, that place must be deemed, for the purposes of Article 5(1) of the Convention, to be the place of performance of the obligation on which a claim relating to a contract of employment is based».



court's jurisdiction because in fact Mr Rutten carried out his activity not only in the Netherlands, but also - for approximately one third of his working hours - in the United Kingdom, Belgium, Germany and the United States of America. His office was established in his home at Hengelo; therefore, in the company's opinion, the competence should have been conferred to the courts «of the place where the business which engaged the employee was or is now situated», in accordance with *lit. b*) of Article 5(1).

While in the first instance the Dutch authorities declared they had jurisdiction, on appeal they declined it. Consequently Mr Rutten resorted to the supreme court, the Hoge Raad der Nederlanden, which submitted three questions to the Court of Justice for a preliminary ruling on the interpretation of Article 5(1).

The Court considered that, although the provision had been amended, its preceding case law and, in particular, the decision delivered in the *Mulox* case, was still valid<sup>24</sup>; it consequently affirmed that when work is carried out in more than one State, Article 5(1) of the Convention must be understood to refer to the place «where the employee has established the effective centre of his working activities and where, or *from which*, he in fact performs the *essential* part of his duties vis-à-vis his employer». The Court added that the national court, in making this identification, ought to give prominence to the fact that almost two-thirds of the activity was carried out in one contracting State, and that the employee had his office in that very State «where he organized his work for his employer and to which he returned after each business trip abroad».

**16.** Also the third case, decided in 2001, arose from a question related to a dismissal, and also in this case the reference for a preliminary ruling concerned the interpretation of Article 5(1), but similarities with the *Rutten* and *Mulox* cases ended here<sup>25</sup>. Herbert Weber was a German citizen who resided in Germany; he worked as a cook for a British company, Universal Ogden Services Ltd, incorporated under Scottish law and established in Aberdeen, United Kingdom, on board mining vessels or on mining installations stationed on the Netherlands continental shelf, as well as on board ships flying the Dutch flag and, for a few months, on board a floating crane in Danish territorial waters. Following his dismissal, Mr Weber brought an action against his employer before a Dutch court, which, in accordance with its domestic rules, affirmed its jurisdiction. The company appealed, and the Dutch Rechtbank te Alkmaar, again with reference to Netherlands law, considered that it did not have jurisdiction to hear the case.

The Hoge Raad der Nederlanden, to which Mr Weber had resorted, affirmed that the Rechtbank should have taken into consideration whether the rules of the Brussels Convention conferred jurisdiction on the Netherlands courts. The Hoge Raad referred two different questions to the Court of Justice. In the first it asked whether the work performed in the Netherlands continental shelf should be considered as having been carried out in the Netherlands, and, therefore, within the territory of a State party to the Brussels Convention. In the second it asked whether, in order to consider an employee as having carried out his work «habitually» in a determined country, the entire period of his employment had to be taken into consideration or only the most recent period.

In reply to the first question the Court recalled concepts of international law and concluded that «work carried out by an employee on fixed or floating installations positioned on or above the part of the continental shelf adjacent to a Contracting State, in the context of the prospecting and/or exploitation of

<sup>24</sup> According to the Court, as confirmed by the Report by ALMEIDA CRUZ, DESANTES REAL and JENARD on the San Sebastian Convention, the new version of Article 5(1) of the Convention took into account the wording of Article 5(1) of the Lugano Convention of 1988 (which was itself based on the interpretation which the Court adopted in *Ivenel* and *Shenavai*), as well as on the need to afford proper protection to the employee, as stated by the Court in *Six Constructions* (issued after the adoption of the Lugano Convention, whose text accordingly was not consistent with that Court decision and differed from the Brussels Convention as amended in 1989; the revision of 2007 aligned the Lugano Convention to the Brussels I Regulation also in that respect).

<sup>25</sup> Judgment of the Court, 27 February 2002 C-37/00, *Herbert Weber v Universal Ogden Services Ltd*; see the comments by C. GÓRRIZ, «Competencia judicial internacional y trabajo marítimo (A propósito de la STJCE de 27 de febrero de 2002: Weber vs. Universal Ogden Services Ltd.)», *Anuario de derecho marítimo*, 2003, p. 307; P. RODIÈRE, «Coordination des droits nationaux, loi applicable, compétence juridictionnelle», *Revue trimestrielle de droit européen*, 2003, p. 529; E. ZABALO ESCUDERO, «Sucesión de lugares de trabajo y competencia judicial internacional: Nuevos problemas planteados ante el TJCE», *Revista de Derecho Comunitario Europeo*, 2003, p. 225.

its natural resources, is to be regarded as work carried out in the territory of that State for the purposes of applying Article 5(1) of the Brussels Convention». This aspect of the decision will be dealt with further on. As concerns, instead, the second question, the Court pointed out that Mr Weber had undoubtedly carried out his work in at least two different contracting States, as in the *Mulox* and *Rutten* cases. Unlike those two cases Mr Weber did not have an office in one of the contracting States constituting the actual center of his professional activities and from which he carried out the essential part of his duties vis-à-vis his employer.

The Court therefore affirmed that, although its previous case law could not be integrally transposed in the case at hand, it was nevertheless pertinent because, as a consequence, Article 5(1) of the Convention had to be interpreted as if it referred to the place where, or from which, the employee does in fact carry out the most important part of his obligations vis-à-vis his employer; accordingly, reference must be made to the place in which the employee has passed most of his working hours on behalf of his employer.

It is nevertheless interesting to note that the Court stressed how the temporal criterion mentioned is applicable in a case in which the employee has habitually carried out the same activity; in other cases could and ought to be pertinent the qualitative criterion, based on the nature and importance of the work carried out in various places in contracting States.

Whenever the criteria established by the Court fail to enable the national court to determine the habitual place of work according to Article 5(1) of the Brussels Convention because there are at least two places of equal importance or if none of them «has a sufficiently permanent and close connection with the work done to be regarded as the main link for the purposes of determining the courts with jurisdiction», the employee can choose to bring an action against his employer either before the court of the country where the business premises of the employer who hired him are located, as provided in the last part of Article 5(1), or the courts of the contracting State on whose territory the employer is domiciled.

17. This case law, according to the Court, was relevant for clarifying the meaning of Article 6 of the Rome Convention in the *Koelzsch* case, because both the special jurisdiction grounds and the conflict-of-laws rules shared the same objective of protecting the weak party to the contract.

### **C) An interpretation aimed at ensuring protection for employees**

18. The Court thus considered the need for an interpretation that would ensure the protection of employees. In particular this objective makes it necessary that the provision guarantees the applicability of the law of the State in which the employee carries out his working activities rather than that of the State in which the employer is established. It is in the former State that the employee performs his economic and social duties and it is there that the business and political environment affects employment-related activities. Therefore, compliance with the employment protection rules provided for by the law of that country must, as far as possible, be guaranteed.

For that reason the Court affirmed that the criterion of the country in which the employee «habitually carries out his work» must be given a broad interpretation, while the criterion of «the place of business through which [the employee] was engaged» must be used only when it is impossible to determine the country in which the work is carried out.

Consequently, the connecting factor indicated in Article 6(2)(a) of the Rome Convention can operate also with respect to a situation in which the employee carries out his work in several different countries, if it is possible to determine the country «with which the work has a significant connection». The Court's previous case law indicates that the phrase «country in which the work is habitually carried out» must be given a broad interpretation and must be understood as referring to the place in which, or from which, the employee carries out his work; in the absence of a centre of activity, such a place is the one where he carries out the greater part of his work.

## **4. The Court's ruling**

19. The Court ruled that a broad meaning of the connecting factor needed to be adopted in order to determine whether the applicant in the main proceedings habitually carries out his work in one of the

contracting States, and if he so does, to determine which State that is. More specifically, bearing in mind the nature of work in the international transport sector, the national judges ought to take into account all the factors that characterize the employee's work. In particular, they ought to determine the country from which the employee carries out the transportation, receives instructions relating to his work, and the place in which the instruments of his work are located. They also ought to establish the places in which the transportation is provided, where the goods are unloaded and the place to which the employee returns after performing his duties.

Besides, the Court pointed out that this interpretation was consistent with the new provision concerning employment contracts in the Rome I Regulation which, with respect to the text of the corresponding article of the Convention, contains an addition providing that the place of work can be the place «from which» the employee habitually carries out his work. As has been seen, this amendment is based on the decisions of the judges in Luxembourg. The Court, recalling recital 23 of the preamble of the Regulation, also stressed that the provision must be interpreted in the light of *favor laboratoris* (sic!) which imposes the duty to protect the employee by resorting to the most favourable conflicts-of-law rules.

**20.** In conclusion, the Court ruled that the interpretation to be given to Article 6(2)(a) of the Rome Convention is the one according to which the country where the employee habitually carries out his work must be interpreted as meaning the country in which, or from which, in the light of all the characteristics of his work, the employee carries out the greater part of his duties vis-à-vis his employer.

### III. Assessment of the decision and of its contribution in determining the law governing employment relationships

**21.** The commentator at this point has two tasks. The first is to assess the decision; the second to appraise its contribution on the future application of the rule.

#### 1. A few aspects that remain obscure in the proceedings

**22.** The Court's ruling is not surprising, because it follows in the path of its previous decisions, albeit rendered in the context of a different instrument which is, however, according to the Court, linked to the Rome Convention by a general design.

First of all it is worthwhile to point out that there are some aspects in this case that the Court did not address. Indeed, the fact that Mr Koelzsch was an alternate member of a *Betriebsrat* composed of employees of Gasa Spedition in Germany was not emphasized; in the absence of more information it is difficult to determine whether this fact could have had an influence on the identification of the main place of work, but it certainly cannot be excluded that it could have. Anyhow it was an important piece of information worth to be taken into consideration. Furthermore, protection against dismissal is a guarantee to the freedom to organise trade unions. The exercise of trade union rights is generally considered to be subject to the laws of the place in which those rights are exercised<sup>26</sup>; the referring court did not consider this specific aspect, an interesting one to take into account<sup>27</sup>.

The Court did not attach importance to the fact that in the case under examination there was no significant connection between Mr Koelzsch's work and Luxembourg. Of course the Convention sets no limits to the law one can choose; however, the connecting factors that determine the applicable law in the absence of a choice, even the one indicating the place of business through which the employee was

<sup>26</sup> Thus J. CARRASCOSA GONZÁLEZ, «Derecho laboral internacional», in A.L. CALVO CARAVACA/J. CARRASCOSA GONZÁLEZ, *Derecho internacional privado*, cit., p. 859 s.; L. GAROFALO, «I conflitti di leggi in materia di sciopero», *Rivista di diritto internazionale privato e processuale*, 1982, p. 724; A. LYON-CAEN, «La grève en droit international privé», *Revue critique de droit international privé*, 1977, p. 271; F. MÖRGENSTERN, *Les conflits de lois en droit du travail: étude de la loi applicable à la relation de travail internationale*, Genève, 1986, p. 119 et seq.

<sup>27</sup> A rule such as the one contained in Article 15(1) of the KSchG could have been applied also on the basis of Article 7(1) of the Rome Convention, without German law having to be considered the «otherwise applicable» law. Luxembourg is however one of the seven States that expressed a reservation in connection with said Article.

hired, seek to regulating employment contracts by a law having a certain connection with the employment contract. Such a connection was almost absent in the case under examination. Perhaps the Court's decision would have been different if, in addition to the registration of the vehicles and of the company (established in Luxembourg, but itself a branch of a Danish firm, subsequently taken over by the mother company), there had been to link this case to the Grand Duchy an element of an objective nature, such as those indicated by the Court itself.

## 2. The broad interpretation to be given to the connecting factor of the place in which the work is habitually carried out

23. The first important aspect pointed out by the Court in its preliminary ruling in the *Koelzsch* case is that the connecting factor of the place in which the work was carried out «must be given a broad interpretation». It follows that this reduces the operative space available for the functioning of the criterion of «the place of business through which [the employee] was engaged», to which recourse must not be had, as a literal interpretation of the provision would suggest, in all cases in which work is carried out in more than one country, but only when the first criterion is incapable of functioning because «the court dealing with the case is not in a position to determine the country in which the work is habitually carried out». The adverb «habitually» therefore characterizes the determination of the place of work. The Court had in fact ruled that contracts of employment «are linked to the place where the activities are pursued, which determines the application of mandatory rules and collective agreements»<sup>28</sup>; this aspect in the Court's opinion justifies broad recourse to the criterion of the place of performance of the activity.

The cases in which it is hard to identify the place in which the work is carried out are first of all those, such as the one under consideration, that involve continuous movement from one country to another. These movements must be so frequent as to be one characteristics of the work: travelling sales persons, special correspondents for newspapers and news agencies, transport workers, come to the mind.

## 3. International transport workers: «habitual» place of work, «base» rule or «place of business» of engagement?

24. As concerns lorry drivers and crews travelling overland on international routes —on buses, trains or other vehicles— it could be held that their «habitual» place of work cannot be determined and that recourse must be had to the law of the country in which the employer's business which appointed them is located. But the Court's decision goes in a different direction; the Court held that the place in which is performed the greater part of the activities is to be considered the «habitual» place, to be determined in the light of a series of criteria it indicated.

Admittedly the Court may have been influenced by the peculiarities of the case, and the solution might not lend itself to be extended to all employees working in the international road transport sector. Precisely this sector has been indicated, by the first commentators on the provision<sup>29</sup>, as a typical example in which reference could be made to the criterion of the place of business through which the employee was engaged, set out in Article 6(2)(b); nevertheless, the case law in the *Mulox* and *Rutten* cases and the subsequent amendment to the corresponding provision on the occasion of the conversion of the Rome Convention into a Regulation, with the insertion of the phrase «from which», had already influenced the opinions of more recent authors who refer to a base or an operative centre that makes it possible to identify the place in which the work is carried out when the employee moves from one country to another<sup>30</sup>. This criterion, which has been called the «base rule»<sup>31</sup>, is particularly suited to applica-

<sup>28</sup> Judgment of the Court of 15 January 1987, c. 266/85, *Hassan Shenavai v Klaus Kreischer*.

<sup>29</sup> See U. VILLANI, *La Convenzione di Roma sulla legge applicabile ai contratti*, Bari, 1997, p. 163; PH. COURSIER, *Le conflit de lois en matière de contrat de travail*, cit., p. 106, who refers to «activité mobile terrestre».

<sup>30</sup> See for example M. GARDEÑES SANTIAGO, «La regulación conflictual del contrato de trabajo en el Reglamento Roma I: una oportunidad perdida», in *Anuario español de derecho internacional privado*, 2008, p. 409.

<sup>31</sup> P. MANKOWSKI, «Employment Contracts under Article 8 of the Rome I Regulation», in F. FERRARI/S. LEIBLE (eds), *Rome I Regulation: The Law Applicable to Contractual Obligations in Europe*, Munich, 2009, p. 177 et seq.

tion in connection with scheduled transport, where the employees have a base from which they usually depart, even though their journey is carried out in different countries.

It is however hard to speak of a real operative base in connection with the *Koelzsch* case, unless the parking place for the lorries is to be considered as such! In this case the Court applied instead the rule of prevalence, as an index of habitualness, which it specified as the country in which or from which «the employee performs the greater part of his obligations towards his employer». On account of this, it is possible that in the case of an employee in the international transport sector whose activities make it impossible to identify a main place of work, the «base rule» must be used, if it is possible to ascertain a «base», or the subsidiary criterion of the place where the business which engaged the employee is situated.

**25.** It must be pointed out that the subsidiary connecting factor has its own justification, to which the Court had made reference in *Shenevai*. The employment contract creates, in the words of the Court, a «lasting bond» that «brings the worker to some extent within the organisational framework of the business of the undertaking or the employer». In this perspective, the debate on the meaning of the phrase «the law of the country in which the place of business through which he was engaged is situated» of Article 6(2)(b) of the Convention, a phrase that has been transferred unchanged to Article 8(3) of the Regulation, loses weight<sup>32</sup>; the principle underlying also *lit.* (b) of the provision raises to the level of «place of business» a place which has a real connection with the work, i.e. that *organizational framework of the business* mentioned by the Court in its ruling.

It is thus rather logical that the employment contract of the test-driver or installer used by the employer in more than one country remains subject to the law of the place of business of the undertaking, provided that there exists a «lasting bond», otherwise the connecting factor would evidently be deprived of any connection with the contract. This is also true of the work of journalists and all those who carry out their work in different places but coordinate with other employees working for the same undertaking, most likely situated in the place where they were hired and from where their employer organises the work. It is moreover the *ratio* of the provision according to which the employment contract of an employee who for a very short period of time works in another country continues to be subject to the law of the country in which he «habitually» works.

#### 4. Reassignment of the employee in a different place of work

**26.** There is a second modality in which work carried out in more than one place can create problems with respect to the identification of the habitual place of work: the case in which an employee is moved from one place of work to another at subsequent times, not for temporary transfers, for which the provision expressly provides that there is no change in the applicable law, but for reassignments from one place of work to another. This hypothesis came up before the Court of Justice in the *Weber* case. As already mentioned, Mr Weber was transferred from installations on the Netherlands continental shelf to a floating crane in Danish territorial waters to carry out identical duties. In this case the Court applied a criterion of temporal prevalence; it held, that is, that since the period of work on the Danish floating crane was relatively brief, the «habitual» place of work had to be considered as having been carried out on the Dutch installation, because that one was prevalent. It is hard to say whether this criterion, prescribed to determine jurisdictional competence, could be suitable for establishing the applicable law; it seems more reasonable to hold that if the transfer to another work place is of a permanent nature, surely the law of the country to which the employee has been transferred ought to apply, while a merely temporary transfer would maintain the validity of the preceding law. It may be difficult to establish whether the transfer is permanent or temporary, but it is a matter of fact and not an interpretation of the provision<sup>33</sup>. It must be stressed that the transfer might fulfil the conditions for being included in the provisions of the

<sup>32</sup> See the concerns expressed by P. MANKOWSKI, «Employment Contracts under Article 8 of the Rome I Regulation», *cit.*, p. 196 *et seq.*

<sup>33</sup> See several cases in R. PLENDER, M. WILDERSPIN, *The European Private International Law of Obligations*, 3<sup>rd</sup> ed., London, 2009, p. 317 *et seq.*

EC directive 97/71 on posting of workers, and that, although the directive does not provide conflict-of-laws provisions, it may however have relevant consequences on the rules governing the employment relationship<sup>34</sup>.

## 5. Work performed in a place not subject to the sovereignty of any State

17. The Giuliano-Lagarde Report refers to the cases of work carried out in a place which is not subject to the sovereignty of any State, as for example work on a platform on the high seas, and suggests in that case recourse to the second connecting factor, namely, the application of the law of the place of business through which the employee was engaged. The Court, in its ruling in the *Weber* case, likened the installation to the territory of the State in order to determine whether the Brussels Convention was applicable and also to identify the place in which the work was carried out for grounding jurisdiction. However it is not certain that this interpretation can be automatically transposed to determine the applicable law. In actual fact, the international sea is not subject to the authority of any State. Sovereignty with respect to the continental shelf is functional to the exploitation of the shelf's underground resources and is not therefore full. Since in cases such as these, work is often carried out by a social group organized in accordance with the law of a specific State, it may be held that such a social group is tantamount to a community under the authority of that State and that the law of that State will consequently govern also employment contracts. This very solution may be considered applicable also to other cases concerning work carried out in other places not subject to the sovereignty of a State, such as for example the Antarctic<sup>35</sup>.

## 6. The law applicable to maritime labour contracts

28. Alongside these interesting, but nevertheless relatively rare hypotheses, are the more frequent cases of seafarers and air crews; the ruling in the *Koelzsch* case has set out some useful principles also for these categories of employees.

29. The question concerning seamen is very complex. It is worth remembering that the Giuliano-Lagarde Report had enigmatically stated that «[t]he Group did not seek a special rule for the work of members of the crew on board a ship». Among other things, since Professor GIULIANO was an expert in that field<sup>36</sup>, it may be held that it was the impossibility of agreeing on a rule that led to the conclusion that it was preferable not to comment on the question. The issue is basically linked to the possibility of considering the ship itself as a habitual place of performance of the work, in which case the law of the flag would apply as the connecting factor. The objections are of two sorts. Some legal writers, a minority, hold that the ship cannot be considered a «place of work» in the meaning of Article 6 and therefore one must resort to the subsidiary criterion of the place of business through which the employee was

<sup>34</sup> 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; it provides that, whatever the law applicable to the employment relationship, a hard core of mandatory rules for minimum protection must be observed in the host country by employers who post workers to perform temporary work in the territory of a member State. The posting of workers has been the object of an abundant case-law of the Court of Justice; see P. MENGOZZI, «I conflitti di leggi, le norme di applicazione necessaria in materia di rapporti di lavoro e la libertà di circolazione dei servizi nella Comunità Europea», in G. VENTURINI/S. BARIATTI (eds), *Liber Fausto Pocar*, Milano, vol. 2, 2009, p. 701.

<sup>35</sup> This solution can apply also to the hypothesis of work in space in orbiting stations. The question is obviously even more complex in the case of international stations; see on this subject the analysis of G. CATALANO SGROSSO, «Legal Status of the Crew in the International Space Station», in *Proceedings of the Forty-second Colloquium on the Law of Outer Space, 4 October - 8 October 1999*, Amsterdam, vol. 42, 2000, p. 35.

<sup>36</sup> M. GIULIANO was both an expert in private international law in the maritime sector and of employment contracts; among his numerous studies can be recalled: «Le norme di diritto internazionale privato del nuovo codice della navigazione», *Diritto internazionale*, 1941, p. 111; «Rapporti di lavoro e diritto internazionale privato», *Rivista giuridica del lavoro*, 1952, I, p. 1 ss.; «La nazionalità della nave come criterio di collegamento del diritto internazionale privato italiano», *Rivista di diritto internazionale privato e processuale*, 1965, p. 415.

engaged or to the escape clause<sup>37</sup>. Others, while not objecting to the possibility of considering the ship a place of work, hold that the connecting factor of the law of the flag can become a fictitious criterion in the case of flags of convenience, when there would be no connection between the country whose flag the ship is flying and the ship itself. Recourse to the ship flag in those cases would risk, among other things, placing seamen under a law that could provide them very poor conditions. Consequently, according to some, the criterion ought to be entirely discarded<sup>38</sup>, or at least mitigated for cases in which there is no link between the work carried out on board ship and the country in which the ship is registered<sup>39</sup>. In an exhaustive study on the question of work at sea, the author of this note held that despite the seriousness of these objections the application of the law of the flag proves at any rate to be the most correct connecting factor<sup>40</sup>. It corresponds to the tradition of the maritime powers<sup>41</sup>; it complies with the Montego Bay Convention and with the law of the sea in general<sup>42</sup>; it conforms with the conventions of the International Labour Organization<sup>43</sup>; it has been confirmed by the legislation of the European Union<sup>44</sup>. Moreover, paradoxically, precisely the recourse to the flag criterion can be a bulwark against the relatively recent phenomenon of international registries of the major maritime powers, when they resort to the techniques of private international law to take the work of seamen out from under the law

<sup>37</sup> O. FOTINOPOULOU BASURKO, «Reflexiones acerca de la ley del pabellón como criterio de conexión conflictual a efectos de la determinación de la ley aplicable al contrato de embarque», *Annuaire de droit maritime et océanique*, 2006, p. 261 *et seq.*, maintains that the criterion of the place in which the work is carried out, indicated in Article 6(1) of the Convention, features elements of territoriality that render it inapplicable to seafarers. For a similar opinion see also S.M. CARBONE, «Conflits de lois en matière maritime», in *Recueil des cours de l'Académie de droit international de La Haye*, p. 179 *et seq.*, who adds: «Ce n'est qu'au cas où le navire est concerné par le trafic de cabotage national, relatif à un Etat spécifique, que la réglementation de ce système pourra être invoquée à titre de *lex loci executionis laboris*». However, it should be underlined that for maritime transport services within EU Member States Article 3 of EEC Regulation No. 3577/92 provides that «For vessels carrying out mainland cabotage and for cruise liners, all matters relating to manning shall be the responsibility of the State in which the vessel is registered (flag state), except for ships smaller than 650 gt, where host State conditions may be applied».

<sup>38</sup> Of this opinion is T. BALLARINO, *Diritto internazionale privato*, Padova, 1999, p. 689 and, although with some hesitation, P. LAGARDE, «Le nouveau droit international privé des contrats après l'entrée en vigueur de la Convention de Rome du 19 juin 1980», in *Revue critique de droit international privé*, 1991, p. 319.

<sup>39</sup> V. J. CARRASCOSA GONZÁLEZ, «Derecho laboral internacional», in A.L. CALVO CARAVACA/J. CARRASCOSA GONZÁLEZ, *Derecho internacional privado*, *cit.*, p. 859 *et seq.*, stating that it is preferable in these cases to apply the exception clause in order to resort to the law of the place which has the closest connection.

<sup>40</sup> A. ZANOBETTI, *Il rapporto internazionale di lavoro marittimo*, Bologna, 2008, p. 143 *et seq.*. In favour of the application of the law of the flag under Article 6 of the Rome Convention see also F. BERLINGIERI, «Istituzione del registro internazionale e nuove norme in tema di requisiti di nazionalità e dismissioni della bandiera», *Il diritto marittimo*, 1998, p. 542; J.L. IRIARTE ANGEL, *El contrato de embarque internacional*, Madrid, 1993, p. 153 *et seq.*; P. MANKOWSKI, «Arbeitsverträge von Seeleuten im deutschen IPR. Ein Beitrag zur Auslegung des art. 30.II EGBGB und zum sog. Zweitregistriergesetz», in *Rabels Zeitschrift für ausländisches und internationales Privatrecht*, 1989, p. 487; *Id.*, *Seerechtliche Vertragsverhältnisse im Internationalen Privatrecht*, Tübingen, 1995, p. 466, 482; U. VILLANI, *La Convenzione di Roma sulla legge applicabile ai contratti*, *cit.*, p. 167, 170.

<sup>41</sup> The U.S. Supreme Court, in the case *Lauritzen v. Larsen*, 345 US 571, 1953, p. 571, made the well known statement «Perhaps the most venerable and universal rule of maritime law is that which gives cardinal importance to the law of the flag».

<sup>42</sup> The Montego Bay Convention provides, in Article 94, *Duties of the flag State*, that «Every State shall take such measures for ships flying its flag as are necessary to ensure safety at sea with regard, *inter alia*, to: [...] (b) the manning of ships, labour conditions and the training of crews, taking into account the applicable international instruments».

<sup>43</sup> Numerous conventions of the International Labour Organization refer to that law as governing labour relations on board ship and, moreover, establish rules on working conditions for States with reference to ships registered in their registries; in fact, it is up to the flag State to apply the provisions of the conventions and recommendations. The Maritime Labour Convention (MLC) adopted in 2006 states that: «Each Member shall effectively exercise its jurisdiction and control over ships that fly its flag by establishing a system for ensuring compliance with the requirements of this Convention».

<sup>44</sup> EEC directive 92/29 (on the minimum safety and health requirements for improved medical treatment on board vessels) sets out the obligations of each member State with respect to «every vessel flying its flag or registered under its plenary jurisdiction»; as we have seen *supra*, footnote n. 36, EC Regulation No. 3577/92, applying the principle of freedom to provide services to maritime transport within Member States, states that the flag State is responsible for all matters relating to manning concerning vessels carrying out mainland *cabotage* and for cruise liners, with the exception of ships smaller than 650 gt, where host State conditions may be applied. These rules confirm the general rule of the application of the law of the flag to work on board ships. Therefore the recourse to different rules are an exception to the general rule and are limited to smaller ships. As is known, a case recently decided by the Court of Justice concerned an action taken by a trade union to prevent a change in the naval vessel register in order to avoid the consequent change of the applicable law, an indirect confirmation of the link between the naval vessel register and the law applicable to employment contracts (Judgment of 11 December 2007, *c. C-438/05, International Transport Workers' Federation and Finnish Seamen's Union v Viking Line*).

of the flag, thereby permitting fleets to operate in more economic and competitive regimes, to the total detriment of the seamen<sup>45</sup>.

The *Koelzsch* ruling is an enticement to a broad recourse to the criterion of the place in which the work was carried out, which should be disregarded in favour of the law of the place where the business which engaged the employee is situated only when it proves to be incapable of functioning (a situation which in the case of work on board ship cannot be, as already mentioned, seriously challenged), and accordingly it confirms the applicability of the law of the flag. It should be recalled that no other State has jurisdiction over a ship and cannot influence the conditions of work on board<sup>46</sup>; protection against unacceptable labour standards has accordingly been granted either by recourse to public policy as provided in Article 16 of the Convention and by Article 21 of the Rome I regulation, or, when appropriate<sup>47</sup>, by the application of the *lois de police* of the *lex fori*, as set out in Article 7(2) and in the corresponding Article 9(2) of the Rome I Regulation.

## 7. The work of aircrafts crews

**30.** Concerning crews aboard aircrafts, as is known, recourse was traditionally made to the law of the place of registration of the airplane<sup>48</sup>. Nevertheless, deregulation of the sector has led to opposition to this criterion in favour of the so-called «rule base» criterion which in many cases seems to be particularly well suited to airlines organized in «hubs» from which employees are usually taken on board and disembarked. It should however be pointed out that even recently the nationality of the airplane was considered the proper connecting factor for work carried out on board.

## 8. Conditions of application of the escape clause

**31.** Lastly, the decision of the Court induces one to abandon definitively the idea, which had enjoyed authoritative support, that the connecting factors indicated in Article 6 of the Convention and, now, in Article 8 of the Regulation constitute «no more than presumptions», because the last paragraph suggests that the contract be governed by the law of the State with which the contract is more closely connected<sup>49</sup>.

It is true that the Convention, in the final paragraph of Article 6, provides, as has been seen, that the law referred to in application of the connecting factor set out at points 1 and 2, *lit. (a)* and *lit. (b)*, of the provision may be inapplicable whenever «it appears from the circumstances as a whole that the contract is more closely connected with another country» and in this case it states that «the contract shall be governed by the law of that country». Formulated in a very similar way, Rome I Regulation maintains the same provision in the final paragraph of Article 8 which reads «[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».

<sup>45</sup> See A. ZANOBETTI, *Il rapporto internazionale di lavoro marittimo*, cit., p. 204.

<sup>46</sup> A minimum standard that all countries should ensure on board of ships flying their flag is set out by the Maritime Labour Convention, that consolidates and updates more than 68 conventions and recommendations related to the maritime sector adopted over the last 80 years. With the aim of reinforcing the respect of international standards, States have powers of inspection over ships entering their ports, regulated by international agreements and specified by the Maritime Labour Convention.

<sup>47</sup> For the conditions of application of the *lois de police*, see A.L. CALVO CARAVACA, «El reglamento Roma I sobre la ley aplicable a las obligaciones contractuales: cuestiones escogidas», cit., p. 121 *et seq.*

<sup>48</sup> See P. MANKOWSKI, «Employment Contract», cit., who considers, p. 178 *et seq.*, that «the better systematic and dogmatic reasons call for an application of the law of the place where the respective airplane is registered as *lex loci laboris* although the majority opinion in national [German] jurisprudence might hold against it and might prefer either the base as a connecting factor or a direct recourse to the engaging place of business».

<sup>49</sup> R. PLENDER, M. WILDERSPIN, *The European Private International Law of Obligations*, cit., p. 301; note that the authors refer to the rules set out under (a) and (b) of Article 6(2) as «presumptions» and not as «connecting factors» throughout the text (e.g., at p. 321). But see instead M. FRENZEN, «Conflict of Laws in Employments Contracts and Industrial Relations», cit., p. 232.



**32.** This provision, defined «exception clause» or «escape clause»<sup>50</sup>, has, with reference to employment contracts, a relatively unclear *ratio*. Indeed, the corresponding clause in Article 4 relating to contracts in general was justified in the Giuliano-Lagarde Report by the «entirely general nature of the conflict rule contained in Article 4, the only exemptions to which are certain contracts made by consumers and contracts of employment», thus making it necessary «to provide for the possibility of applying a law other than those referred to in the presumptions in paragraphs 2, 3 and 4 whenever all the circumstances show the contract to be more closely connected with another country». Moreover the margin of discretion introduced by the provision represented «the inevitable counterpart of a general conflict rule intended to apply to almost all types of contract».

With reference to Article 6, on the other hand, the Report merely observed that «the last sentence of Article 6 (2) provides that if it appears from the circumstances as a whole that the contract is more closely connected with another country, the law of the latter country is applied». As it is appended to a set of rules for employment contracts only, it is clear that the general justification adopted in the introduction to the same clause in Article 4 is not pertinent and one must infer from its insertion that, for the determination of the law governing employment contracts, there was a desire to maintain a certain margin of discretionality in order to allow the application of the law of the country with which the relationship has the closest connection.

The rule has therefore a corrective purpose with respect to cases in which the application of objective criteria would lead to the determination of the law of a country with which the work, taken account of the way in which it is carried out, really does present too weak a link. It must be remembered that the need to protect employees must be joined to the need for predictability and legal certainty, which in this domain have a paramount value since the contractual relationship is a long term one with a set of reciprocal laws and obligations that make it extremely important to know the rules which govern it<sup>51</sup>. Recourse should be had to the escape clause only when the entire centre of gravity of the contract points to a country other than the one indicated by the objective criteria<sup>52</sup>. Moreover, one cannot resort to the escape clause for the purpose of avoiding the difficulties that might arise in identifying the preceding criteria<sup>53</sup>.

**33.** The nature of the present clause makes it hard to maintain that one can resort to it for material purposes. It is not therefore possible to disregard the applicability of the law indicated by the connecting factors set out in Article 6 of the Convention and in Article 8 of the Regulation in order to apply

<sup>50</sup> On this category of rules see the analysis by R. BARATTA, *Il collegamento più stretto nel diritto internazionale privato dei contratti*, Milano, 1991, p. 227, who reconstructs their way of operating and their *raison d'être*; see also C.E. DUBLER, *Les clauses d'exception en droit international privé*, Friburg, 1983; P. LAGARDE, «Le principe de proximité dans le droit international privé contemporain. Cours général de droit international privé», in *Recueil des cours de l'Académie de droit international de La Haye*, vol. 196, 1986, p. 97 *et seq.*, who finds the foundation of the rule in the proximity principle; F. MOSCONI, «Exceptions to the Operation of Choice of Law Rules», in *Rec. des cours de l'Académie de dr. international de La Haye*, vol. 217, 1989, p. 192 *et seq.*

<sup>51</sup> Thus PH. COURSIER, *Le conflit de lois en matière de contrat de travail*, *cit.*, p. 94, according to whom recourse to the closest connecting factor «ne peut être que très secondaire»; see also R. BARATTA, *Il collegamento più stretto nel diritto internazionale privato dei contratti*, *cit.*, p. 241, who favours a restrictive interpretation of the clause, and states that the rule's function is to «rettificare eccezionalmente» the localization achieved by the connecting factors set out in Article 6.

<sup>52</sup> However, some cases in which case law has had recourse to the connecting factor of the closest connection could have been justified on the basis of the other criteria indicated in the provision. The decisions in which recourse has been made to this criterion do so very superficially. For example, the French Cour de cassation, in its decision No. 04-43.119 rendered on 14 March 2006, indicates a series of criteria from which it deduces that the contract has the closest connection with France; on closer examination, such criteria constitute signs of an implicit choice of French law to which the contract would therefore have had to be subject by virtue of the main criterion of the intention of the parties, and not by virtue of the criterion of closest connection. Certainly, recourse to the latter criterion may be more convenient, also because it does not oblige the judge to assess whether the mandatory rules of the law applicable to the contract in the absence of a choice have been respected.

<sup>53</sup> On the contrary a German court, in a dispute concerning work on board ship (Bundesarbeitsgericht, 24 August 1989, *Der Betrieb*, 1990, p. 1666) resorted to the escape clause, as pointed out by S.M. CARBONE, P. IVALDI, *Lezioni di diritto internazionale privato*, Padova, 2000, p. 147: «i giudici non hanno mancato di sottolineare come il ricorso alla clausola di eccezione fosse particolarmente opportuno, perché consentiva loro di evitare di misurarsi con un problema assai delicato: quello dell'applicazione della norma generale di conflitto relativa al lavoro subordinato al caso dei rapporti di lavoro marittimo, senza alcun particolare adattamento o precisazione normativa che tenga conto delle peculiarità di tale rapporto».

a law in consideration of its substantive contents; the purpose of the clause is to permit the determination of the law of a country that presents stronger links with the contract than that designated by the preceding connecting factors, and is therefore neutral *vis-à-vis* the foreign law indicated<sup>54</sup>.

### 9. The parallelism of interpretation of the rules on jurisdiction and of the conflict-of-laws provisions in the relevant EU instruments

34. Another issue addressed in the decision that deserves attention is the parallelism of interpretation of the expressions contained in the Rome Convention (and in the Rome I Regulation), on the one hand, and in the Brussels Convention and Regulation No. 44/2001, on the other. The Court states in paragraph 33 of the decision that the interpretation to be given to Article 6 of the Rome Convention «must not disregard that relating to the criteria set out in Article 5(1) of the Brussels Convention where they lay down the rules for determining jurisdiction for the same matters and set out similar concepts». The justification for this consideration is the fact that, as already mentioned and as the Court itself pointed out in its decision in the *ICF* case, the preamble to the Rome Convention indicates that «it was concluded in order to continue, in the field of private international law, the work of unification of law set in motion by the adoption of the Brussels Convention». Recourse to previous case law is likewise justified by the Court in paragraph 41 on the ground that in interpreting the phrases contained in the Rome Convention, the Brussels Convention and Regulation No. 44/2001, it must «take due account of the need to guarantee adequate protection to the employee as the weaker of the contracting parties»<sup>55</sup>. There are therefore two aspects which permit the Court to resort to the interpretation of one of the instruments to clarify the meaning of the expressions contained in the other: one of a general nature lies in the fact that the Rome Convention completes the task of unification begun by the Brussels Convention, and the other, specifically related to employment contracts, is the need to adopt, with reference to both sets of instruments, interpretative criteria that take into account the need to protect the weaker of the contracting parties.

35. As we have seen the Court is well aware of the limits of a parallel interpretation of the phrases contained in the two types of instruments, those referring to jurisdiction and those referring to conflicts-of-law. It clearly stated this concept in *Six Constructions*, even though it considered unnecessary to mention it in the *Koelzsch* case. Instead the Advocate General, as mentioned, stressed in paragraphs 82 and 83 of her conclusions the limits of this parallelism. Taking into account that the two categories of rules have «different aims», she underlines that uniformity of interpretation must be tested with reference to each individual case, and that it cannot be held, even as a presumption, that identical or similar expressions must be uniformly interpreted. These warnings are undoubtedly important, but it may be objected that they are expressed in two short paragraphs placed at the end of her reasoning, which on the contrary developed along the lines of an interpretation literal, historical, systematic and teleological, and to which she dedicates thorough arguments with the support of concordant legal writings.

It is an important aspect worth dwelling on. The criteria of legislative and of jurisdictional competence fulfil different functions that the Court itself did not fail to illuminate. It referred for example to the need to identify the place where the employee discharges his obligations as a ground for jurisdiction because this is the place where it is least expensive for employees to defend themselves<sup>56</sup>. This is a

<sup>54</sup> On this point see the analysis of F. MOSCONI, «Exceptions to the Operation of Choice of Law Rules», *cit.*, p. 193; see also F. MOSCONI, C. CAMPILLO, *Diritto internazionale privato e processuale, Parte generale e contratti*, vol. I, 4<sup>th</sup> ed., Torino, 2007, p. 373, in which the authors state that the clause plays a neutral role and is therefore suitable «a far prevalere, rispetto a quello in principio applicabile, un diritto meno favorevole al lavoratore, sulla base appunto della maggiore intensità del collegamento e dunque della prevedibilità».

<sup>55</sup> See in this connection the reasoning of E. LEIN, «The New Rome I / Rome II / Brussels I Synergy», *Yearbook of Private International Law*, 2008, spec. pp. 179 *et seq.*, who sees in the need to protect the weaker party a common principle in different instruments which makes it possible to affirm that «synergies of fundamental principles» exist among them.

<sup>56</sup> In the *Weber* ruling, at paragraph 40, the Court, also recalling its previous case law, stated that «in matters relating to contracts of employment, interpretation of Article 5(1) of the Brussels Convention must take account of the concern to afford proper protection to the employee as the weaker of the contracting parties from the social point of view. Such protection is best assured if disputes relating to a contract of employment fall within the jurisdiction of the courts of the place where the

concern that has no weight in relation to the legislative competence. Moreover, there is no doubt that the recourse to the law of the place where the employee discharges his obligations responds to more general concerns of an economic nature which are not absent from the Court's assessment, even though they are not fully developed.

**36.** The Court refers to the *ratio* of Article 6 which, like Article 5(1), lies in the need to protect the employee, the weaker of the contracting parties<sup>57</sup>. The connecting factor of «the otherwise applicable law» will lead in most cases to the law of the place in which the employee habitually carries out his work; as a consequence, all employees in one and the same establishment are under the same rules. This responds to the need for equity expressed in the fundamental principle that prohibits discrimination in the work place<sup>58</sup>. Moreover, the governing law coincides for the most part with the rules of a social and fiscal nature, and has the effect of better coordinating the various aspects of the overall regulation of employment contracts.

In this way not only is the protection of individual employees achieved but so is compliance with the economic principle of equal treatment of all employees working in the same socio-economic situation, with the effect of avoiding *social dumping*, i.e. the distortion of competition with other undertakings situated in the same country that could lead to the application of a less protective law involving less burdensome charges for the employer.

**37.** It is therefore advisable to underline that it is inappropriate, under the «Rome I» and the «Brussels I» sets of instruments, to refer to a parallelism between jurisdictional competence and legislative competence, even with respect to the relatively narrow subject of employment contracts. First of all the main criteria are different. The principal criterion of the applicable law is the result of a choice of law by the parties, even an implicit one, without any need for a link with the employment contract to be regulated. However, as concerns jurisdiction, such a power is established only in favour of the employee, it cannot be implicit and is not, at any rate, exclusive. Even the type of protection is different; safeguarding the mandatory rules of the «otherwise» applicable law in the first case, unilateral invalidity of the agreement in the second. Now one could speak of parallelism, achieved by the technique defined as the «*corrélation entre points de rattachement législatifs et juridictionnels*»<sup>59</sup>, only when the correspondence between *forum* and *jus* is achieved by the adoption of identical, strict criteria. This certainly does not occur with respect to the provisions under consideration<sup>60</sup>. It is therefore more correct to recognise the

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employee discharges his obligations towards his employer, since that is the place where it is least expensive for the employee to commence or defend court proceedings (see, inter alia, *Mulox IBC*, paragraphs 18 and 19, and *Rutten*, paragraph 17)». It should however be noted that this is not always true; this could be untrue for example if the employment contract has terminated—and this is often the case with respect to labour disputes—and the employee has moved to another country; see the observations of P. RODIÈRE, in *Journal du droit international*, 2003, p. 667 *et seq.* It would at any rate be a country in which the employee has carried out his work and therefore also knows the language, thus making his defence easy should the general criterion of the defendant's place of domicile oblige him to bring his case before the court of a country completely foreign to him.

<sup>57</sup> Thus U. VILLANI, *La Convenzione di Roma*, cit., p. 149, according to whom Article 6 «risponde principalmente all'intento di tutelare il lavoratore, parte debole rispetto al datore di lavoro». On the protection of the weaker of the contracting parties in private international law, see F. POCAR, «La protection de la partie faible en droit international privé», *Recueil des cours de l'Académie de droit international privé de La Haye*, vol. 188, 1984, p. 339. It should be noted that Article 6 of the Convention has often been discussed together with Article 5 on consumer contracts, on account of their identical protective purpose; thus, for example, I. PINGEL, «La protection de la partie faible en droit international privé (du salarié au consommateur)», *Droit social*, 1986, p. 133; M.M. SALVADORI, «La protezione del contraente debole (consumatori e lavoratori) nella Convenzione di Roma», cit., p. 121. But see also A. SINAY-CYTERMANN, «Une disparité étonnante entre le régime des clauses attributives de juridiction et des clauses compromissaires dans le contrat de travail international et dans le contrat de consommation internationale», *Revue critique de droit international privé*, 2009, p. 427, who expresses surprise on account of the different treatment in the two cases with respect to the validity of the choice of law clauses.

<sup>58</sup> U. VILLANI, *La Convenzione di Roma*, cit., p. 164 ss.

<sup>59</sup> The phrase is by J.-M. BISCHOF, *La compétence du droit français dans le règlement des conflits de lois*, Paris, 1959, p. 138

<sup>60</sup> H. BATIFFOL, «Observations sur les liens de la compétence judiciaire et de la compétence législative», *De conflictu legum. Mélanges R. D. Kollwijn et J. Offerhaus*, Leyden, 1962, p. 66; J.D. GONZÁLEZ CAMPOS, «Les liens entre la compétence judiciaire et la compétence législative en droit international privé», *Recueil des cours de l'Académie de droit international de La Haye*, vol. 156, 1977, p. 227, 337. [http://www.nijhoffonline.nl/book?id=er156\\_227-376](http://www.nijhoffonline.nl/book?id=er156_227-376).

similarity of technico-legal concepts that can frequently be interpreted in a similar way but that this resemblance does not rest on a link of necessity<sup>61</sup>.

38. An undoubted effect on the interpretation of the provisions of the two types of instruments is that they benefit from the preliminary ruling delivered by the same judge. It is known that the Court of Luxembourg is not just any court: its case law has played a driving role in building the European legal system, thanks also to its preliminary rulings that follow a method functional to the objectives of the development of integration. One of these objectives is without a doubt the creation of a system of private international law functional to the achievement of a free market, further and beyond what the member States themselves could possibly foresee when they adopted those instruments. That *anxiety* «to continue in the field of private international law the work of unification of law», expressed in the Preamble to the Convention, to which the Court refers to justify the pertinence of its previous case law which referred to a different instrument, cannot let us forget that the process has been very lengthy, difficult and not without wavering<sup>62</sup>. Moreover, as to the provisions that specifically concern employment contracts, the Court itself, as we have seen, by means of its decision in the *Ivenel* case, identified, also in the light of the provisions of the Rome Convention, at the time not yet in force, the protection of employees as an objective of the Brussels Convention, despite the fact that the original text of the latter did not contain any references in this connection<sup>63</sup>, thereby laying the foundation for parallel interpretation on which it now bases its preliminary ruling in the *Koelzsch* case.

## 10. The *Koelzsch* ruling and the Rome I Regulation

39. The last question that might be of interest is whether the decision rendered in this case will establish a precedent also for the application of the Rome I Regulation. The reply is in the affirmative, for more than one reason. First of all, the provision —Article 8— and the corresponding one referred to in the present decision are almost identical; the difference in the wording consists in the insertion of the words «from which», a specification which, as has been seen, is precisely the result of the Court's interpretation of the rules on jurisdictional competence. It is true that the Regulation, unlike the Convention, contains in its preamble recitals concerning the reasons for the provisions under examination and clarifies their *ratio*; these statements do not, however, appear to modify the scope of the provision. Moreover, despite the different legal nature, which is certainly not bereft of consequences, it may be held that the Court will maintain the validity of its previous case law; this is what happened with the transformation of the Brussels Convention into a regulation<sup>64</sup>. A sure influence on this is also the fact that the Court has adopted, in interpreting this instrument, the same hermeneutical methods it generally follows for European law strictly speaking. An indirect confirmation in this direction can be deduced by the fact that mention of the Regulation appears both in the conclusions of the Advocate General and in the ruling of the Court<sup>65</sup>.

<sup>61</sup> See the analysis by B. HAFTTEL, «Entre 'Rome II' et 'Bruxelles I': l'interprétation communautaire uniforme du règlement 'Rome I'», *Journal du droit international*, 2010, p. 761; although the author's observations centre mainly on qualification and not on connecting factors, he points out that «ce n'est pas parce que les solutions *sont* souvent les mêmes, qu'elles *doivent* être les mêmes».

<sup>62</sup> Suffice it to mention the long gestation of the Rome Convention, the first proposal for which was made in 1967; the eleven years which passed between the signing of the Convention in 1980 and its entry into force in 1991; the period of time that passed between the adoption of the Convention and the adoption, in 1988, of the two protocols on the interpretation of the Convention by Court of Justice, and an even longer period of time —no less than sixteen years!— needed to complete the ratification process.

<sup>63</sup> It is worth mentioning that P. RODIÈRE, in *Revue critique de droit international privé*, 1989, p. 562, with reference to the *Ivenel* decision, pointed out that «*Ubi lex non distinguit...*, il convient que la Cour de Justice ne distingue pas... excessivement!». But the Court was of different opinion and its decision (defined by G. DROZ, in *Revue critique de droit international privé*, 1987, p. 797 ss., as «prétorienne»), as we have seen, provoked the amendments to the rule.

<sup>64</sup> See in this connection P. FRANZINA, «La giurisdizione in materia contrattuale», cit., p. 63 *et seq.*

<sup>65</sup> The decision lists in the part concerning relevant legislation also the Rome I Regulation. In her conclusions, the Advocate General points out how the interpretation the decision proposes complies with the text of the Regulation. The Court states that the proposed interpretation is consistent with the wording of Article 8 of the Rome I Regulation.

**40.** A final observation: now that the Rome Convention has been transformed into a regulation it is possible that the Court may be called to intervene not only for preliminary rulings, but also in actions concerning violations that the Commission, or possibly a member State, might bring against a State — with the obvious exclusion of Denmark— for failure to apply the Regulation. Although this hypothesis may appear unlikely, there may be cases in which similar proceedings may be initiated<sup>66</sup>, and contribute in this way to a wide, uniform compliance with the rules of European private international law of contracts.

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<sup>66</sup> See, for an example connected with maritime labour law, A. ZANOBETTI, *Il rapporto internazionale di lavoro marittimo*, *cit.*, p. 215 *et seq.*