

# THE FIRST TWO DECISIONS OF THE EUROPEAN COURT OF JUSTICE ON THE LAW APPLICABLE TO EMPLOYMENT CONTRACTS

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**Abstract:** The article examines the first two decisions of the Court of Justice of the European Union on Article 6 of the Rome Convention on the law applicable to employment contracts.

The author underlines the effort of the Court in giving raise to a well integrated European system of conflict of laws and international procedure's rules. Building on the value given by the Court to its previous case law on grounds for jurisdiction in employment contracts, the author then argues that such a system is thoroughly oriented towards a substantive (not formal) construction of conflict of laws' rules, in view of attaining the aim of protection of the employee.

**Key words:** Rome Convention on the law applicable to contractual obligation, notion of «habitual place of work», employees performing their work in more than one State.

**Estratto:** Il contributo esamina le prime due sentenze nelle quali la Corte di giustizia dell'Unione europea interpreta l'art. 6 della Convenzione di Roma, relativo alla legge applicabile ai contratti individuali di lavoro. L'autore sottolinea lo sforzo della Corte nella ricostruzione di un sistema di diritto internazionale privato e processuale europeo organico e ben integrato. Sulla scorta del valore attribuito dalla Corte alla propria precedente giurisprudenza sui titoli di giurisdizione in materia di contratto di lavoro, l'autore sostiene che tale sistema appare fortemente orientato verso un'interpretazione materiale (non formale) delle regole di conflitto, volta alla realizzazione della miglior tutela del lavoratore.

**Parole chiave:** Convenzione di Roma sulla legge applicabile alle obbligazioni contrattuali, nozione di «luogo abituale di lavoro», dipendenti che prestano l'attività lavorativa in più di un Paese.

**Sumario:** I. Brief preliminary comments on the Court's jurisdiction in this matter. II. The relevance the Court attributes to its *grounds for jurisdiction* over employment contracts. III. The two cases: workers in the international transport sector. IV. The criterion of habitual place of work: the broad interpretation developed by the Court in the two cases under examination. 1. The Court favours a «substantively oriented» interpretation of conflict of laws' rules. V. The interpretation of the criterion of the place of engagement. 1. The principle of the prevalence of substance over form in identifying the employer. VI. The role of the criterion of closest connection in employment contracts.

## I. Brief preliminary comments on the Court's jurisdiction in this matter

1. After years of silence, over a ten month period the European Court of Justice handed down two separate decisions on the interpretation of the 1980 Rome Convention<sup>1</sup> on the law applicable to

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<sup>1</sup> *Convention on the Law Applicable to Contractual Obligations*, Rome, June 19, 1980, in *G.U.U.E. C 334* of December 30, 2005, p. 1 (consolidated version), available in R. CLERICI, F. MOSCONI, F. POCAR, *Legge di riforma del diritto internazionale privato e testi collegati*, Milan, 2009, p. 65. Of the many contributions on the Rome Convention, including additional bibliographi-

international employment contracts. While the Rome Convention is not the basic source of private international law on obligations within the European Union –it was in fact replaced by Regulation no. 593/2008,<sup>2</sup> Art. 8 of which contains the new special provisions on employment contracts– nevertheless, the *Koelzsch*<sup>3</sup> and *Voogsgeerd*<sup>4</sup> decisions indisputably have material relevance for two reasons. First of all, the provisions of the Rome Convention are still applicable to all contracts concluded *prior to* December 17, 2009,<sup>5</sup> and secondly, both of the connecting criteria construed by the Court in the decisions in question are picked up by the new Regulation, either word for word (this is so for the *criterion of the place of business through which the employee was engaged*) or with changes that the Court expressly intended to «reconcile» itself with (*criterion of habitual place of work*). So the Court's detailed construction of Art. 6 of the Rome Convention can *also* be used as a guide for the application of Art. 8 of the *Rome I* Regulation. The fact that it was not until 2011 that the Court *for the first time* addressed the issue of interpreting the Rome Convention with regard to employment contracts –although it had been in effect since 1991<sup>6</sup>– can be explained by the late entry into effect of the two protocols signed in Brussels in 1988 that give it jurisdiction to construe the said Convention.<sup>7</sup>

2. The need for a uniform interpretation of the provisions of private international law contained in the Rome Convention has always been affirmed by Italian authors<sup>8</sup> and has constituted one of the strongest arguments in support of the need to transform the Convention into a European Union regulation.<sup>9</sup> A reading of the *Koelzsch* and *Voogsgeerd* decisions confirms the solidity of this position, demonstrating the contribution that the Court's effort to clarify the issue of international employment contracts can make to achieving greater certainty of the law in governing cross-border private law relationships in Europe.

## II. The relevance the Court attributes to its grounds for jurisdiction over employment contracts

3. The two decisions in question are quite consistent with the course the European Union has chosen in order to create an organic system of norms for coordinating legal systems, which contemplates both the standardization of grounds for jurisdiction and rules for the recognition of decisions, and the adoption of common connecting criteria for identifying the law applicable to cases that present elements

cal references, see: U. VILLANI, *La convenzione di Roma sulla legge applicabile ai contratti*, second ed., Bari, 2001; N. BOSCHIERO, «Obbligazioni contrattuali (*diritto internazionale privato*)» in Enc. Dir., IV aggiornamento, 2000, p. 851 et seq.; G. SACERDOTI, M. FRIGO (edited by), *La Convenzione di Roma sul diritto applicabile ai contratti internazionali*, second ed., Milan, 1994.

<sup>2</sup> Regulation (EC) no. 593/2008 of the European Parliament and of the Council of June 17, 2008 on the law applicable to contractual obligations (Rome I), in *G.U.U.E.*, L 177 of July 4, 2008, p. 6, as well as in R. CLERICI, F. MOSCONI, F. POCAR, *op. cit.*, p. 300. In this regard, see generally: N. BOSCHIERO (edited by), *La nuova disciplina comunitaria della legge applicabile ai contratti (Roma I)*, Turin, 2009; B. Ubertazzi, *Il regolamento Roma I sulla legge applicabile alle obbligazioni contrattuali*, Milan, 2008; T. BALLARINO, *Dalla convenzione di Roma del 1980 al regolamento Roma I*, in *Rivista di diritto internazionale*, 2009, p. 40 et seq. and the commentary by F. SALERNO, P. FRANZINA, in *Nuove leggi civ. com.*, 2009, p. 521 et seq.

<sup>3</sup> ECJ, 15 March 2011, Case C-29/10, *Heiko Koelzsch v. Etat du Grand-Duché de Luxembourg*, not yet published in *Raccolta*.

<sup>4</sup> ECJ, 15 December 2011, Case C-384/10, *Jan Voogsgeerd v. Navimer SA*, not yet published in *Raccolta*. Among the authors who have commented on the two decisions, reference should be made at least to the following: C. E. TUO, *La tutela del lavoratore subordinato tra diritto internazionale privato e libertà economiche dell'UE*, *Diritto del commercio internazionale*, 2011, p. 1172; V. PARISOT, *Vers une coherence vertical des textes communautaires en droit du travail? Reflexion autour des arrêts Heiko Koelzsch et Jan Voogsgeerd de la Cour de Justice*, *Journal du droit international*, 2012, p.597.

<sup>5</sup> This is in fact what Art. 29 of Regulation (EC) 593/2008 provides.

<sup>6</sup> Italy had already implemented the Convention in 1984, through Law no. 975 of Dec. 18, 1984 (OJ no. 25 of January 30, 1985, ord. suppl. no. 6), but only in 1991 were the seven ratifications necessary for it to enter into effect obtained.

<sup>7</sup> Pursuant to Art. 6 of the first protocol (89/128/CEE), both interpretative instruments went into effect on August 1, 2004. On October 6, 2009, the Court exercised its new jurisdiction for the first time, providing an interpretation of Art. 4 of the Rome Convention: cf. Case C-133/08, *ICF*, in *Raccolta*, p. I-9687.

<sup>8</sup> Such as R. LUZZATTO, *L'interpretazione della convenzione e il problema della competenza della Corte di giustizia delle Comunità*, in T. TREVES (edited by), *Verso una disciplina comunitaria della legge applicabile ai contratti*, Padua, 1983, p. 57 et seq.

<sup>9</sup> In this regard, see the Commission's Green Paper «on the conversion of the Rome Convention of 1980 on the Law Applicable to Contractual Obligations into a Community Instrument and its Modernization,» Brussels, 14 January 2003, COM(2002) 654 final, p. 15.

of contact with a number of different legal systems. While the now numerous initiatives taken by EU lawmakers based on the new competencies pursuant to Art. 81 TFUE<sup>10</sup> constitute important structural elements in constructing a European private international law system, the *Koelzsch* and *Voogsgeerd* decisions demonstrate the potential of the Court's role in harmonizing and cementing this new system.<sup>11</sup> This is true under at least two perspectives. From one standpoint, the Court has indirectly responded to doubts arising from the concurrent applicability, in the EU legal system, of the old Rome Convention and the new Regulation no. 593/2008, by providing an evolving interpretation of the former, which anticipates the new provisions of the Rome I Regulation<sup>12</sup> and is capable of unifying the conflict of laws system in the area of employment contracts. From a second standpoint, the Court gave form to the *principle of continuity* between the work of unifying the Union's international civil procedural law –begun by the Brussels Convention in 1968<sup>13</sup>– and unifying private international law regarding obligations. Such a principle had already been affirmed in the preamble to the Rome Convention<sup>14</sup> and revealed itself later in the osmotic relationship between this Convention and the versions that followed of the Brussels Convention, which in its 1989 text set out new special grounds for jurisdiction in employment law, directly inspired by Art. 6 of the Rome Convention<sup>15</sup> and later confirmed in the Brussels I Regulation.<sup>16</sup> In the *Koelzsch* decision, adopting the position that the Advocate General stated in her extensive arguments,<sup>17</sup> the Court reconfirmed the position already expressed in its first decision interpreting the Rome Convention<sup>18</sup> and declared that in interpreting Art. 6, par. 2, a) of this Convention, *it could not disregard* its own case law on similar notions contained in Art. 5, 1 of the Brussels Convention, again with regard to employment law.<sup>19</sup> In so doing, the Court proved its capacity to actively contribute, by creating an appropriate *interpretative link*, to the unification of international procedural law and the Union's conflict of laws system into an organic legal system that could manage all cross-border cases.

<sup>10</sup> Based on this provision, the Union «shall develop judicial cooperation in civil matters having cross-border implications» that can be implemented by adopting measures aimed at guaranteeing, among other things, «the compatibility of the rules applicable in the Member States concerning conflict of laws and of jurisdiction» (Art. 81, no. 2, lett. c). The norm, which corresponds to Art. 65 of the TEC (formerly Art. 73 M introduced by the Treaty of Amsterdam in 1997) thus gives the Union specific jurisdiction to adopt, now through ordinary legislative procedures, its own uniform private international law system, voiding Art. 220 of the original Treaty of Rome, which provided, for this purpose, for the stipulation of international conventions among member States. Both the Brussels Convention in 1968 and the Rome Convention in 1980 used said Art. 220 (later Art. 293) of the TEC as their regulatory foundation: with regard to the effects produced on this latter norm (which was not formally abrogated until the Treaty of Lisbon) by the entry into effect of the new EU competencies on judicial cooperation in civil matters, see F. CARUSO, *Considerazioni generali su unificazione e uniformazione delle legislazioni statali in diritto comunitario*, in P. PICONE (edited by), *Diritto internazionale privato e diritto comunitario*, Padua, 2004, p. 21.

<sup>11</sup> For an authoritative reflection on the Court's interpretative role regarding the matters included in the so-called «area of freedom, security, and justice,» see: A. TIZZANO, *Qualche riflessione sul contributo della Corte di giustizia allo sviluppo del sistema comunitario*, in *Liber Fausto Pocar*, I vol., Milan, 2009.

<sup>12</sup> I refer to both the extensive interpretation of the criterion of habitual place of work and to the significant reduction of the sphere of application of the criterion of the place where the worker is engaged, which can be seen, *infra*, at paragraphs 4 and 5.

<sup>13</sup> Brussels Convention on Jurisdiction and the Enforcement of Judgments on Civil and Commercial Matters, *Brussels, September 27, 1968*, in *G.U.C.E. C 27* of January 26, 1998, p. 1, available in R. CLERICI, F. MOSCONI, F. POCAR, *Legge di riforma del diritto internazionale privato e testi collegati*, Milan, 2009, p. 17.

<sup>14</sup> «The High Contracting Parties (...) Anxious to continue in the field of private international law the work of unification of law which has already been done within the Community, in particular in the field of jurisdiction and enforcement of judgments (...): cf. Preamble to the Rome Convention, *cit.* at note 1.

<sup>15</sup> Cf. Art. 5, no. 1 of the Brussels Convention, as amended by the Convention of May 26, 1989 regarding accession of the Kingdom of Spain and the Portuguese Republic.

<sup>16</sup> *Council Regulation (EU) of December 22, 2000, no. 44/2001, concerning jurisdiction, recognition and execution of judgments in civil and commercial matters*, in *G.U.U.E. L 12*, p. 1.

<sup>17</sup> In her conclusions, Advocate General Trstenjak traced the Court's developing case law on grounds for jurisdiction of the «place where the worker habitually carries out his work,» pursuant to Art. 5 no. 1 of the Brussels Convention, asserting that it was comparable, by analogy, to the corresponding connecting criterion contained in Art. 6, no. 2, lett. a) of the Rome Convention, based on both a systematic and teleological interpretation of such. In the Advocate General's opinion, this result would not be precluded by either a literal interpretation or historic interpretation of the provision in question: cf. the *Conclusions of the Advocate General Verica Trstenjak presented on 16 December 2010, Case C – 29/10*, sections 52 - 81, not yet published in *Raccolta*, but available at the Court's website: <http://curia.europa.eu>

<sup>18</sup> Cf. ECJ, 6 October 2009, Case C-133/08, *ICF*, *cit.*, paragraph 22.

<sup>19</sup> Set out in paragraph 33 of the *Koelzsch* decision.

### III. The two cases: workers in the international transport sector

4. From a brief review of the facts that led to the two preliminary proceedings, it is not surprising that both cases deal with workers employed in the international transport sector (road or ship), which by definition are the most vulnerable to problems caused by an employment relationship in a number of States. Yet it may be surprising to learn that Mr. Koelzsch, a German worker employed by a Danish road transport company, had to wait a full ten years after he first challenged his dismissal and had to go through seven different judicial proceedings to obtain the reference for preliminary ruling that led to the first of the two judgments commented on (which should offer some consolation to those who complain about the dysfunctions in their own justice system ...). Koelzsch, a resident of the German city of Osnabruck, transported goods, primarily in Germany, but also in other States, using trucks stationed in Osnabruck and two other German cities (Kassel and Neukirchen). The employment contract he signed in 1998 in Luxembourg with the Danish company Gasa contained both a clause electing the law of Luxembourg and a clause granting exclusive jurisdiction to the courts of that State. In a letter of March 13, 2001, Koelzsch was dismissed, effective the following May 15. The employee, who from March 5, 2001 had held the office of alternate member of the employer's works council (*Betriebsrat*), challenged the company measure, asserting that he had a right to the protection granted to works council members by German law on protection against dismissals, with its mandatory rules, which was, in his opinion, applicable to the relationship pursuant to Art. 6, par. 1 and par. 2 of the Rome Convention.

After long and complex procedural issues, the petitioner's faith in his claims finally seems destined to be rewarded, as the interpretive criteria of Art. 6 of the Rome Convention stated by the Court unequivocally leads to a finding that the German law on dismissals which Koelzsch invoked is applicable.<sup>20</sup>

5. The petitioner seems to be equally fortunate in the outcome of the second preliminary proceeding under examination, which led to the decision of December 15, 2011 in action C-384/10. In this case, the question is complicated by an interposition event that casts doubt on the employer's identity and makes it problematic to identify the «place of business in which the employee was engaged» pursuant to Art. 6, par. 2, b) of the Rome Convention. Here are the facts of the case. On August 7, 2001, Mr. Voogsgeerd, domiciled in the Netherlands, signed an indefinite employment contract with the Luxembourg company Navimer SA, at the offices of the Belgian company Naviglobe NV, in Antwerp, Belgium. In the contract, the parties agreed that the law governing the contract would be that of the Grand Duchy of Luxembourg. Between August 2001 and April 2002, Voogsgeerd performed duties as a head machinist on board two ships owned by Navimer, the company that paid his wages and which, on April 8, 2002, sent him a letter of dismissal. Mr. Voogsgeerd stated that in performing his work, he had sailed primarily in the territorial waters of Belgium and had always received instructions regarding his work from Naviglobe, to whose offices in Antwerp he always returned at the end of each assignment. In challenging the dismissal, the sailor jointly sued Navimer and Naviglobe, asserting that in reality he had worked under the direction of the latter and claiming the right to receive a severance indemnity based on Belgian law, which he considered applicable as a mandatory law of the State of the place of business where he was engaged, pursuant to Art. 6, par. 2, b) of the Rome Convention. With his claims denied by the two lower courts, Voogsgeerd filed an appeal for reversal to the Belgian Court of Cassation against Navimer alone, complaining that the contested decision had violated the Rome Convention to the extent to which the circumstances he had presented had been considered irrelevant for purposes of identifying the applicable law pursuant to Art. 6, par. 2, b) of said Convention.

### IV. The criterion of habitual place of work: the broad interpretation developed by the Court in the two cases under examination

6. Art. 6, par. 2, b) of the Rome Convention is thus the subject of *all* interpretive questions that the referencing judge in the *Voogsgeerd* case presented to the Court. Nevertheless, referring to previous case

<sup>20</sup> Cf. following paragraph of this comment.

law that states it is up to the Court, based on the information provided by the national judge, to extract «the elements of European Union law requiring an interpretation» (cf. par. 30 of the decision), the Court of Justice disregards the expectations of the Belgian Court of Cassation and takes its cue from the *Voogsgeerd* case to first of all complete the interpretation of the different connecting criterion of the *country in which the employee habitually carries out his work in performance of the contract*, set out in lett. a) of the cited provision, already initiated in the *Koelzsch* case. The two decisions must therefore be analyzed together, as they provide elements that constitute a single hermeneutic construction. The cornerstone on which the Court relies in performing its analysis consists of the assumption that only through an autonomous interpretation of the terms contained in the EU's private international law instruments can these instruments achieve their goals of providing uniform legal solutions and certainty of the law in the event of disputes. Added to the *autonomous* interpretation of the connecting criteria contained in the Rome Convention as regards the legal systems of member States, is the *conformity* that same interpretation must show with the construction of similar expressions in the Brussels Convention, in order to constitute an organic, non-contradictory body of instruments aimed at optimal management of trans-border disputes in member States.<sup>21</sup> With this in mind, in the *Koelzsch* and *Voogsgeerd* cases, the Court provides an interpretation of habitual place of work which, based on the results of the hermeneutic work already performed on the identification of the court with jurisdiction to hear the relative disputes, builds a sort of bridge that allows these interpretative results to be developed for purposes of applying the regulations that have replaced the two EU conventions on private international procedure and law.<sup>22</sup> The first step in the interpretative path described consists, in fact, of fully incorporating the hermeneutic work done on grounds for jurisdiction as per Art. 5, no. 1 of the Brussels Convention. In the Court's opinion, when the employee carries out his work in a number of member States, the place where he habitually carries out his work is *that in which or from which, in the light of all the factors which characterise that activity, the employee performs the greater part of his obligations towards his employer*. This same criterion fits also for purposes of identifying the applicable law. (*Koelzsch* decision, par. 50). The Court, thus, uses the interpretative content of the decisions in *Mulox*,<sup>23</sup> *Rutten*,<sup>24</sup> and *Weber*,<sup>25</sup> which as early as 1992 had extended the significance of the expression «place of work» to include the place *starting from which* the work is carried out, and the concept of «habituality» to coincide with that of *performing the essential part of the worker's obligations*, which can be deduced, depending on the sector of activity, from factually different circumstances, such as the opening of an office in a member State where the worker returns after each business trip (*Mulox* and *Rutten*), or a predominant quantity of work time spent in the same State (*Weber*).

## 1. The Court favours a «substantively oriented» interpretation of conflict of laws' rules

7. The Court's hermeneutic work regarding the notion of the «place... in which the worker habitually carries out his work» pursuant to Art. 5, 1) of the Brussels Convention, which, as we have seen, in the *Koelzsch* decision was expressly extended to the similar expression in Art. 6 of the Rome Convention (see par. 45 of the decision) and is certainly likely to be further extended to Art. 8 of Regulation no. 593/2008, is a clear manifestation that the Court favours developing the so-called «substantive method» of solving conflicts of laws in the EU's private international law system.<sup>26</sup> In particular, the

<sup>21</sup> The relevance of case law on Art. 5, no. 1 of the Brussels Convention for purposes of interpreting the Rome Convention had already been affirmed by the Court in the decision of 6 October 2009, Case C-133/08, *Intercontainer Interfrigo SC (ICF) v. Balkenende Oosthuizen BV, MIC Operations BV*, in *Raccolta*, p. I-9687, par. 22 et seq.

The decision was commented on by RE J., *La Corte di giustizia e l'art. 4 della convenzione di Roma: il caso ICF*, in *Rivista di diritto internazionale privato e processuale*, 2010, p. 407 et seq.

<sup>22</sup> The reference, of course, is to the Brussels I and Rome I regulations.

<sup>23</sup> ECJ, 13 July 1993, Case C-125/92, *Mulox IBC Ltd v. Hendrick Geels*, in *Raccolta*, p. I-4075, par. 21 - 23.

<sup>24</sup> ECJ, 9 January 1997, Case C-383/95, *Petrus Wilhelmus Rutten v. Cross Medical Ltd*, in *Raccolta*, p. I- 57, par. 23.

<sup>25</sup> ECJ, 27 February 2002, Case C-37/00, *Herbert Weber v. Universal Ogden Services Ltd*, in *Raccolta*, p. I-2013, par. 42.

<sup>26</sup> For a reconstruction of the genesis of the «substantive method» of conflict of laws by American case authorities, see P. PICONE, *Diritto internazionale privato e pluralità dei metodi di coordinamento tra ordinamenti*, in P. PICONE (edited by), *Diritto internazionale privato e diritto comunitario*, Padua, 2004, p. 486 et seq. According to the author, this method constitutes one of the various instruments for coordination among systems now contextually used by European conflict of laws systems, cf.: P. Picone, *cit.*, p. 487 and p. 489.

Court's interpretation gives a central role to those strictly substantive objectives that the authors of the Rome Convention had pursued when designing the connecting criteria. In this case, these aims should certainly be to protect the worker as the weaker contracting party, and, more specifically, to guarantee that where possible, the employment protection rules of the State where the worker performs his economic and social duties will be applied to the contract (see *Koelzsch* decision, sections 40 and 42).<sup>27</sup> In the decisions noted, the principle of *favor laboris*,<sup>28</sup> which is the very reason for including Art. 6 in the Rome Convention, moreover acts not only as a criterion for interpreting the keywords that express the connecting criteria in letters a) and b) of paragraph 2 of said norm, but above all as the instrument for coordinating the two criteria, no longer as objective alternatives,<sup>29</sup> but rather in a *strictly hierarchical* manner (cf. *Voogsgeerd* decision, par. 34). This is exactly where we can see the second, decisive step the Court took during its process of interpreting Art. 6, par. 2 of the Rome Convention.

8. This interpretative evolution is based on two considerations. In one, the mechanistic identification of the law applicable to the employment contract based on the spatial location of the worker's services has become increasingly unsatisfactory, due to the emergence of a multiplicity of professional figures that fall into a gray area – while they carry out their work in a number of States, it is nevertheless possible to identify a primary connection (*significant*, according to the terminology used by the Court: cf. *Koelzsch* decision, par. 44) with one of them. Secondly, since 1980, the importance of the goal of protecting the worker as the weaker party in the relationship has changed in the EU system: it no longer finds expression only in international conventions, even though they are desired and entered into by member States, but has been recognized in numerous secondary norms – including the Brussels I and Rome I Regulations – and corresponds to a value that is expressly declared in the Union's legal system.<sup>30</sup> The two decisions thus express an evolution in perspective that is significant in the gradual reconstruction of the European Union's private international law system that is currently underway. With regard to Savigny's traditional method based on the spatial location of relationships,<sup>31</sup> the previously mentioned «substantive method» of coordinating legal systems is gaining ground, in which the end pursued by law-makers *before* drafting connecting criteria must, where possible, prevail even when interpreting and applying norms on conflict of laws. This new perspective caused the Court to first affirm that the criteria of habitual place of work «must be given a broad interpretation» (*Koelzsch*, par. 43) that includes the cases in which the worker carries out his activities in more than one State, provided that the judge can use the circumstances of the case to identify the State that has a *significant connection* with the work (*ibid*, par. 44). Thus, in the *Voogsgeerd* decision, it perfected its interpretative work by giving national judges precise instructions on how to proceed with the construction of cases involving employment contracts.

9. The result is a strictly hierarchical succession of situations that makes the habitual place of work the primary criterion, giving the place where the worker was engaged (Art. 6, par. 2, b) a completely residual role. According to this reconstruction, the law applicable to the employment contract should be identified based on the criterion set out in Art. 6, par. 2, a) of the Rome Convention in the

<sup>27</sup> Less evident, but no less well-founded, is the qualification in terms of the substantive objective of the Union's lawmakers, of the consistency between *forum* and *ius*, which Advocate General Trstenjak uses as the basis for her teleological interpretation of Art. 6, par. 2, a) of the Rome Convention (cf. *The Conclusions of Advocate General Verica Trstenjak, cit., paragraph 80 et seq.*), and which is concretely associated with the principle of continuity between the work of unification in the private international law sector commenced with the Brussels Convention and continued with the adoption of the Rome Convention: see the preamble to the Rome Convention, available in R. CLERICI, F. MOSCONI, F. POCAR, *op. cit.*, p. 65 and *supra*, at note 14.

<sup>28</sup> For an in-depth exploration of the evolution and current status of the principle of favoring workers in the Rome Convention, and, now, in Regulation no. 593/2008, refer, including for additional bibliographical information, to the exhaustive study by R. CLERICI, *Quale favor per il lavoratore nel regolamento Roma I?*, in *Liber Fausto Pocar*, vol. I, Milan, 2009, p. 215 et seq.

<sup>29</sup> In the sense that the application of one or the other criterion is based on the objective fact that the work is carried out in a single State (lett. a) or in a number of countries (lett. b), according to a mechanistic identification of the location of the relationship.

<sup>30</sup> In this regard, see, for example, consideration 23 of the *Rome I Regulation*. Holding that no innovative contribution can be found in the cited consideration is R. CLERICI, *Quale favor per il lavoratore nel regolamento Roma I?*, *cit.*, p. 226, note 65.

<sup>31</sup> Cf. SAVIGNY, *Sistema del diritto romano attuale*, vol. VIII, Italian translation by Scialoja, Turin, 1898, p. 31.

following cases: i) the work is carried out in a single State; ii) the work is carried out in one State by a worker sent *temporarily*<sup>32</sup> to another country; iii) the work is carried out in a number of States, if, based on the circumstances of the action, the judge is able to ascertain the existence of a *significant connection* of the work with one of those States. Only when it is impossible to classify a case based on Art. 6, par. 2, a) may the Court use the secondary and residual criterion contained in letter b) of said provision.<sup>33</sup>

## V. The interpretation of the criterion of the place of engagement

10. Once the interpretation of the criterion regarding connection to the habitual place of work is completed, the Court can finally answer to the four interpretative questions formulated by the referring judge in the *Voogsgeerd* case. The goal of certainty of the law that the uniform system of conflict of laws seeks to achieve once again arises here, after being subordinated to providing protection to the worker as the weaker party to the contract: only a narrow and strict interpretation of the criterion pursuant to Art. 6, par. 2, b) can, in fact, ensure predictability regarding the law applicable to it. This is not, of course, an abandonment of the goal of protecting the weaker party in the relationship: the criterion of the place of engagement, in fact, comes to the forefront only when the factual circumstances make it impossible for the judge to identify a legal system to which the work has a significant connection. Being this not feasible, the need to make it possible to predict what law will operate becomes once again a priority in order to supplement and correct the choice the parties made pursuant to Art. 6, par. 1. A reading of the second part of the *Voogsgeerd* decision may, at first, seem unsatisfactory: the question underlying all interpretative inquiries, that is whether Antwerp can be considered the place of business pursuant to Art. 6, par. 2, b), does not find an immediate response. But we should not forget that the solution to the case on appeal is not the goal of the Court, whose purpose is to provide parameters so that the norm can be applied to this and other cases directly by the courts of the member States. In interpreting the criterion of the place of engagement, as well as it is already the case for the habitual place of work, the Court's analysis is penetrating and just as detailed in the logical path it sets for national courts in order to properly apply the norm in question.

11. The fixed points of the interpretation provided by the Court are essentially as follows:

- i) First of all, the criterion set out in Art. 6, par. 2, b) coincides with «*the place of business of the undertaking which employs the worker*» (*Voogsgeerd* decision, par. 48 and par. 51) and must be understood in a narrow sense. This means that it is in no way liable to a broad interpretation that makes it the equivalent of the (different) place where the employment contract is carried out: everything that relates to the execution of the contract may become relevant for purposes of the criterion set out in par. 2, a) of Art. 6, but does not regard ascertaining the place of engagement.
- ii) The place of engagement should also not be identified as the place where the contract was signed: in doubtful cases, the lower court judge must examine all the factual circumstances to ascertain what undertaking performed the activities prior to engagement (publication of the help wanted ad, conducting the job interview, preparing and signing the contract).
- iii) It must, in any event, involve a unit that can be traced to the undertaking's organizational structure and must therefore be characterized by a condition of *stability*, even if it does not have an official legal personality. Applying these interpretative criteria to the case in question, the Antwerp offices of Naviglobe, where *Voogsgeerd* signed the employment contract with *Navimer*, could be classified by the lower court judge as a place of business pursuant to

<sup>32</sup> This is the case of a worker «*sent abroad for a given duration or for the needs of a specific job*»: see Commission, *Green Paper on the Conversion of the Rome Convention of 1980 on the Law Applicable to Contractual Obligations into a Community Instrument and its Modernization*, Brussels, 14 January 2003, COM(2002) 654 final, p. 35.

<sup>33</sup> See paragraph 42 of the *Koelzsch* decision, as well as paragraphs 32 and 34 of the *Voogsgeerd* decision.

Art. 6, par. 2, b), if said judge ascertained that Navimer had an office in them, or a permanent representation, perhaps constituted by one of its own officers with duties of enlisting a crew.

### 1. The principle of the prevalence of substance over form in identifying the employer

12. Turning the case completely around, Naviglobe's same Antwerp offices could also become the connection set out in Art. 6, par. 2, lett. b). The Court's response to the last question formulated by the referring judge, in fact, leads to the conclusion that Antwerp could also become relevant as *Naviglobe's place of business*, but this only if the preliminary investigation in the case finds that this company was Voogsgeerd's employer. Once again, the issue is ensuring the certainty of the law when the criterion of habitual place of work cannot be used: the place of engagement is, first of all, «the place of business of the undertaking which employs the worker» (*Voogsgeerd* decision, par. 48 and par. 51). Thus, while the elements related to carrying out the work are relevant *exclusively* for purposes of supplementing the criterion set out in Art. 6, par. 2, a), the judge must adequately evaluate additional circumstances – such as, in this case, the fact that the same individual is a director for both Navimer and Naviglobe, and the failure to give Naviglobe management authority in the employment relationship – to ascertain which of the two companies is Mr. Voogsgeerd's true employer.<sup>34</sup> The ascertainment that the national court is required to make is *substantive*: the purpose is to establish the *real* factual situation and see that it prevails over the apparent one: this explains why the Court did not find that the formal fact of the transfer of authority had an effect that was in itself decisive<sup>35</sup> (see decision, par. 63).

## VI. The role of the criterion of closest connection in employment contracts

13. On the other hand, it is quite possible that the relevant factors, according to the Court, for purposes of fulfilling the connecting criteria for habitual place of employment or place of business that hired the worker, may remain doubtful or appear to be irrelevant or that, in fact, they may show that the employment relationship is more closely connected to a legal system other than the ones to which they refer. If this is the case, the judge may consider other elements to ensure that the law in force in the State to which the case is most closely connected pursuant to the last subparagraph of Art. 6, par. 2, of the Rome Convention (*Voogsgeerd* decision, par. 51) is applied to the contract. In her conclusions, the Advocate General underlines how the rationale for this last criterion of Art. 6, no. 2 is to give the judge a certain *flexibility* in applying the Rome Convention, which flexibility is required in order to maintain the principle of favouring the worker in all cases in which the employer voluntarily establishes its place of business in a State with less incisive legislation on protecting workers.<sup>36</sup> For the (substantive) purpose of protecting the worker as the weaker contractual party, the Court thus once again gives preeminence to the logical path that national judges are called to follow, leading them to apply laws that provide greater protection to the worker.<sup>37</sup> It is worth noting, in conclusion, how this interpretation seems to be in agreement with the new text of the private international law norm on employment contracts contained in the previously noted Rome I Regulation, whose Art. 8 dedicates a separate paragraph to the criterion of close connection, formally equating its role with that of the criteria of the place where work is habitually carried out and the place of engagement.

<sup>34</sup> In fact, it could result that Navimer entered the contract only as a representative of Naviglobe and thus in the name and on behalf of that company, and that the employer would therefore be that company.

<sup>35</sup> As the Advocate General notes, it is possible that, based on the contract, the worker is required to perform his duties for a company connected to the one that employs him, and in this case it is completely natural for the employer to give that company the relative management powers: cf. the *Conclusions* of the Advocate General, *cit.*, par. 89.

<sup>36</sup> Cf. *Conclusions* of the Advocate General, *cit.*, par. 73.

<sup>37</sup> Some authors had already considered the exception clause in Art. 6 no. 2 lett. b) last subparagraph of the Rome Convention as a corrective intended to favor workers. See, in this sense: N. Boschiero, *Verso il rinnovamento e la trasformazione della convenzione di Roma: problemi generali*, in P. Picone (edited by), *Diritto internazionale privato e diritto comunitario*, 2004, p. 402. Moreover, it should not be forgotten that to achieve the goal of protecting workers, the national court also has the instrument of the international public policy exception: cf. in this regard, R. Clerici, *Rapporti di lavoro, ordine pubblico e convenzione di Roma del 1980*, in *Rivista di diritto internazionale privato e processuale*, 2003, p. 831.