International Labour Law under the Rome Conventions

A Handbook
Deinert

International Labour Law under the Rome Conventions
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edited by

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2017

C.H.BECK · HART · NOMOS
For Peter
Foreword

This book has been published in German language firstly in 2012. It goes back to the famous German book on private international law in the field of Labour law from Franz Gamillscheg, which was published 50 years before (see the translation of the four good for the German edition).

Publisher, sponsor and author decided to edit a (revised) translation. The aim of this book is on the one hand to present a comprehensive analysis of the private international law in the field of labour contracts under the Rome conventions and on the other hand to provide an insight into the German debate on this subject for scholars and practitioners. We think that this could be interesting because the country is big enough to produce enough cases to open debates on many questions of conflicts laws in the field of Labour law that are not understandable for everyone due to language reasons. Maybe the arguments from the German discussion could be fruitful not only for the debate on European level, but also for legal discussions at national level in other countries.

For these reasons I am very thankful to the Hans Böckler Foundation for supporting this edition by bearing the costs of translation and to Marc Schietinger also from the foundation for personally supporting this project. I am happy to have found Narina and Norton Sims who have translated the German edition into English. I’d like to say thanks to both for their exhausting and very helpful work.

This edition is nevertheless not an English copy of the German edition from 2012. Publisher and author are convinced that detailed observations on German peculiarities are not of interest for lawyers outside our country. Therefore, the descriptions on the German legal situation are restricted to those which could be illustrative for private international law questions. Since the PIL rules on collective agreements and the workers' involvement are not harmonised at European level and therefore still national rules I have eliminated the chapters regarding these rules. For those who are interested in these national peculiarities I have given a short overview on private international law in the field of collective Labour law at the beginning of chapter 15. Furthermore, references to the German edition are given where observations on purely domestic discussions have been eliminated.

It was not possible to bring the, with all its comparative, observations from 2012 up to date. As far as legal debate and national statutes for illustration of PIL problems are concerned, this seems not to be serious because some changes in detail do not affect the conflicts laws solutions. On the other hand it is natural that evident mistakes and inaccuracy should be avoided. This is the reason why I updated the book in summer 2016 with a view to new EU level statutes and
caselaw of the German federal Labour Court and the Court of Justice of the European Union.

After these revisions there was a lot of work left to be done with respect to language harmonisation, check of cross-references, homogenous reference style and careful proof-reading. I am very thankful to Betts Albers, Inga Lehner, Charlotte Dorn, Jasmin Dubenkropp, Susanne Eichhorn, Anne Kärcher, Christopher Siemon and Raphael Wollers for a lot of ambitious and accurate work in that field.

Besides all this helpful support by many pleasant colleagues the liability for any mistakes will remain by the author.

Göttingen, October 2016

Olaf Deinert
Almost 4 years ago Franz Gamillscheg asked me whether I would like to write a new book about international employment law (conflict of laws). If so, he could make a certain amount of material available to me. Having some idea of what to expect, I did not say yes immediately, but only some time later. Yet I had no inkling of what an immense effort the writing of this book would be. And in the process of writing it I received help from many different quarters. Not only the materials promised, which were not transportable without mechanical assistance, but also the time for research and for exchanging opinions in discussions with interlocutors, provided support for the project in many different ways.

More than 50 years ago, Franz Gamillscheg systematically analysed international employment law for the German legal system on a comparative-law basis. His conception has been carried on in this work. His structure could not, however, be wholly retained because of new provisions, such as the Rome I Regulation, the directive on the posting of workers and the law on the posting of workers (AEntG). However, new law still means having recourse to old knowledge. Thus, again and again citations from former times will be found in support of new law. That they must be transposed to the new law must always be in the reader’s mind. The objective of the exposition has, however, remained fundamentally the same. This book is intended first and foremost to afford employment-law practitioners an overview and guidance in order to understand international employment law questions and successfully work through them. An appendix with glossary and the most important legal provisions is intended to provide additional help in that context. Secondly, it is intended to add to the sum of legal science and to provide detailed discussion of individual questions. The book refers to foreign law from the 15 July 2012, and to German and European law from the 31 August 2012.

Comparative law has acquired a different significance for the conception of the work. After private international law in regard to employment law was essentially codified by European law, it has at the same time become more and less important: more important, where the interpretation of supranational law is involved, less important where that law is codified. Comparative law is not, however, limited to the comparison of private international law but also includes substantive law. Relevant comparative references to foreign legal systems are intended to illustrate conflict-of-laws problems. They also reveal questions which one would not have encountered without a knowledge of the features of those foreign legal systems. However, the accounts given do not claim to have any autonomous status in regard to giving information about foreign law. They are in-
tended to provide orientation and are therefore sometimes more detailed than would be absolutely necessary for the purposes of private international law.

Without the help from many quarters, mentioned at the outset, this book would never have been finished. My thanks therefore go to the numerous friends, sponsors and institutions. I would mention, first of all, Franz Gamillscheg for his suggestion and encouragement, for passing his materials to me and for commenting on the finished manuscript. I would like to thank Mr. Gillig for his spontaneous agreement for the book to be published in this conceptual format by the Mohr Siebeck publishing house. I thank the Hans-Böckler-Stiftung and the Otto Brenner Stiftung for financing both the project and a term of research by financing a replacement. I would like to thank my faculty and Institute colleague, Rüdiger Krause, for the patience with which he has borne the additional stresses and strains which inevitably fell upon him during two terms of research. I would further like to thank colleagues and friends from abroad who have critically examined the descriptions on the relevant domestic laws: Edoardo Ales (Cassino University), Filip Dorssemont (Catholic University of Louvain), Ruth Dukes (Glasgow University), Teun Jaspers (University of Utrecht), Elisabeth Kohlbacher (Graz University), Thomas Kohler (Boston College Law School), Natividad Mendoza Navas (Castilla-La Mancha University), Patrick Rémy (University of Paris I) and Mia Rönnmar (University of Lund).

My special thanks go to the truly good friends who read the manuscript in full and, by their numerous comments, caused me some considerable work but thereby considerably improved the book. I thank Michael Kittner particularly for giving me conceptual advice under the motto ‘the better is the enemy of the good’, at the same time as picking up the smallest detail with his criticism. Peter Winkel von Mohrenfels raised conflict-of-laws points which here and there brought about a change of mind. Wolfgang Däubler I thank for pointing out unusual matters that otherwise would have remained unheeded. I also thank my collaborator, Raphaël Callsen, for his extremely alert reading of the manuscript, with a heightened sensitivity for hidden contradictions. I thank my secretary Bastienne Brühmann for her unstinting devotion to maintaining the database for the index of keywords.

The gratitude expressed to all who were prepared to lend their critical assistance is not intended to relieve the author of responsibility for any errors for which he remains solely responsible.

Göttingen, September 2012

Olaf Deinert
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<td>Law Reports Appeal Cases</td>
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<td>a.F.</td>
<td>alte Fassung</td>
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<td>ABGB</td>
<td>Allgemeines Bürgerliches Gesetzbuch</td>
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<td>AD</td>
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<td>AEntG</td>
<td>Arbeitnehmer-Entsendegesetz</td>
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<td>AG</td>
<td>Aktiengesellschaft, Amtsgericht</td>
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<td>Bundesrahmentarifvertrag für das Baugewerbe</td>
</tr>
<tr>
<td>BUAG</td>
<td>Bauarbeiter-Urlaubs- und -abfertigungsgesetz</td>
</tr>
<tr>
<td>Bull.civ</td>
<td>Bulletin des arrêts de la Cour de Cassation, chambres civiles</td>
</tr>
<tr>
<td>BUrlG</td>
<td>Bundesurlaubsgesetz</td>
</tr>
</tbody>
</table>
Register of abbreviations

EuGRZ Europäische Grundrechte Zeitschrift
EurJIR European Journal of Industrial Relations
EuroAS Europäisches Arbeits- und Sozialrecht
EuZA Europäische Zeitschrift für Arbeitsrecht
EuZW Europäische Zeitschrift für Wirtschaftsrecht
EWR Europäischer Wirtschaftsraum
EWS Europäisches Wirtschafts- und Steuerrecht
EzA Entscheidungen zum Arbeitsrecht
FA Fachanwalt Arbeitsrecht
fin. final
FlRG Flaggenrechtsgesetz
Foro Ital. Foro Italiano
FS Festschrift (liber amicorum)
GenDG Gendiagnostikgesetz
GewO Gewerbeordnung (for Austria: Gewerbeordnung 1994)
GG Grundgesetz
Giust.civ.Mass Giustizia civile, Massimario annotato della cassazione
GK BetrVG Gemeinschaftskommentar zum BetrVG from Wiese/Kreutz/Oetker/
Raab/Weber/Franzen (s. register of literature)
GIG Gleichstellungsgesetz
GmbH Gesellschaft mit beschränkter Haftung
GmbHG GmbH-Gesetz
GmbHR GmbH Rundschau
GMH Gewerkschaftliche Monatshefte
GPR Gemeinschaftspravatrecht
GS Großer Senat
H.L. House of Lords
Habil. Habilitationsschrift
HGB Handelsgesetzbuch
HR Hoge Raad
HSWA Health and Safety at Work Act 1974
IAR Internationales Arbeitsrecht
ICLQ International and Comparative Law Quaterly
ICR Industrial Cases Reports
IFA International Framework Agreement
IJCLLIR The International Journal of Comparative Labour Law and
Industrial Relations
IJL Industrial Law Journal
ILLR International Labour Law Reports
ILO International Labour Organization
ILR International Labour Review
infas Informationen aus dem Arbeits- und Sozialrecht
IPR Internationales Privatrecht
IPRax Praxis des internationalen Privat- und Verfahrensrechts
IPRG IPR-Gesetz
IPRpsr. Deutsche Rechtsprechung auf dem Gebiete des internationalen
Privatrechts
ITF International Transport Workers Federation
J. Journal
JAR Jurisprudentie Arbeitsrecht
JArbSchG Jugendarbeitsschutzgesetz
JbItalR Jahrbuch für Italienisches Recht
JBL Journal of Business Law
JBl. Juristische Blätter
JCP Juris-Classeur périodique

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Register of abbreviations

JDI  Journal du droit international  Clunet
JE  Jura Euopae
JO  Journal Officiel
JPIL  Journal of Private International Law
Jus  Rivista di scienze giuridiche
 JW  Juristische Wochenschrift
K.B.  King’s Bench Division
KDZ  Kündigungsschutzrecht, ed. by. Kittner/Däubler/Zwanziger
(s. register of literature)
KJBG  Bundesgesetz über die Beschäftigung von Kindern und Jugendlichen
KritV  Kritische Vierteljahresschrift für Gesetzgebung und Rechtswissenschaft
KSchG  Kündigungsschutzgesetz
L.J.  Lord Justice
LAG  Landesarbeitsgericht
LAGE  Entscheidungen der Landesarbeitsgerichte
LCC  Loi sur les conventions collectives de travail et les sommations paritaires
lit.  litera
LMRA  Labor Management Relations Act
LO  Landsorganisationen i Danmark
Mass.Giur.Lav.  Massimario di giurisprudenza del lavoro
MBL  Lag om medbestæmmende i arbedslivet
MgVG  Gesetz über die Mitbestimmung der Arbeitnehmer bei grenzüberschreitenden Verschmelzungen
Mitb.  Mitbestimmung
MitbErgG  Mitbestimmungsergänzungsgesetz
MitbG  Mitbestimmungsgesetz
MontanMitbG  Montanmitbestimmungsgesetz
MPI  Max-Planck-Institut für ausländisches und internationales Privatrecht
MuSchG  Mutterschutzgesetz
n.F.  neue Fassung
NIPR  Nederlands International Privaatrecht
NIS  Norwegian International Ship Register
NJ  Nederlandse Jurisprudentie
NLCC  Le Nuove Leggi Civili commentate
NLRA  National Labor Relations Act
NLRB  National Labor Relations Board
No  Number
NSitZ-RR  Neue Zeitschrift für Strafrecht – Rechtsprechungsreport
NTES  Nederland tijdschrift voor Europees recht
NZA  Neue Zeitschrift für Arbeitsrecht
NZA-RR  Neue Zeitschrift für Arbeitsrecht – Rechtsprechungsreport
NZG  Neue Zeitschrift für Gesellschaftsrecht
ÖGB  Österreichischer Gewerkschaftsbund
OGH  Oberster Gerichtshof
OJ  Official Journal
ÖJZ  Österreichische Juristenzeitung
OR  Obligationenrecht
OSH  Occupational Safety and Health Act
OVG  Oberverwaltungsgericht
p.  Page
para.  Paragraph
PIL  Private International Law

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<th>Abbreviation</th>
<th>Description</th>
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<td>PublG</td>
<td>Publizitätsgesetz</td>
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<tr>
<td>Q.B.</td>
<td>Queen’s Bench Division</td>
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<td>RabelsZ</td>
<td>Rabels Zeitschrift für ausländisches und internationales Privatrecht</td>
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<td>RAG</td>
<td>Reichsarbeitsgericht</td>
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<td>RAGE</td>
<td>Entscheidungen des Reichsarbeitsgerichts</td>
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<td>RdA</td>
<td>Recht der Arbeit</td>
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<td>RDC</td>
<td>Revue des contrats</td>
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<td>RDIPP</td>
<td>Revista di diritto internazionale privato e processuale</td>
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<tr>
<td>RDT</td>
<td>Revue de Droit du Travail</td>
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<td>RdW</td>
<td>Recht der Wirtschaft</td>
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<td>Rec.</td>
<td>Recueil des Cours</td>
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<td>REDI</td>
<td>Revista española de derecho internacional</td>
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<td>REDT</td>
<td>Revista española de derecho del trabajo</td>
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<td>Reg.</td>
<td>Regulation</td>
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<td>Rev.crit.DIP</td>
<td>Revue critique du droit international privé</td>
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<td>RG</td>
<td>Reichsgericht</td>
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<td>RIDC</td>
<td>Revue internationale de droit comparé</td>
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<td>RIDL</td>
<td>Rivista italiana de diritto del lavoro</td>
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<td>Rivista di diritto internazionale</td>
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<td>Riv.Giur.Lav.</td>
<td>Rivista Giuridica del Lavoro</td>
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<td>RIW</td>
<td>Recht der Internationalen Wirtschaft</td>
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<td>RIW/AWD</td>
<td>Recht der Internationalen Wirtschaft / Außenwirtschaftsdienst des Betriebs-Beraters</td>
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<tr>
<td>RJS</td>
<td>Revue de jursiprudence sociale</td>
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<td>RPDS</td>
<td>Revue Pratique de Droit Social</td>
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<td>RTDE</td>
<td>Revue Trimestrielle de Droit Européen</td>
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<tr>
<td>SAE</td>
<td>Sammlung arbeitsrechtlicher Entscheidungen</td>
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<td>SCE</td>
<td>Societas Cooperativa Europaea</td>
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<td>SEBG</td>
<td>SE-Beteiligungsgesetz</td>
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<td>Sect.</td>
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<td>SeemG</td>
<td>Seemannsgesetz</td>
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<td>Sem.soc.Lamy</td>
<td>Semaine sociale Lamy</td>
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<td>SGB</td>
<td>Sozialgesetzbuch</td>
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<tr>
<td>SozF</td>
<td>Sozialer Fortschritt</td>
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<tr>
<td>SprAuG</td>
<td>Sprecherausschussgesetz</td>
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<td>SR</td>
<td>Soziales Recht</td>
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<td>SZ</td>
<td>Entscheidungssammlung des OGH in Zivilsachen</td>
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<td>SZIER</td>
<td>Schweizerische Zeitschrift für internationales und europäisches Recht</td>
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<tr>
<td>TCT</td>
<td>Tribunal Central de Trabajo</td>
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<td>Tenn.</td>
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<td>TFEU</td>
<td>Treaty of the Functioning of the European Union</td>
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<td>TPS</td>
<td>Travail et protection sociale</td>
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<td>TRA</td>
<td>Tijdschrift recht en arbeid</td>
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<tr>
<td>TS</td>
<td>Tribunal Supremo</td>
</tr>
<tr>
<td>TSJ</td>
<td>Tribunal Superior de Justicia</td>
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<tr>
<td>TULR(C)A</td>
<td>Trade Union and Labour Relations (Consolidation) Act 1992</td>
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<tr>
<td>TUPE</td>
<td>Transfer of Undertakings (Protection of Employment) Regulations</td>
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<tr>
<td>TVG</td>
<td>Tarifvertragsgesetz</td>
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<tr>
<td>TzBfG</td>
<td>Teilzeit- und Befristungsgesetz</td>
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<tr>
<td>U. S.</td>
<td>US Supreme Court</td>
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<td>UK</td>
<td>United Kingdom</td>
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<tr>
<td>UKSC</td>
<td>United Kindom Supreme Court</td>
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<td>UmwG</td>
<td>Umwandlungsgesetz</td>
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<td>Univ.</td>
<td>University</td>
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<td>UrlG</td>
<td>Urlaubsgesetz (Urlaubsgesetz)</td>
</tr>
<tr>
<td>USA</td>
<td>United States of America</td>
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<tr>
<td>UVG</td>
<td>Unfallversicherungsgesetz (Unfallversicherungsgesetz)</td>
</tr>
<tr>
<td>UWG</td>
<td>Gesetz gegen den unlauteren Wettbewerb (Gesetz gegen den unlauteren Wettbewerb)</td>
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<tr>
<td>VfGH</td>
<td>Verfassungsgerichtshof</td>
</tr>
<tr>
<td>VG</td>
<td>Verwaltungsgericht</td>
</tr>
<tr>
<td>VUV</td>
<td>Verordnung über die Unfallverhütung</td>
</tr>
<tr>
<td>VwGH</td>
<td>Verwaltungsgerichtshof</td>
</tr>
<tr>
<td>W.L.R.</td>
<td>The Weekly Law Reports</td>
</tr>
<tr>
<td>WAV</td>
<td>Wet op het algemeen verbindend en het onverbindend verklaren van collective arbeidsovereenkomsten</td>
</tr>
<tr>
<td>WBI</td>
<td>Wirtschaftliche Blätter</td>
</tr>
<tr>
<td>WCAO</td>
<td>Wet op de collectieve arbeidsovereenkomst</td>
</tr>
<tr>
<td>WiRO</td>
<td>Wirtschaft und Recht in Osteuropa (Zeitschrift)</td>
</tr>
<tr>
<td>wistra</td>
<td>Zeitschrift für Wirtschafts- und Steuerstrafrecht</td>
</tr>
<tr>
<td>WOR</td>
<td>Wet op de ondernemingsraden</td>
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<tr>
<td>WRV</td>
<td>Weimarer Reichsverfassung</td>
</tr>
<tr>
<td>ZAS</td>
<td>Zeitschrift für Arbeits- und Sozialrecht</td>
</tr>
<tr>
<td>ZEuP</td>
<td>Zeitschrift für Europäisches Privatrecht</td>
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<tr>
<td>ZfRV</td>
<td>Zeitschrift für Rechtsvergleichung</td>
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<td>ZGB</td>
<td>Zivilgesetzbuch</td>
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<td>ZGR</td>
<td>Zeitschrift für Unternehmens- und Gesellschaftsrecht</td>
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<td>ZHR</td>
<td>Zeitschrift für das gesamte Handelsrecht und Wirtschaftsrecht</td>
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<td>Zeitschrift für internationales und ausländisches Arbeits- und Sozialrecht</td>
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<td>Zeitschrift für Wirtschaftsrecht</td>
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<td>ZTR</td>
<td>Zeitschrift für Tarif-, Arbeits- und Sozialrecht des öffentlichen Dienstes</td>
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<tr>
<td>ZVglRWiss</td>
<td>Zeitschrift für vergleichende Rechtswissenschaft</td>
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<tr>
<td>Term</td>
<td>Definition</td>
</tr>
<tr>
<td>------------------------------------------</td>
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<tr>
<td>Adjustment</td>
<td>Necessary correction in terms of the substantive law or conflict of laws in the event of a legal lacuna or a proliferation of norms</td>
</tr>
<tr>
<td>Approximation</td>
<td>Adjustment</td>
</tr>
<tr>
<td>Autonomous PIL/conflict of laws</td>
<td>Conflict of laws under domestic law</td>
</tr>
<tr>
<td>Change of applicable law</td>
<td>Change of law applicable to a specific factual situation</td>
</tr>
<tr>
<td>Choice of law</td>
<td>Choice of the applicable law</td>
</tr>
<tr>
<td>Conflict rule</td>
<td>Rule of law determining which substantive law is applicable</td>
</tr>
<tr>
<td>Connecting criterion</td>
<td>Reliance by a legal system on a conflict rule in order to adjudicate on a factual situation by linkage with a specific connecting factor</td>
</tr>
<tr>
<td>Connecting factor</td>
<td>Circumstance which, under the relevant conflict rule, links a factual situation with a substantive law</td>
</tr>
<tr>
<td>Dépeçage</td>
<td>Situation in which different issues within a particular case may be governed by the laws of different states</td>
</tr>
<tr>
<td>Domestic applicability of foreign law</td>
<td>Operation of foreign law in domestic law</td>
</tr>
<tr>
<td>Domestic uniformity of decisions</td>
<td>Determination of facts under the same law by the courts and authorities of one state</td>
</tr>
<tr>
<td>Extraterritoriality</td>
<td>Operation of domestic law abroad</td>
</tr>
<tr>
<td>Favor negotii</td>
<td>Interpretation favouring business transaction negotiated</td>
</tr>
<tr>
<td>Forum shopping</td>
<td>Targeted choice of one of several courts having international jurisdiction</td>
</tr>
<tr>
<td>International uniformity of decisions</td>
<td>Determination of facts under the same law by courts of different states</td>
</tr>
<tr>
<td>Law applicable in the case of persons</td>
<td>Law applicable to a person</td>
</tr>
<tr>
<td>Law applicable to employment contract</td>
<td>Law applicable to employment contract</td>
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<tr>
<td>Law objectively applicable to the contract</td>
<td>Substantive law applicable to the contract in the absence of a choice of law</td>
</tr>
<tr>
<td>Law substantively applicable</td>
<td>Substantive law applicable to a factual situation</td>
</tr>
<tr>
<td>Term</td>
<td>Definition</td>
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<td>------------------------------------------</td>
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</table>
| Law subjectively applicable to the con-
  tract                                  | Substantive law applicable as a result of a choice of law                                                                                                                                            | Ch. 9, para. 14 et seq.           |
| Lex causae                               | Substantive law called upon to apply under conflict-of-laws rules                                                                                                                                 | Ch. 1, para. 4                    |
| Lex filiae                               | Law applicable at the place where the subsidiary is established                                                                                                                                          | Ch. 9, para. 117 et seq.          |
| Lex fori                                 | Law applicable at the place where the court is established                                                                                                                                              | Ch. 1, para. 3                    |
| Lex loci actus                           | Law of the place where the act took place                                                                                                                                                              | Ch. 15, para. 3                   |
| Lex loci damni                           | Law of the place where the harm occurred                                                                                                                                                               | Ch. 15, para. 3                   |
| Lex loci laboris                         | Law of the place where the work is performed                                                                                                                                                           | Ch. 9, paras. 65, 83 et seq.      |
| Lex loci solutionis                      | Law of the place of performance                                                                                                                                                                        | Ch. 10, para. 81 et seq.          |
| Locus regit actum                        | Place that governs the action                                                                                                                                                                          | Ch. 8, para. 5                    |
| Overriding mandatory law                | Law which, in light of public interests, demands mandatory application, irrespective of the otherwise applicable law                                                                              | Ch. 10, para. 11 et seq.          |
| Proliferation of provisions             | Parallel applicability of functionally analogous provisions of different legal systems in respect of which adjustment is required                                                                 | Ch. 16, para. 15                  |
| Protective provision                    | Substantive law protecting the employee in that capacity                                                                                                                                             | Ch. 9, para. 51 et seq.           |
| Provisions deficit                       | Non-applicability of all functionally analogous provisions of different legal systems in respect of which adjustment is required                                                                       | Ch. 16, para. 15                  |
| Public policy                            | Public policy                                                                                                                                                                                             | Ch. 5                             |
| Referral                                 | Determination of applicable substantive law under a conflict rule                                                                                                                                       | Ch. 1, para. 3                    |
| Repatriation of a legal issue            | Preference for a conflict of laws solution leading to the application of the domestic law of the person applying the law                                                                             |                                   |
| Situation having a foreign factual con-
  nection                                | Occurrence of facts abroad which may become significant in the context of the application of the substantive law                                                                                       | Ch. 1, para. 16                   |
| Substantive law                          | Substantive law of a legal system called upon to apply by a conflict rule – lex causae                                                                                                                   | Ch. 1, para. 4                    |
| Substitution                             | Replacement of a domestic factual situation by an equivalent foreign one                                                                                                                                     | Ch. 16, para. 16                  |
| Unilateral conflict rule                 | Conflict rule determining when a specific law is applicable (opposite of a universal conflict rule)                                                                                                   | Ch. 1, para. 32                   |
| Universal conflict rule                  | Conflict rule which, on the facts, determines the applicable law whereby potentially any law may be eligible (opposite of unilateral conflict rule)                                                       | Ch. 1, para. 33                   |
Register of shortly cited literature*

Agel-Pahlke, Cornelia, Der internationale Geltungsbereich des Betriebsverfassungs gesetzes, Eine Untersuchung der für das Betriebsverfassungsgesetz gel tenden international-arbeitsrechtlichen Normen, Frankfurt/Main 1988 (also Darmstadt, TH, Diss. 1987).


* Literature without reference here has been cited in the footnotes with full reference.


Block, Alexander, Die kollisionsrechtliche Anknüpfung von Individualarbeitsverträgen imstaatsfreien Raum, Bestimmung des anwendbaren Rechts nach der Rom I-Verordnung, Hamburg 2012 (also Rostock, Univ., Diss. 2011).

Bohne, Antje, Kollisions- und Sachnormen der betrieblichen Altersversorgung bei internationalen Personaleinsätzen, Aachen 2004 (also Münster, Univ., Diss. 2004).

Bonomi, Andrea (Ed.), Diritto internazionale privato e cooperazione giudiziaria in materia civile, Turin 2009.


Bovenberg, Antje Marieke, Kündigung und Kündigungsschutz im Italienischen Arbeitsrecht, Hamburg 2003 (also Bielefeld, Univ., Diss. 2002).


Calo, Emanuele, Il diritto internazionale privato e dell’unione europea, nella prassi notarile, consolare e forense, Mailand 2010.


XXVI
Register of shortly cited literature


Deinert, Olaf, Der europäische Kollektivvertrag, Rechtstatsächliche und rechtsdogmatische Grundlagen einer gemeineuropäischen Kollektivvertragsautonomie, Baden-Baden 1999 (also Rostock, Univ., Diss. 1998).

Deinert, Olaf, Privatrechtsgestaltung durch Sozialrecht, Begrenzungen des Akzeptanz- und Vermögenswertprinzips durch sozialrechtliche Regelungen, Baden-Baden 2007 (also Rostock, Univ., Diss. 2006).

Deinert, Olaf, Zwingendes Recht, Köln u.a. 2002.


Di Stasi, Antonio, Manuale breve diritto del lavoro e della previdenza sociale, Mailand 2012.


Dorssemont, Filip, Rechtsposition en syndicale actievrijheid van representatieve werknemersorganisaties, Brügge 2002.

XXVII


Franzen, Martin, Der Betriebsinhaberwechsel nach § 613a BGB im internationalen Arbeitsrecht, Heidelberg 1994 (also Berlin, Freie Univ., Diss. 1993).


Führich, Ernst, Die Einordnung des Arbeitsschutzrechts in das öffentliche oder private Recht und die internationalrechtlichen Folgen dieser Einordnung, Würzburg, Univ., Diss. 1978.


Gamillscheg, Franz, Internationales Arbeitsrecht (Arbeitsverweisungsrecht), Berlin und Tübingen 1959 (also Tübingen, Univ., Habil.) (cited: IAR).


Geffen, Rolf, Seeleutestreik und Hafenarbeiterboykott, Marburg 1979 (also Bremen, Univ., Diss. 1978).

Geiser, Thomas / Müller, Roland, Arbeitsrecht in der Schweiz, 2nd Ed., Bern 2012.


XXVIII
Register of shortly cited literature


**Hasselbalch, Ole**, Labour Law in Denmark, 2nd Ed., Deventer u.a., 2010.


**Henssler, Martin / Willemsen, Heinz Josef / Kalb, Heinz-Jürgen** (Ed.), Arbeitsrecht Kommentar, Köln 2010 (cited: HWK-Author).


**Hoek, Aukje Anna Heleen van**, Internationale mobiliteit van werknemers, Een onderzoek naar de interactie tussen arbeidsrecht, EG-recht en IPR aan de hand van de Detacheringsrichtlijn, Den Haag 2000 (also Amsterdam, Univ., Diss. 2000).


**Huber, Peter** (Ed.), Rome II Regulation, München 2011 (cited: Huber-Author).


Kallos, Christian, Der gesetzliche Kündigungsschutz Englands – insbesondere bei redundancy, Berlin 2008 (also Bielefeld, Univ., Diss. 2008).


Kasten, Christopher, Spanisches Arbeitsrecht im Umbruch, Von der Franco-Diktatur zur Demokratie, Baden-Baden 1999 (also Halle, Univ., Diss. 1997).


Kollerbauer, Agnes Maria, Die französische Arbeitsinspektion, Eine Untersuchung unter besonderer Berücksichtigung ihrer Rolle bei Kündigungen, Frankfurt/M. 2011 (also München, Univ., Diss. 2010/11).
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<td>Kulbe, Ursula Maria</td>
<td>Kollektivrechtliche Vereinbarungen im englischen Arbeitsrecht, Diss., Köln, Univ., 1986.</td>
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<td>Lassmann, Andreas</td>
<td>Kündigung und Kündigungsschutz im norwegischen Arbeitsrecht, Aachen 2007 (also Dresden, Techn. Univ. 2007).</td>
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<td>Lipperheide, Peter Jürgen</td>
<td>Die Arbeitnehmervertretungen und ihre Bedeutung bei einem deutschen Betrieb eines Unternehmens mit Sitz im Ausland, Frankfurt/Main 1980 (also Bielefeld, Univ., Diss. 1978).</td>
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<tr>
<td>Ludewig, Katharina</td>
<td>Kollektives Arbeitsrecht auf Schiffen des Internationalen Seeschifffahrtsregisters, Berlin 2012 (also Hamburg, Univ., Diss. 2012).</td>
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</tbody>
</table>
Lüttringhaus, Jan D., Grenzüberschreitender Diskriminierungsschutz – Das internationale Privatrecht der Antidiskriminierung, Tübingen 2010 (also Köln, Univ., Diss. 2009).


Müller, Carsten, International zwingende Normen des deutschen Arbeitsrechts, Tübingen 2005 (also Köln, Univ., Diss. 2004/05).


Nunes Fernandes Gil Wolf, Angela, Arbeitnehmereinsatz im Ausland, Das auf doppelte Arbeitsverhältnisse anwendbare Recht am Beispiel der Vertragsgestaltung eines internationalen Konzerns, Frankfurt/M. 2010 (also München, Univ., Diss. 2009/10).

Ossenbühl, Fritz / Cornils, Matthias, Tarifautonomie und staatliche Gesetzgebung, Verfassungsüberwachung gegen § 1 Abs. 3a des Arbeitnehmer-Entsendegesetzes, Rechtsgutachten erstattet dem Bundesministerium für Arbeit und Sozialordnung, Bonn 2000.


Pauker, Katharina, Streikrecht entsandter ausländischer Arbeitnehmer im inländischen Betrieb, Berlin 2009 (also Regensburg, Univ., Diss. 2008).
Petrovicki, Kolja, Amerikanisches und europäisches Arbeitsrecht im Strukturvergleich, Aachen 2002 (also Köln, Univ., Diss. 2001/02).
Rauscher, Thomas (Ed.), Rom I-VO, Rom II-VO, München 2011 (cited: Rauscher-Author).
Roth, Markus, Private Altersvorsorge: Betriebsrentenrecht und individuelle Vorsorge, Tübingen 2009 (also Hamburg, Univ., Habil. 2009).
Sagan, Adam, Das Gemeinschaftsgrundrecht auf Kollektivmaßnahmen – Eine
dogmatische Analyse des Art. 28 der Europäischen Grundrechtecharta,
Berlin 2008 (also Köln, Univ., Diss. 2004).

Schäfer, Kerstin Ann-Susann, Application of Mandatory Rules in the Private In-
ternational Law of Contracts, Frankfurt/M. 2010 (also Kapstadt, Univ., Diss. 
2003).

Scherpenberg, Sabine van, Kollektive Bestimmung der Arbeitsbedingungen in
Deutschland und England, Baden-Baden 1995 (also Berlin, Humboldt-Univ.,
Diss. 1994).

Schmidt, Folke / Neal, Alan C., Collective Agreements and Collective Bargain-
ing, Chapter 12, in: International Encyclopedia of Comparative Law, Volume 


Schubert, Jens, Der Vorschlag der EU-Kommission für eine Monti-II-Verord-
nung – eine kritische Analyse unter Einbeziehung der Überlegungen zu der 
Enforcement-Richtlinie, Frankfurt/M. 2012.

Schulze-Doll, Christine, „Kontrollierte Dezentralisierung“ der Tarifverhandlun-
gen, Neue Entwicklungen der Kollektivverhandlungen in Deutschland und 
Frankreich, Baden-Baden 2008 (also Halle/Wittenberg, Univ., Diss. 
2006/07).

Schwimann, Michael, Internationales Privatrecht einschließlich Europarecht, 3rd 

Selenkewitsch, Ilja I., Spanisches Tarifrecht, Frankfurt/M. 2006 (also Trier, 
Univ., Diss. 2004).

Sittard, Ulrich, Voraussetzungen und Wirkungen der Tarifnormerstreckung nach 
§ 5 TVG und dem AEntG, Zugleich ein Beitrag zur Debatte um staatliche 
Mindestlöhne, München 2010 (also Köln, Univ., Diss. 2009).

Staudinger, EGBGB/IPR, Art. 7, 9-12, 47, Berlin 2007
EGBGB/IPR, Art. 11-29 Rom I-VO; Art. 46 b, c EGBGB, Berlin 2011
Art. 1-10 Rom I VO, Berlin 2011
(cited: Staudinger-Author).

Stoll, André, Eingriffsnormen im Internationalen Privatrecht, Dargestellt am 
Beispiel des Arbeitsrechts, Frankfurt/M. u.a. 2002 (also Mannheim, Univ., 

Straube, Gunnar, Sozialrechtliche Eingriffsnormen im Internationalen Privat-
recht, Frankfurt/M. 2001 (also Hamburg, Univ., Diss. 2000).

Stützel, Wieland (Ed.), Streik im Strukturwandel, Die europäischen Gewerk-
chaften auf der Suche nach neuen Wegen, Münster 1994.

Symeonides, Symeon C. (Ed.), Private International Law at the End of the 20th 

Register of shortly cited literature


Ubertazzi, Benedetta, Il regolamento Roma I sulla legge applicabile alle obbligazioni contrattuale, Mailand 2008.


Wollwert, Klaus Christian, Die Errichtung eines Konzernbetriebsrats in nationalen und internationalen Konzernen, Hamburg 2011 (also Köln, Univ., Diss. 2010).


Zelfel, Anja, Der Internationale Arbeitskampf nach Art. 9 Rom II-Verordnung, Frankfurt/M. 2011 (also München, Univ., Diss. 2011).


Chapter 1: Introduction

1 Subject-matter, Objectives and methods

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I. Overview

The exposition set out below is concerned with the applicable law in relation to international employment law. In that connection an introductory approach to the conflict-of-laws question will be provided (paragraphs 2 et seq.). Then, conceptual clarifications (paragraphs 11 et seq.) will be provided, and thematic dividing lines drawn (paragraphs 15 et seq.). Finally, the governing concepts overarching the conflict-of-laws rules applicable to employment law will be discussed (paragraphs 21 et seq.). From a methodical point of view comparative law plays an important role (paragraphs 23 et seq.); the specific compound of private and public law characteristic of employment law throws up additional challenges to the conflict of laws (paragraphs 33 et seq.). A solution to these fundamental problems will be adumbrated in the course of the account of overriding mandatory provisions (Section 10 paragraphs 110 et seq.).

II. Conflict-of-laws issues and rules for determining the applicable law

The German employment market, as an indicator for any industrialised market economy, is characterised by an appreciable internationalisation. Even if employment markets are in no way internationalised to the same extent as markets for goods and services, increasingly questions of law arise involving a foreign element. According to the International Labour Migrant Statistics of the International Labour Organisation (ILO)\(^1\), in 2006 558,467 workers immigrated to Germany whilst 155,290 emigrated. According to information provided by CESInfo in the European currency zone, 221,220 E 101 certificates (now A1 certificates) were issued for postings to Germany in 2009.\(^2\) In the same year 3.289 million foreign workers were employed in Germany, which represents a proportion of 9.4%.\(^3\) In 2008 there were 332,000 foreigners temporarily employed in Germany altogether.\(^4\) Finally, economic and financial crises have since

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1 http://laborsta.ilo.org/default.html.
2 http://www.cesifo-group.de/portal/page/portal/ifoHome/a-winfo/d3iiv/_DICE_division?_id=6745832&_div=6870603.
3 Source: See footnote 2.
4 Source: See footnote 2.
2009 led to an immigration trend from South to North Europe with the result that in May 2012 there were around 6.5% more Greek, Spanish, Portuguese and Italian workers employed in Germany than in the comparable month of the preceding year.\footnote{iwd (Informationsdienst des Instituts der deutschen Wirtschaft) 35/2012, p. 6, 7.}

A foreign element will always raise questions of legal applicability. Thus, it may be questionable whether a foreign employer can be sued outside his own country or which law is applicable to an employment contract. The present account fundamentally concerns these questions of the applicable law in relation to employment matters with a foreign element (conclusion of the employment contract, performance of the employment contract, industrial action, co-determination of the works council, applicability of a collective agreement etc.). The question as to the legal rules to be applied to such factual situations is answered in turn by legal rules. Those legal rules for determining the applicable law are described as referring rules (because they refer to a specific law) or conflict rules (because where several legal systems compete for consideration, they determine which one is to apply). Thus, for example, Article 8 of the Rome I Regulation lays down that a contract of employment is to be governed, in the first instance, by the law chosen by the parties or, otherwise, by the law of the place where the work is habitually carried on.\footnote{See for employment law BAG NZA-RR 2012, 268, 271.}

There is no superimposed world-wide master plan for universally determining the legal system under which a factual situation is to be adjudged. Rather it is the case that each legal system contains its own conflict rules which answer this question. That again means that a conflict-of-laws question has to be determined \textit{in advance of the application of the conflict rule}, that is to say as to the legal system from which the conflict rules are to be taken to determine which legal provisions are applicable to the factual situation. Ultimately, this can be determined only from the perspective of a court or of an authority. Since courts and authorities are state institutions they always apply their own law.\footnote{No more than the courts of other states can German courts lay claim to a power to decide and adjudicate on any dispute in this world. They make decisions only in the context of their \textit{international jurisdiction}. In the same way as with}
other questions of jurisdiction, there can be no judicial determination on the substance if the court lacks jurisdiction. That means that the application of conflict rules always presupposes that the court that applies or should apply them has international jurisdiction. Only if the question as to international jurisdiction is answered affirmatively may the conflict rules of the forum be applied. Even if the international jurisdiction at issue is not a central feature of this exposition, it must always be kept in mind. For every person or body applying the law, it is the first matter to be clarified: the court has to verify its international jurisdiction and to apply its conflict-of-laws rules and thereafter the law that then falls to be applied. Legal representatives verify which international jurisdictions come into play, which conflict-of-laws rules consequently are to be applied by the various courts having international jurisdiction and the substantive law to which they refer and the consequences this may ultimately have for the party represented. Law framers finally have to examine the conflicts capable of arising and the courts before which they are to be tried, the conflict-of-laws rules which apply in that connection and the law to which they point, and thus the legal consequence that may arise therefrom.

For all cases with a foreign connection, the **following sequence in the examination** is required:

1. International jurisdiction according to the *lex fori*
2. Referral by operation of the conflict-of-laws rules of the *lex fori*
3. Application of the *lex causae*.

A more detailed graphic representation of this sequence is to be found after paragraph 12.

Referral by the conflict rule results in the applicability of the substantive provisions of a specific legal system. This bringing of the facts of the case together with the applicable law is termed a connection. Where, for example, Article 8 section 2 of the Rome I Regulation lays down that the law applicable to the contract of employment is the place in which the employee habitually carries out his work, the contract of employment of an employee working in Germany is brought into connection with German law. The connections in relation to the individual employment relationship are described in Chapter 3. The normal connection in regard to the employment relationship is set out in Section 9. Connections in regard to collective bargaining agreements are described in, in Section 15, The elements constituting the connection are described as connecting factors. In the example given, the habitual place of work is the connecting factor.

The sum total of the legal provisions which may be called upon by such a referring provision is termed the applicable law, for example, the law applicable to the contract of employment or, in other cases, the law governing industrial action or the law governing the corporate constitution.

Normally, the connection is not all-embracing. Again and again it may be ousted by so-called special connections. Thus, for example, the sub-issue of ca-
pacity to enter into legal relations is not covered by the law governing the employment contract but by a specific connection of its own (Section 7). The same is true of formal requirements (Section 8). It is termed a special connection because the general connection has failed to provide an answer. In addition, every legal system allows itself to apply specific rules compulsorily and irrespective of the substantive law applicable. These are termed overriding mandatory rules that are likewise brought into play by a special connection (Section 10).

Both the question as to the relevant conflict rules in relation to specific questions of substantive law and the significance of numerous special connection factors raise, then, many questions concerning the scope of the applicable substantive law. This view of the matter is not conditioned by the legal relationship as a whole but by specific legal issues. These will be discussed in detail in Chapter 4 in relation to the conclusion of the contract, contractual obligations, termination, legal succession and continuing effects (Sections 11-15).

III. Subject-matter

The area of law concerning the referral to a substantive law in the case of a foreign element is termed international employment law. It is that area of law which clarifies which substantive law, that is to say the substantive law (material law) of which legal system, is applicable to an employment-law case with a foreign element. This is a question of central importance to the outcome of the application of the law. Even in a situation where there is considerable substantive harmonisation of the individual legal systems, differences remain which can have an influence on the outcome.7 Even if, for example, the law of mass dismissals is harmonised on a European-wide basis (see Section 13 paragraph 21), the matter will turn on which national transposing provisions are applied.

Sometimes the term ‘international employment law’ is displaced in favour of ‘private international law in the field of employment law’. Both terms have their advantages and disadvantages. International employment law may be understood as the referring employment law, that is to say the law determining which law is to be applied to factual situations having a foreign element. It is becoming more widespread for the concept of international employment law to be construed as the sum total of employment law provisions that are of international origin such as, for example, ILO conventions. Conversely, the term ‘pri-

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7 This question is superfluous only when one is dealing with international uniform law, that is to say when specific legal rules apply across several countries. If, for example, the same law on protection against dismissal applied in Germany and the Netherlands, it would be immaterial which law was being referred to. However, there is as yet nothing like this in the sector of private employment law. Even the proposed creation of a so-called ‘optional instrument’ for European contract law is not intended to make provision for employment law. Moreover, even were there such a uniform European law, there would continue to be an abundance of conflict-of-laws issues relating, for instance, to the legal system under which lacunae in the uniform law would have to be filled. See, on the last point, Busch, EuZW 2011, 655 et seq. In addition, the validity of the same law is not a guarantee of the uniform application of the law.
vate international law in the field of employment law’ has the disadvantage of suggesting that employment law is solely of a private-law nature. In reality substantive parts of it are at the same time of a public-law nature. Nevertheless, some confusion may occur for the reason that readers may think of the law of nations. However, I would prefer this handy technical term for the purposes of this book.

Figure 1: Jurisdiction, referral and substantive-law application

To formulate a term avoiding these pitfalls is not an easy matter. Since what is entailed in the final analysis is the handling of conflict between various legal
systems that may be considered for the purposes of application of their substantive laws, terms have been discussed, such as conflict-of-laws rules in employment law. The objection that such terms are reminiscent of the laws on industrial action and are therefore likely to give rise to confusion cannot, however, nowadays carry conviction since such terms are no longer customary in connection with industrial action. Of great significance in this connection is the term coined by Franz Gamillscheg, namely the law referring to the applicable employment law for it carries within it an element describing the process which occurs in relation to the application of conflict rules. The same element is also apparent in terms such as renvoi or total renvoi. Nonetheless, it has not found full acceptance over the course of time but, in the course of this exposition, it will be used to the same extent as the term international employment law to denote the conflict-of-laws rules in the field of employment law.

In what follows, the question to be discussed concerns the applicable law where there is a foreign element. A foreign element is in any event a precondition of dealing with this question. The requirements as to the foreign element are not, however, strict. They will always be met when the application of another legal order appears at all conceivable. For example, in a case with a purely domestic content, the choice of a foreign law by the parties will suffice. Where the parties have a different nationality that will be sufficient as well. It will certainly also be the case when the work is carried out abroad. The foreign element requirement will also be present where the work is carried out in a stateless area, for example, on a drilling platform on the high seas or in outer space and it must be clarified which national law is to be applicable.

The public international law of employment does not form part of the subject-matter of this account since it is well-known that it is characterised by public international law conventions concluded under the auspices of the ILO and the European Social Charter. European employment law, which is governed by the EU, the TFEU, as well as by regulations and numerous directives, is also outside the limits of this account. That is true, of course, only insofar as EU law determines substantive employment law and employment procedural law. Conversely, the European conflict of laws (in particular, the Rome I Regulation) virtually forms the subject-matter of the present exposition.

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8 Gamillscheg, IAR, p. 2.
9 Gamillscheg, IAR, p. 2.
10 Heilmann, p. 37.
11 See Block, p. 82.
12 Heilmann, p. 37 et seq.
13 See Däubler, RIW 1987, 249, 250 who however equates foreign connection with the relevant sufficient foreign connection under Article 3 section 3 of the Rome I Regulation (see Section 9 paragraph 41).
14 Block, p. 82; see (with regard to the international jurisdiction of German courts) BAG NZARR 2012, 320, 322.
15 Block, p. 83.
Likewise, the law determining rights of residence for foreigners is not dealt with, not even insofar as it governs the grant of a residence permit for the purpose of taking up employment.\textsuperscript{16} Conversely, problems concerning foreign factual situations will necessarily be dealt with although these do not come under private international law as narrowly construed (see Section 2 paragraph 26).\textsuperscript{17} They play a role, for example, when in the application of the substantive law indicated by the conflict-of-laws rules in the employment sector, facts have occurred abroad triggering the operation of the law, for example, by business divisions located abroad in the context of the application of Paragraph 23 of the law on protection against dismissal (Kündigungsschutzgesetz – KSchG) (see Section 13 paragraphs 36 et seq.). Likewise, German substantive law will be referred to when it relates to employment abroad or employment of foreigners at domestic level if that is necessary in the context of the conflict of laws, though not with any claim to completeness.\textsuperscript{18}

Nor will international social security law be dealt with, in particular the law of social insurance. Of course that can also be significant to questions of employment law and will then be looked at specifically, for example, in the context of continued payment of remuneration in the case of illness (see Section 12 paragraph 37) or in the context of compensation for accidents at work (see Section 12 paragraphs 130 et seq.).\textsuperscript{19}

Nor will questions of international law as it relates to officials of international organisations be dealt with. Private international law in regard to independent contracts for services are also outside the scope of this work. Where, however, the problem crosses over into the area of international employment law, particularly in the case of persons with employee-like status (see Section 4 paragraph 46), the question will exceptionally be considered.

Questions of inter-regional employment law, which deal with the question of the applicable law within a State, are essentially structured in the same way as questions arising under international employment law and will not be the subject of specific attention in this discussion. In Germany, questions of inter-regional employment law arise in particular in regard to entitlement to leave for training, which is provided for at provincial level.

\section*{IV. Objectives, governing concepts and methods}

Even though it is clear what the task of international employment law is, it is not clear how that specific objective is to be realised. The question is therefore according to which ideal the conflict rules should be determined. The point of

\begin{itemize}
  \item[16] See on this Marschner, DB 2005, 499; Bünte/Knödler, NZA 2008, 743.
  \item[17] See for French law Couturier, Dr. soc. 1991, 843 et seq.
  \item[18] For an overview of this, see Däubler, Festschrift Birk, 2008, p. 27 et seq.; for French substantive law Lacoste-Mary, p. 51 et seq.
  \item[19] On connections and conflicts between international social law and international employment law generally, Eichenhofer, EuZA 2012, 140 et seq.
\end{itemize}
departure is initially simple and yet not self-explanatory. The State refrains from making every legal relationship subject to its own rules. Rather it is guided by the consideration that in principle all legal systems are equivalent and that therefore a decision is required as to which legal system is to be applicable in the individual case, that is to say the legal system with which the facts are most closely connected. The answer to that question must be sought in the substantive rules on whose applicability the question turns. Their specific objectives must also be considered from a conflict-of-laws point of view. This is the question as to the ideal connection. This is determined by the central focus of the legal relationship, that is to say of the employment contract, the industrial relations situation or, for example, the collective agreement. However, that does not refer to the central focus in the actual sense of the weight of the matter. The question is which law ought to be best applied to the facts. This focus may, as is often the case, be the place of employment. The central focus may emerge also from other elements such as, for example, personal characteristics, nationality or the element of intention in the subjective connection in the event of a choice of law.

These considerations are based on the basic assumption that all legal systems ultimately pursue the same objective. In the case of dependent employment, legal provisions protect the weaker contracting party, balance interests and guarantee the dignity and fundamental rights of workers. In regard to this objective, all legal systems may be regarded as potentially equivalent. For precisely this reason, the conflict rules are potentially intended to enable foreign legal systems also to come into play and to prevent the matter from being reduced to the application of the lex fori, the law of the place where the court is situated.\(^20\) The statement that all legal systems in their totality may be assumed, in different ways, to afford to the worker equivalent protection, may appear at first sight to be inappropriate.\(^21\) Who would dispute that many legal systems afford a clearly higher standard of protection to workers than others? Yet this statement is objectively correct in regard to the question as to the central focus of the employment relationship. From the perspective of the protection of the worker as the weaker contracting party and the protection of his fundamental rights, it would appear to be entirely appropriate for a contract of employment with its central focus in China not to be subject to a comparable regulation concerning Sundays and holidays as a contract with its central focus in Germany. Along those lines, the Federal Labour Court (BAG) has held a provision providing for working time in Saudi Arabia of 54 hours a week to be equitable.\(^22\)

International uniformity of decisions is regarded as an ideal of private international law.\(^23\) According to that principle, the same law is always to be applied to a case, irrespective of the country in which the court is situated which is called

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\(^{20}\) Gamillscheg, IAR, p. 5.

\(^{21}\) Gamillscheg, IAR, p. 5.

\(^{22}\) BAG AP No. 2 on § 4 TVG Arbeitszeit.

\(^{23}\) See on this Kropholler, Section 6, p. 36; v. Bar/Mankowski, Section 6 paragraph 56.
upon to decide on the facts of the case. Thus, it depends neither on coincidence nor on the skill of the parties as to how the legal dispute will in the end be resolved. That dispenses with the need for forum shopping whereby a court is chosen which will apply the substantive law desired from the conflict-of-laws point of view.\textsuperscript{24} Even agreements conferring jurisdiction on courts which, in employment law, of course only have a limited scope (see Section 16 paragraph 9) lose their relevance.\textsuperscript{25} Conflict-of-laws rules which point to the central focus of the employment relationship must therefore produce uniform results in accordance with the international uniformity of decisions, irrespective of the manner in which and by whom those rules were drawn up.\textsuperscript{26} In Europe, that has been achieved to a large extent by virtue of the fact that international law on employment contracts at least, that is to say the law applicable to the individual employment relationship, is uniform in the Member States of the European Union (except Denmark) as a result of uniform European law in the guise of the Rome I Regulation (see Section 2 paragraph 6). Yet even within that system, the international uniformity of decisions is not guaranteed if, for example, use is made of the public-policy reservation under Article 21 of the Rome I Regulation. Nor does the application of overriding mandatory rules under Article 9 section 2 of the Rome I Regulation (see Section 10 paragraphs 11 et seq.) promote the international uniformity of decisions. Outside the system of uniform law, in relation to a non-Member State or in the sector of collective bargaining law the international uniformity of decisions remains an ideal that should be striven for at academic level as well.

A specific role is played by knowledge of foreign law. The \textit{comparative-law method} in the conflict-of-laws rules in regard to employment was above all developed by \textit{Gamillscheg}\textsuperscript{27} who for his part was guided by \textit{Batiffol}\textsuperscript{28} and \textit{Rabel}\textsuperscript{29} as precursors.\textsuperscript{30}

Thus, foreign legal systems frequently offer solutions to conflict problems of a comparable nature. That concerns rule formation as much as rule interpretation.\textsuperscript{31} In that connection, comparative law increases the stock of problem solutions that are available. Of course, the context of the foreign law cannot be ignored.\textsuperscript{32} Many conflict rules only reveal their meaning on acquaintance with the substantive law of the foreign legal system. Foreign law can also only be a ratio-

\textsuperscript{24} See Junker, RabellZ 55 (1991), 674, 675.
\textsuperscript{26} See Gamillscheg, IAR, p. 6.
\textsuperscript{27} Gamillscheg, IAR.
\textsuperscript{28} Batifol, Conflits des lois, p. 262 et seq.
\textsuperscript{29} Rabel, Conflict of Laws III, p. 181 et seq.
\textsuperscript{30} More restrained is Junker, RabellZ 55 (1991), 674, 679; in detail on the history of comparison of private international law Reimann/Zimmerman-Reimann, p. 1363, 1366 et seq.
\textsuperscript{31} See Reimann/Zimmerman-Reimann, p. 1363, 1377 et seq., 1380 et seq., especially 1384 et seq.
\textsuperscript{32} This applies in particular also to historical connections, see for example most recently Bucher, RabellZ 74 (2010), 251, 252 et seq., 296 et seq.
nal model for the reply to be given to the question arising within one’s own legal system if it is committed to the same conflict-of-laws rules ideal (paragraph 20) as one’s own system.

25 Insofar as the Rome I Regulation has rendered European conflict of laws uniform, this manner of proceeding is not only a programme but is also legally binding because the regulation is indeed directly applicable in Germany although it does not thereby become a legal source of national law but is to be treated as a European source of law. That for its part requires an interpretation according to European principles of law, including interpretation on the basis of comparative law (Section 2 paragraph 18). From a purely practical point of view, it is of course not possible for the individual to acquire knowledge of all that has been written and decided in European countries about the Rome I and Rome II Regulations.33 Here there are not only language barriers but also entirely practical difficulties of access. However, notice will be taken, where possible, of the debates that have taken place abroad.

26 As far as the area outside Europe is concerned, knowledge of foreign situations can be instructive for the domestic or European discussion. Of course, it is also true in that connection that a comprehensive knowledge of problems and discussions abroad is not possible for the reasons stated. However, this book should be treated as contributing material in that connection which often may also appear to have been chosen at random.

27 Over and above adding to the stock of solutions to problems, foreign law also provides illustrative material of use in connection with possible problem configurations which in internal discussions are as yet unknown.

28 Comparative law is also instructive in relation to substantive employment law. Frequently problems of conflict of laws can be better illustrated by employment law than by the purely notional legal norms of State X. From time to time foreign concepts and principles, that are unknown domestically, may also shed light on a question in such a way as to result in the solution of a conflict-of-laws problem. That is true, for instance, of the manner in which one deals with the official requirement under Netherlands law for authorisation of a dismissal (see Section 13 paragraphs 26, 33). In contradistinction to comparative-law references which directly contribute to the solution of conflict-of-laws questions, references to foreign law, which in this connection have an illustrative function, are highlighted by indentation.

29 Conversely, the descriptions of foreign law encountered in this book are not to be construed as guidelines for practice but at most as introductory pointers. Irrespective of the fact that no comprehensive insight can be gained from specific and often random references, the likelihood of mistakes is frequently higher.

33 Although 50 odd years ago Gamillscheg, IAR, p. 16 et seq. was still able to state that conflict-of-laws rules in regard to employment law had scarcely received attention either abroad or at home this finding is no longer true. Rather it is a matter of mastering the mass of material.
than when one is dealing with one’s own system of law\textsuperscript{34}, which is the reason why the reading of relevant accounts by recognised experts is indispensable.

That determines the \textbf{number of legal systems to be examined}. In general the legal systems of England\textsuperscript{35}, France and Italy, which are important for Europe, are included. In addition, a glance will be taken at Austria and, outside the EU, at Switzerland. Furthermore, where appropriate, the law of the United States of America, in particular federal law, in its substantive form, will be included. In addition to that, reference will always be made, where relevant, to specific features of other countries where they are known to the author. That concerns in particular various Netherlands regulations. Nor, in view of the proliferation of models, will there be any indications as to the situation under the Austrian company constitution, except in the context of dismissal (Section 13 paragraph 23).

Comparison of laws must be \textbf{functional}.\textsuperscript{36} It does not start with written rules but with a social problem and the solutions of that problem under the relevant legal systems. To that end, the bare text of the law is frequently not sufficient; the legal situation abroad may also be defined by a practice which is not discernible from the legal provision. That is to be taken account of as a \textbf{finding of fact}. It is another matter, of course, in regard to the \textbf{application} of foreign law which under conflict-of-laws rules is called upon to apply: a person having a claim under foreign law cannot be deprived of that claim on the basis of the argument that the relevant claims would not be satisfied abroad. It may, at most be otherwise only if divergent customary law is found to apply which presumably will be an unusual exception.\textsuperscript{37} The result will of course also be different when the courts declare a provision not to be applicable by interpreting it restrictively, or it applies differently from the way it is applied by national courts or because it has been set aside, for example, under constitutional law with which it conflicts.

A peculiar feature of the conflict-of-laws rules in regard to employment law is the fact that the latter is a \textbf{compound of public and private law}. The conflict rules for public law and private law are differently structured. Public law governs the relationship between state and citizen. It is enforced by the state against its citizens. Enforcement ends at the state border. Conflict rules for public-law provisions are therefore normally \textbf{unilateral conflict rules}. They do not ask which law is applicable, but whether the public law of the forum can apply.\textsuperscript{38} The question to be asked is therefore not which legislation (be it German, Chinese or French) applies in regard to the standard of the workplace but whether

\textsuperscript{35} I shall be considering the legal position in England and Wales; any particular features relating to Scotland and Ireland are in principle not considered. For simplicity I shall refer to the legal position in England.
\textsuperscript{36} See Zweigert/Kötz, Section 3 II p. 33 et seq.; Koch/Magnus/Winkler von Mohrenfels, Section 13 paragraphs 11 et seq.
\textsuperscript{37} Gamillscheg, IAR, p. 19.
\textsuperscript{38} Gamillscheg, AcP 155 (1965), 49, 54.
the domestic regulation on workplace standards (Arbeitsstättenverordnung – ArbStättV) can be applied by a domestic authority. If that is not the case, no foreign public-law provision concerning workplaces will apply either. Therefore, the statement that, in regard to the law on the protection of young persons, the law of the place of employment, for example, is determinant is in itself inaccurate\(^\text{39}\) because it is formulating a universal conflict rule. Nonetheless, it is describing the typical result from a practical point of view, because other countries operate by analogous principles.\(^\text{40}\) In that connection, the above statement can never be correct from the perspective of the forum, though it may be from the vantage point of the parties, at any rate when jurisdiction is conferred on the place where the work is carried out, as provided for in Article 19 (2)(a) of the Brussels I Regulation. In that sense as well, designation under the **territoriality principle** is vague but at the same time useful. In that connection, the unilateral conflict rule must not of course be misunderstood as meaning that public law covers only factual situations occurring at domestic level. Rather it is the case that the conflict rule itself determines the extent to which national public-law rules can also be applied to foreign factual situations. That is immediately apparent in regard to the punishment of an act committed abroad or the taxation of income from employment abroad. Of course, in regard to public law relating to employment a conflict rule may in general be assumed to apply to work performed at national level (Section 10 paragraph 111).

Conversely, private international law does not stop at national borders. The adjudicating court must apply a legal rule to the facts. If the court enquires whether the legal rule is applicable to the facts and the answer is in the negative, the court cannot determine the dispute. The question proceeds from the facts and is **universal in nature**. Which of several legal rules which fall to be considered demand application? There are sometimes unilateral connecting rules under private international law. But they must be expanded into universal rules. That was earlier the case in regard to Paragraph 1 of the Seafarers’ law (SeemG) under which German law was deemed to apply in the case of work on ships flying the German flag. That was extended to provide that the applicable law concerning the employment of a seafarer followed the flag (see Section 9 paragraphs 157 et seq.).

A particular problem arises from the fact that it is a feature of the mixture of private and public law comprising employment law that the public-law provisions mostly intrude into the private law employment relationship. That is why the earlier assumption that public-law provisions preclude\(^\text{41}\) the application of private international law in the sector of employment law falls wide of the mark. Insofar as the employer’s public-law obligations are intended to protect the em-

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39 Gamillscheg, IAR, p. 11 et seq.
40 See also the observations made by Hepple, in Lipstein (Ed.), Harmonisation of Private International Law by the EEC, London 1978, p. 39, 45.
41 Rabel, Conflict of Laws III, p. 190 et seq.
ployee, they are in his favour. This right to employment protection under public law is not without significance in private law.\textsuperscript{42} It is recognised in German employment law\textsuperscript{43} that the public-law obligations of the employer, at any rate where they could have been agreed in the context of an employment contract, are at the same time to be regarded as duties on the employer under the employment contract to provide employee protection.\textsuperscript{44} Under the Swiss law of obligations this is even provided for expressly in Article 342 section 2. It is therefore possible to speak\textsuperscript{45} of a kernel of public law relating to employment located within private law or of a transmutation of the employer’s public-law obligations into the employment relationship. This transmutation does not, however, turn the public-law rule into a rule of private law with the further consequence that the relevant universal conflict-of-laws rules should necessarily apply to the contract of employment. The fact that public law relating to employment has its own conflict rules must be taken into account. The most diverse solutions as to how public-law rules are to be taken into account in the context of the employment contract have been suggested, ranging from ignoring them, through considering them from a substantive-law point of view, or applying them without distinction as part of the applicable law governing the contract, to treating them as a special connecting rule.\textsuperscript{46} That will be discussed in regard to principle in Section 10 paragraphs 110 et seq., and will become clear in different respects in Chapter 4 (Sections 11-14) concerning the scope of the law governing the contract.

It will have become apparent from these considerations that international employment law can be regarded as a part of private international law, but that private international law solutions cannot be reproduced in international employment law without further reflection. Conflict-of-laws rules must also take account of the specific nature of the substantive law.\textsuperscript{47} That is clearly documented, for example, by the discussions concerning the question of party autonomy in international employment law (see on that point Section 9 paragraphs 2 et seq.). In addition, conflict-of-laws rules, in particular in regard to employment law, are not unpolitical. The legislature seeks to pursue various political objectives, even in terms of conflict-of-laws rules.\textsuperscript{48} This is particularly apparent in the case of the directive on the posting of workers, and the German law on that subject (Arbeitnehmer-Entsendegesetz – AEntG), which aim to extend the legal

\textsuperscript{42} Birk, NJW 1978, 1825, 1830.
\textsuperscript{43} Whether this also applies under a foreign law governing the contract is to be answered for each legal order, Gamillscheg, RabelsZ 23 (1958), 819, 844; Rabel, Conflict of Laws III, p. 193, noted the influence of public-law protection on private law matters in the USA as far back as 1950.
\textsuperscript{44} BAG DB 2008, 2030; see, with further references, Deinert, Privatrechtsgestaltung, p. 60.
\textsuperscript{45} According to Gamillscheg, IAR, p. 8.
\textsuperscript{46} Basic observations on this in Gamillscheg, RabelsZ 23 (1958), 819 et seq.
\textsuperscript{47} Simitis, FS Kegel, 1977, p. 153 et seq. is instructive.
\textsuperscript{48} See, from the perspective of German international employment law, Wimmer, IPRax 1995, 207 et seq.
rules of the place of employment to posted workers subject to a foreign law of contract.

The significance of public-law provisions makes it clear that the connecting rules in regard to the law governing the employment contract in no way entail that the law thus ascertained will be called on to determine all questions arising under the employment relationship. Various other connecting rules have to be considered in regard to specific questions, for instance, in regard to formal requirements. This will be discussed in Chapter 3 (Sections 7 et seq., 10). Prior to that, however, the general doctrines of private international law, insofar as they are of significance to employment law, will be presented (Sections 4-6).
2 Sources of law for determining the applicable employment law

The law determining the applicable law, in the same way as substantive law, has different rules of varying rank. The conflict rules relevant to employment law and their ranking will be presented below (paragraphs 2 et seq.). Of particular significance is the Rome I Regulation (paragraphs 7 et seq.) which arose out of the Rome Convention on the law applicable to contractual obligations (paragraph 6). Its guiding principle is uniformity of interpretation and the possibility of a request for a preliminary ruling by the ECJ (paragraph 7). In addition to the European rules some national provisions continue to be relevant (paragraph 11). Finally, legal rules applicable to international factual situations which are not a matter for the conflict-of-laws rules will be looked at (paragraphs 23 et seq.).

A court having to decide a legal dispute with a foreign element requires a referring rule which tells it which law it must apply (see Section 1 paragraphs 3 et seq.). For many years there has been a lack of such rules in regard to employment law. In 1937 the Institute for International law drafted a proposal for a uniform law for conflict-of-laws rules in employment law. This, however, gained little acceptance anywhere. Thus it was initially for the courts and academics doctrine to elaborate the rules of international employment law. Not until 1986 with the enactment of the amended PIL law (IPRNG) was statutory provision made in Germany concerning international employment law for individuals (paragraph 6). Of course there had previously been provision for specific questions, such as capacity (Article 7 of the introductory law to the German Civil Code – EGBGB) or form (Article 11 EGBGB). The current situation in regard to sources is, however, slightly different: after international contract law, and with it international employment law, was harmonised at European level under the convention on the law applicable to contractual obligations there were in Germany relevant referring provisions in the EGBGB which were analogous as to content with those of the other European States (paragraph 6). By virtue of the Rome I Regulation and the Rome II Regulation, the conflict of laws concerning the law of obligations has in the meantime been rendered uniform throughout Europe (paragraphs 7 et seq.). The corresponding provisions of the EGBGB, which have been superseded by the Rome I and Rome II Regulations, were repealed. In details on the situation in regard to sources of law:

Under Article 25 of the German Constitution (Grundgesetz – GG), general rules of public international law form part of the domestic legal order and have priority over ordinary federal law. In regard to employment law there are no such general rules of public international law having a conflict-of-laws content. In regard to public law relating to employment law, one could at most conceive of a rule under which the national employment authority may not carry on any activity abroad, nor issue administrative acts in that connection. Conversely:

1 On this see Gamillscheg, IAR, p. 21.
2 Comprehensive overview in monograph form in Gamillscheg, IAR.
ly, it is not precluded from engaging in activity at national level even if that produces consequences for employment abroad.4

Moreover, under Article 3 EGBGB, the applicable law in a case with a foreign element must be determined in accordance with the private international law contained in the second chapter of the EGBGB, unless otherwise provided for by:

- directly applicable rules of the EU as they may apply from time to time; or
- provisions of international agreements which have been transposed into directly applicable domestic law.

Article 3 (1) EGBGB providing for the primacy of directly applicable European Union law is no more than declaratory in effect. For directly applicable Union law partakes of the primacy of application of Union law (on that point, see Section 3 paragraph 6). On the directly applicable rules of the EU, the legislature is referring specifically to the Rome I and II Regulations (see paragraphs 7 et seq. and 12).

International individual employment law, as a part of international contract law, is based on Article 8 of the Rome I Regulation. As early as the 1960s the European Commission had the intention of regulating at European level the conflict-of-laws rules in respect of employment law. It thus commissioned, for example, studies to be carried out on the application of conditions of employment in regard to employees working outside their country of origin, and on determination of the law applicable to employment relationships in cases with a foreign element.5 A preliminary draft convention on the law applicable to contractual and non-contractual obligations – including employment contracts – had already been drawn up and was in existence by 1976.6 It is based on preliminary work done in connection with the convention on the law applicable to contractual and non-contractual obligations.7 In parallel with that, there was a proposal for a Regulation on intra-Community conflict-of-laws rules concerning the law governing individual employment contracts.8 In the end no such instrument was en-

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3 Gamillscheg, IAR, p. 20.
4 Gamillscheg, IAR, p. 20.
6 Documented by Engels, RdA 1978, 52, 55.
7 Avant-projet de convention sur la loi applicable aux obligations contractuelles et non-contractuelles, SEC (72) 4429.
acted. Instead, on 19 June 1980, the Member States meeting in Rome entered into an international agreement on the private international law of contract. By means of this European Convention on the law applicable to contractual obligations (Rome Convention), the Member States at the time created uniform conflict-of-laws rules. Germany ratified the convention but did not make it directly applicable as, for example, Austria did under Paragraph 53 section 2 of the PIL law, old version, and Italy did by a reference in Article 57 of its PIL law (law number 218/1995); instead Germany transposed the convention in Article 27 et seq. of the EGBGB by means of its PIL amending law. Article 30 of the EGBGB contained the connecting rule referable to the law governing the employment contract. Until that time the international employment law found in the rudimentary provisions of the EGBGB had not yet been codified.

A lack of uniformity in its applicability, as manifested by the particular method of transposition chosen by Germany, instead of an enactment providing for it to be applicable, is one disadvantage, albeit not the only one, of an international instrument as opposed to a regulation directly applicable across the whole of the European Union. Accordingly, the European legislature strove to bring about a Communitarisation of private international law in regard to the law of obligations. For this there was a legal basis granting competence in Articles 61(c) and 65 EC (now Article 81 section 2(c) TFEU). On this basis, the Rome Convention between the Member States was replaced by the Rome I Regulation (reproduced in Annex, p. 417 et seq.). That limits the ability of Member

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12 On the substantive not just formal reference therein to the Rome Convention for all questions of international contract law, see Conetti/Tonolo/Vismara-Tonolo, p. 260 et seq.
13 Law on the amended legislation in private international law (IPRNG) of 25 July 1986, BGBl I 1142; on the preparatory papers see from an employment law perspective Gamillscheg, ZfA 1983, 307 et seq.
14 See on the legal position at the outset Gamillscheg, ZfA 1983, 307, 309 et seq.
16 On authority in the field of PIL see Barrière, RDI 2010, 3 et seq.
States to go their particular ways, which had been the case under the Rome Convention.\textsuperscript{19} Of course, this was not intended to be the only harmonisation of conflict-of-laws rules at European level. Rather the Commission endeavoured in addition to bring about uniformity of conflict-of-laws rules in regard to non-contractual obligations which had not been attended to following the Rome Convention. That accounts for the name of the Rome I Regulation: it is the successor in title to the convention entered into in Rome and was the first building block in the endeavour to render conflict-of-laws rules uniform. I /n that regard it is no longer of any significance that the Rome II Regulation concerning non-contractual obligations (paragraph 12) predated the Rome I Regulation.

However, the Rome I Regulation did not provide for the conflict-of-laws rules in regard to contractual obligations to be fully uniform. First of all, the United Kingdom and Ireland had special positions under the EC treaty of which only the United Kingdom made use.\textsuperscript{20} It has in the meantime accepted the Regulation which led to Decision 2009/26/EC providing for its application to the United Kingdom.\textsuperscript{21} Under a corresponding protocol, Denmark also enjoys a special position, with the consequence that the Rome I Regulation does not apply in Denmark. Denmark therefore has its own private international law rules which stem from the Rome Convention.\textsuperscript{22}

The Rome I Regulation is in fact a \textit{loi uniforme} for all the other Member States. That means that, under Article 2, the law which is determined to be applicable is always to be applied and not only in regard to relations between the Member States bound by the Regulation amongst themselves.\textsuperscript{23} A case involving Brazil to be decided by a German court will be dealt with in the same way as regards the conflict-of-laws rules under the Rome I Regulation as a case before a French court. Also in relation to Denmark the German courts will apply the Rome I Regulation, whilst Danish courts will not, however, apply the Rome I Regulation in regard to Germany.\textsuperscript{24} It is also immaterial whether the conflict rules determine the law of a Member State to be applicable or that of another

\textsuperscript{18} On the slight departures from the geographical applicable area of the Rome Convention on the one hand and the Rome I Regulation on the other and on the (slight) significance (especially for practical formulating measures) \textit{Magnus}, IPRax 2010, 27; 31.


\textsuperscript{20} Recitals 44 and 45.


State. Against that background Articles 27 et seq. of the EGBGB a. F. (old version) have lost their sphere of application since for contractual obligations the Rome I Regulation applies throughout. The EGBGB provisions were rendered devoid of object and did not even need to be repealed. For reasons of clarity it is, however, to be welcomed that the German Parliament has repealed the relevant provisions. Austria has, however, maintained Paragraph 35 of its PIL law in force for contractual obligations not falling within the terms of the Rome I Regulation.

Articles 27 et seq. EGBGB continues to be significant for old cases. For under Article 28 the Rome I Regulation applies to all contracts entered into after 17 December 2009. For older contracts the hitherto existing law therefore continues to be applicable, provided that subsequently there have been no substantial contractual amendments. The German Federal Labour Court has brought the preliminary question to the ECJ if the Rome I Regulation could be also applicable in the case that there have been contractual changes after the entering into force. Thus, for a considerable period to come, the old and the new regimes will continue to co-exist. However, for the purposes of this account, the old law will no longer be presented separately. Since the new provisions are structurally similar, the differences are not all that considerable, with the result that there is no actual need for the new law to apply to old cases. It should further be noted that, under Articles 27 et seq. of the EGBGB, earlier old cases were dealt with differently. Pursuant to Article 220 section 1 of the EGBGB, continuing obligations were not treated as completed transactions. Consequently, continuing obligations were thenceforth governed by the new law.

The other conflict-of-laws rules in the EGBGB may also retain significance provided that they have not been superseded by the Rome I Regulation. The

24 See Pfeiffer, EuZW 2008, 622, 623; Leible/Lehmann, RIW 2008, 528, 532; Martiny, ZEuP 2010, 747, 750; see also Lando/Nielsen, CMLRev. 2008, 1687, 1689 et seq. In detail on the point that the Rome Convention does not apply as regards the relation between the Member States and Denmark, although it was not formally terminated, Magnus, IPRax 2010, 27, 30 et seq.; Martiny, RIW 2009, 737, 739 et seq.
26 The text originally published under which the Regulation was intended to apply to contracts which were concluded ‘after’ 17 December 2009 was corrected ‘as from’, OJ 2009 L 309/87; there is some doubt as to whether the correction is not rather a substantive amendment in regard to which the procedure was not followed, see Rauscher/Pabst, NJW 2010, 3487, 3493.
28 Wurmnest, EuZA 2009, 481, 486.
29 BAG NZA 2015,542.
30 See generally on long term debt obligations Rauscher/Pabst, NJW 2008, 3477, 3481.
31 See also Magnus, IPRax 2010, 27, 32.
32 BAG AP No. 31 on Internationales Privatrecht Arbeitsrecht; Magnus, IPRax 2010, 27, 31 for further detail also on the opposite perspective; Däubler, RIW 1987, 249, 256; Junker, RabelsZ 55 (1991), 674, 692; Staudinger-Magnus, Art. 8 Rom I-VO paragraph 28; Bamberger/Roth-Spickhoff, Art. 8 Rom I-VO paragraph 4; criticised by Mankowski, IPRax 1994, 88, 89 et seq.
Rome I Regulation, however, deals to a great extent with the problems which arise within international employment law, such as the connecting rule to determine the applicable law governing the employment contract, or formal validity under Article 11 or assignment under Article 14 et seq., leaving mainly peripheral issues only, for example, the validity of a marriage (see Article 13 et seq. of the EGBGB, and see Section 6 paragraph 1). Furthermore, conflict rules are also to be found outside the EGBGB. Thus, Paragraph 1 of the law on seafarers (Seemannsgesetz – SeemG) yielded a universal connecting rule\textsuperscript{33} for determining the law applicable to the hiring of seafarers; this will now have been superseded by Article 8 of the Rome I Regulation (cf. Section 9 paragraph 155). Currently, in this context, as far as is apparent, mention should be made of Paragraph 21 section 4 of the legislation on the law of the flag (Flaggenrechtsgesetz – FlRG), whose regulatory content is not free from doubt (cf. Section 9 paragraphs 171 et seq.). A specific instance of statutory conflict-of-law rules is provided by the provisions of the law on the posting of workers (Arbeitnehmerentsendegesetz – AEntG) and the law on minimum employment conditions (Mindestarbeitsbedingungsgesetz – MiArbG), the latter repealed by the Federal Minimum Wage Act (Mindestlohnsgesetz – MiLoG) which render the employment conditions covered by them overriding mandatory provisions within the meaning of Article 9 of the Rome I Regulation (for greater detail, see Section 10 paragraphs 71 et seq.). It is also made clear in recital 34 of the Regulation that the Rome I Regulation does not prejudice the application of overriding mandatory provisions that are ‘in accordance with Directive 96/71/EC’ (the directive on the posting of workers, cf. paragraph 13).

As mentioned, the Rome I Regulation is not the only EU project for the harmonisation of conflict-of-laws rules.\textsuperscript{34} The law concerning non-contractual obligations for events occasioning harm occurring after 11 January 2009\textsuperscript{35} had already been rendered uniform by the Rome II Regulation (see Annex, p. 439).\textsuperscript{36} The relevant Article 38 et seq. of the EGBGB were brought into line with it.\textsuperscript{37}

\textsuperscript{33} Gamillscheg, IAR, p. 136.
\textsuperscript{34} Overall on the status of Europeanised international private and civil procedural law Wagner, NJW 2009, 1911 et seq. On the limits arising therefrom for referral see in detail Sonnenberger, IPRax 2011, 325 et seq.
\textsuperscript{35} See ECJ EuZW 2012, 35 – Deo Antoine Homawoo.
From a conflict-of-laws perspective in the employment sector this regulation is of particular interest because Article 9 contains a reference in regard to liability for industrial action. Since then the Rome III Regulation on the law applicable to divorce and legal separation has also been passed. 38 Further Rome Regulations are to follow. Thus, there are proposals for a Rome IV Regulation on the international law of succession 39 and a Rome V Regulation on the law of matrimonial property 40 is also under consideration.

Under Article 23 of the Rome I Regulation and Article 27 of the Rome II Regulation conflict-of-laws rules under Union law in relation to particular matters will take precedence over the above-mentioned regulations. 41 Of significance for employment law in that connection is the directive on the posting of workers 42 which governs the implementation of overriding mandatory provisions in the case of workers posted abroad (see Section 10 paragraphs 44 et seq). Moreover, the reservation in respect of legislation also applies to future conflict-of-laws rules 43 adopted under secondary legislation, with the result that there may be further employment law directives containing conflict-of-laws rules.

How the Rome I Regulation will relate to a Common Frame of Reference respectively something similar cannot be predicted prior to any harmonisation of European contract law and therefore remains to be seen. 44 Likewise, the above-mentioned regulations give way to international conventions to which the Member States were parties at the time of adoption of the relevant Regulations (on international conventions containing conflict-of-laws rules, see paragraph 21), provided those international conventions were not entered into exclusively between Member States (Article 25 of the Rome I Regulation, Article 28 of the Rome II Regulation). The rationale is that the Member States should not be compelled to violate international obligations to third countries (cf. Recital 41). 45 In this connection as well Denmark is deemed, under Article 1 section 4, first sentence, of the Rome I Regulation, not to be a Member State. Provisions of international conventions in relation to Denmark therefore should continue to be taken into account. In that connection the only convention of relevance for the purposes of employment law is the Rome Convention which

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40 See Schmidt, Jura 2011, 117, 128.
41 See Martiny, RIW 2009, 737, 741 et seq.
43 Hoffmann, EWS 2009, 254, 257; Martiny, RIW 2009, 737, 742.
44 Martiny, ZEuP 2010, 747, 753.
45 Magnus, IPRax 2010, 27, 32.
was superseded by the Rome I Regulation, in relation to Denmark as well (see footnote 24).

Overall, the provisions of private international law stand alongside the parties’ autonomy in giving effect to certain of the possibilities afforded by it. A central role in that connection is the freedom of choice of law which is also guaranteed, subject to restrictions, in the field of international employment law (see Section 9 paragraphs 14 et seq.). Otherwise private international law is not non-mandatory. For instance, the parties cannot agree connecting rules for determining the applicable law which deviate from the connecting rules provided for under private international law.

Uniform conflict-of-law rules are of no use if the uniform law is applied in the Member States in a manner which is not uniform. Article 18 of the Rome Convention already provided for uniform interpretation and, accordingly, Article 36 of the EGBGB required the objective of uniform interpretation and application of the Rome Convention to be taken into account. However, having regard to the judgements of foreign courts is often difficult in practice. Accordingly, it is wholly desirable for there to be a line of accountability, as happens in domestic law with the highest courts as courts of appeal. Thus, there were two protocols to the Rome Convention which conferred interpretative jurisdiction on the ECJ and governed proceedings before it. These entered into force for Germany only on 1 August 2004. Henceforth, the preliminary reference procedure under Article 267 TFEU applies in the case of the Rome I Regulation. That is a substantial advantage enjoyed by the Rome I Regulation over the Rome Convention. In that connection, it is true that the ECJ is not a court of appeal on a point of law but is called upon during proceedings at national level and is requested to give a preliminary ruling on the relevant question of interpretation. Uniformity of interpretation is thereby guaranteed. Plainly, that ought to operate better than the obligation on courts to take into consideration the case law of foreign courts. The previous Article 68 EC contained a special provision for the preliminary reference procedure. Under section 1 thereof a request for a preliminary ruling was mandatory only in the case of courts of last instance. However, this was repealed by the Lisbon Treaty and the TFEU contains no such provision, with the result that all courts may now submit a request for a preliminary ruling. Even the preliminary reference procedure is of no assistance when no relevant request is made, for instance, in the context of interlocutory proceedings or where a court, not being a court of last instance, declines to make a reference.

46 Prevailing opinion, see for instance Spickhoff, Jura 2007, 407.
47 In greater detail see Junker, RabelsZ 55 (1991), 674 et seq.
48 Both reproduced in Jayme/Hausmann, No. 70 a and 70 b; see Dutta/Volders, EuZW 2004, 556.
49 Published in BGBI. 2005 II p. 147, 148.
50 Francq, JDI 2009, 41, 42.
51 See Rauscher/Pabst, NJW 2008, 3477, 3480.
Nothing has yet been said about the method of interpretation. In that respect, the Rome I Regulation and the Rome II Regulation are to be interpreted in accordance with the general principles of interpretation under European law. Greater importance is thereby attached to a purposive interpretation under the doctrine of effectiveness. In that connection, reference is made to the relevant European legal writings. This means, specifically, that interpretation must be autonomous and it is not permitted to proceed in accordance with the rules of national law. Aids to interpretation are in the first instance the recitals. Although they are not directly endowed with legislative force, they offer significant pointers in the context of a teleological interpretation. From an employment law point of view, the significant recitals are those which refer expressly to the employment relationship (34) to (36). Important assistance is afforded also by the Giuliano/Lagarde Report which seeks to clarify the intentions of the framers of the Rome Convention in order to facilitate its application by the courts. There is no equivalent report in connection with the Rome I Regulation. Since it is a successor regulation to the Rome Convention with only slight changes the report continues to this day to be significant in terms of interpretation. Earlier case law and academic writings also retain their significance provided that the substance of the conflict rules has not been changed. Moreover, for the purposes of uniform interpretation the requirement to have regard to case law and academic writings originating in other Member States is of relevance. In this context the comparative-law method of interpretation plays a preponderant role because it affords a perspective on other problem areas and is the best means of ensuring compliance with the autonomous-interpretation requirement. It also plays a role in ascertaining general principles of law to be taken into account in the course of interpretation. Even if subtle differences between methods of interpretation under Union law and the earlier methods of in-

52 Magnus, IPRax 2010, 27, 28.
53 Reithmann/Martiny-Martiny, paragraph 37; Wurmnest, EuZA 2009, 481, 484. For a critical view of the effectivity of the method see Audit, JDI 2004, 789 et seq.
55 For further detail on the meaning of the recitals for the Rome I Regulation Kenfack, JDI 2009, 3, 15 et seq.
58 Lando/Nielsen CMLRev. 2008, 1687, 1688; Reithmann/Martiny-Martiny paragraph 38; on the taking into account. on interpretation of the TFEU see Hanau/Steinmeyer/Wank-Wank, Section 31 paragraph 14.
59 Magnus, IPRax 2010, 27, 28; see also Garcimartín Alférez, EuLF 2008 I-61, I-62.
60 Hanau/Steinmeyer/Wank-Wank, Section 31 paragraph 14; Kropholler, Section 10 III 2 d, p. 81; generally on the meaning of comparative law for Europeanised PIL Reimann/Zimmermann-Reimann, p. 1363, 1391 et seq.
61 Hanau/Steinmeyer/Wank-Wank, Section 31 paragraph 14.
interpreting the Rome Convention may be discernible, stemming above all from the fact that the Rome Convention was an international treaty, that does not prevent foreign case law from being taken into consideration even if it predates the Rome I Regulation because the objective of uniform interpretation was also mandatory in the past. Such judgements cannot have binding effect, but in a proper case they may necessitate preliminary reference proceedings if one does not wish to follow the view expressed therein.

Moreover, the same applies to domestic case law and academic writings as to their foreign counterparts: in view of the only slight changes regard may be had to old case law and academic writings concerning the provisions in question provided that they do not concern aspects which have been amended by the Rome I Regulation.

The Rome I Regulation refers in various recitals (e.g. 7, 17, and 40) to other conflict-of-laws rules under European law. Overall, it is manifestly intended to comprehend the systemic connections with other European legislative instruments and to take them into consideration in the process of interpretation. It is essential to view the Rome I Regulation, Rome II Regulation and the Regulation on jurisdiction (Brussels I bis Regulation, see Section 16 paragraphs 3 et seq.) as an interconnected unit. That is ultimately to be inferred from recital 7, under which the Rome I Regulation must be consistent with the Brussels I bis Regulation and the Rome II Regulation in regard to its substantive scope and provisions. In this connection it must be endeavoured to achieve a uniform interpretation, as indeed the ECJ interpreted the Rome Convention in accordance with the Brussels I bis Regulation. That is why it is a matter for concern that European conflict of laws contains no uniform ‘general part’ (on that see Sections 4-6). Besides, this requirement does not mean that the interpretation must lead to identical definitions. In view of the fact that different provisions pursue different objectives it seems entirely possible that analogous concepts in the various instruments are to be construed differently. What is crucial, however, is that in the course of interpretation, the systemic connections between the instruments are taken into account.

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62 See paragraph 17 footnote 46.
63 See, for the requirement as to uniform interpretation under the TFEU, Junker, RabelsZ 55 (1991) 674, 694; Magnus, IPRax 1991, 382, 384.
65 See Martiny, ZEuP 2010, 747, 781.
66 See ECJ EuZW 2011, 302 – Koelzsch.
67 See Hafiel, JDI 2010, 761 et seq. particularly 768 et seq.; see also Lein in Cashin-Ritaine/ Bonomi (Eds.) Le nouveau règlement ‘Rome I’ relatif à la loi applicable aux obligations contractuelles, Zürich 2008, p. 27, 44 et seq.
68 See Lüttringhaus, IPRax 2011, 554, 557.
It may be that important information will in the future also be provided by the report by the Commission to be submitted pursuant to the review clause in Article 27 of the Rome I Regulation. Admittedly, the report is to concern itself, in particular, with international insurance law and consumer protection. Under Article 27 section 2 of the Rome I Regulation, the Commission was also to submit a report by 27 June 2010 on the assignment of claims. Yet by the time of going to press there was only a preparatory report by the British Institute of International and Comparative Law.\footnote{http://ec.europa.eu/justice/civil/files/report_assignment_en.pdf.}

There are no relevant international provisions for determining the applicable employment law. It is doubtful whether the various ILO agreements, in particular the Seamen’s Articles of Agreement Convention number 22 of 1926 (new version on entry into force of the Maritime Labour Convention 2006), may be construed as generating conflict-of-law rules.\footnote{According to Gamillscheg, IAR, p. 21.} Under Article 1 of this convention, the convention applies to all sea-going vessels registered in the country of any Member ratifying the convention; ratifying Member States must ensure that the relevant provisions are applied to seafarers working on such vessels. Of course, that is not a conflict rule which constitutes directly applicable domestic law under Article 3 section 2 of the EGBGB. A divergent provision, such as may flow from Article 8 of the Rome I Regulation, will therefore take precedence irrespective of the self-denying ordinance in Article 25 section 1 (cf. paragraph 15) of the Rome I Regulation.

For certain areas of employment law, there are no conflict-of-laws rules. These are to be found neither in domestic law, nor at European or international levels. Thus, it continues to be the case that conflict-of-laws rules have to be elaborated by the courts and academic writings (see paragraph 2). Thus, except for liability (paragraph 12), there are no connecting rules (cf. Section 16) for determining the applicable law in respect of the law concerning industrial action. Nor are there any conflict rules concerning co-determination at the level of the plant or the undertaking (see Section 17).

Conflict-of-laws rules are not provisions governing matters for which legal provision is made abroad. Thus, for example, Paragraph 92(c) of the Commercial Code (Handelsgesetzbuch – HBG) provides that the law on agents may be disapplied in the case of commercial agents whose activity under a contract will not be performed within the EU or EEA area. That is a substantive provision of German law; for it to apply it must be called upon to be applicable under the relevant conflict-of-laws rule.\footnote{Gamillscheg, IAR, p. 27.}

Nor likewise can mandatory requirements for the equal treatment of foreigners and national citizens, under the general law on equal treatment (Allgemeines Gleichbehandlungsgesetz – AGG), constitute conflict-of-laws rules. In the case of such provisions as well they must first be called upon, by operation of a con-
flict-of laws-rule, to come into play. Nor yet is the duty of equal treatment under Article 7 of Regulation No. 1612/68\textsuperscript{72} a conflict-of-laws rule. Even if this regulation is directly applicable as a European Regulation, it does not determine by which law a migrant worker’s employment contract is governed but only which substantive conditions are to be granted to such a worker. Likewise, provisions of international law concerning the equal treatment of foreign workers and national workers are not, as a rule, to be construed as conflict-of-law rules.\textsuperscript{73}

Provisions which refer to local usages are not as a general rule conflict-of-law rules. They have substantive content and must for their part be called upon by operation of a conflict-of-laws rule to come into play. For example, that applies to Paragraph 6 of the Austrian law on employees (Angestelltengesetz – AngG) under which, in the absence of an agreement, the nature and extent of the services to be performed, and the remuneration, are to be determined by ‘local usage’. The employment contract is not therefore governed by local usage, rather it is the relevant duties that are to be determined by local usage insofar as Austrian law, and with it Paragraph 6 of the law on employees, is applicable. There are circumstances under which a rule which refers to local law may indeed be expanded into a genuine conflict-of-laws rule, but if there is any doubt, this will not be the case.\textsuperscript{74}

The converse is also true: a substantive provision which, by operation of a conflict-of-laws rule, is called upon to come into play does not as a rule preclude the requirements provided for under it, or certain of them, from being met abroad. This is referred to as facts occurring abroad (see Section 1 paragraph 16). This is as a rule sufficient for the provision to be satisfied in the same way as where the facts occur domestically. On interpretation, it may be that an application to facts occurring abroad is precluded. Of course, that is not the rule and is in most cases not intended by the legislature. See also on substitution, Section 16 paragraph 16.

\textsuperscript{72} Regulation (EEC) No. 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community OJ L 257/2.

\textsuperscript{73} Gamillscheg, IAR, p. 27 et seq.

\textsuperscript{74} Gamillscheg, IAR, p. 29 et seq.
Figure 2: Sources of international employment law

**Applicable law**
With provisions concerning matters provided for by law abroad

**Conflict rules**
- *Rome I Regulation*, Article 8 (individual employment contracts), for older cases Articles 27 et seq. EGBGB, Directive on posting of workers (see Article 23 and recital 34 Rome I Regulation) with transposing Law (in particular AEntG)
- *Rome II Regulation*, Article 9 (liability for industrial action)
- *autonomous law*
  - written (e.g. Paragraph 21 FIRG)
  - unwritten (e.g. in respect of codetermination)

**International jurisdiction**
(see Section 16 paragraphs 2 et seq.)
- *Brussels I Regulation*
- *Lugano Convention*
- Application by analogy of the jurisdiction provisions of the Act on civil procedure (Zivilprozessordnung – ZPO)
3 Influences of European Union law

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European Union law raises specific conflict-of-laws issues in regard to the law governing the applicable employment law which must now be examined.

Apart from the hierarchy of European norms, of which the Rome I Regulation and the Rome II Regulation form part, European law exerts a variety of essential influences. Moreover, Union law is also significant specifically in areas which are not harmonised at European level such as company law or collective employment law.

I. Conflict-of-laws rules under Union law

Irrespective of those issues, it has to be elucidated to what extent express or disguised conflict-of-laws rules exist in European Union law, apart from the provisions originating in private international law of the Rome I Regulation and the Rome II Regulation.

In regard to a disguised conflict rule in Union law, it has, for example, been argued that the principle under primary law of the country of origin could compel a connection to the place of origin of the supplier1; similarly, that fundamental freedoms give rise as a matter of principle to freedom of choice of law which is liable to be overridden under other provisions only under the same conditions as those under which fundamental freedoms may be restricted.2 If that were correct, the connecting rules under the Rome I and II Regulations would in part fall victim to the primacy of primary law. This view does not, however, carry conviction. Primary law contains no conflict-of-laws rules. To infer disguised conflict rules would be justifiable only if conflict-of-laws rules would otherwise be incompatible with primary law. That is however in general not the case (for an exception in international company law see paragraph 6 below). In the assessment of the facts of the case, Union law proceeds on the basis of the direction indicated by conflict-of-laws rules and in the end assesses the law applied against the yardstick of Union law. For example, in the Centros case, the ECJ refrained from any statement on conflict of laws and merely stated with regard to freedom of establishment that a company lawfully established in one Member State may not be prohibited from registering a branch in another Member State under the provisions applicable there to branches.3

1 To that effect Basedow, RabelsZ 59 (1995), 1, 12 et seq., subject to the ‘most favourable’ principle; also e.g. Jobard-Bachelier, in: Audit/Muir-Watt/Pataut (Eds.), Conflits de lois et régulation économique, Paris 2008, p. 57 et seq.
3 ECJ EuZW 1999, 216 – Centros.
cases can private international law itself be contrary to Union law (cf. subsection II below).

In secondary law there are various accompanying directions concerning conflict-of-laws rules which, over and above the Rome I Regulation and the Rome II Regulation, contain rules for determining the applicable law.4 These are to be found in particular areas of private law which for the most part are of no significance to employment law. Only the directive on the posting of workers (see Section 10 paragraphs 44 et seq.) contains important directions of significance to international employment law. As a rule these are ancillary to substantive provisions and are mostly unilateral conflict-of-laws rules to deflect the law of a third country in favour of substantive law harmonised at Community level.5 Such a unilateral conflict rule may also be inferred from a directive by interpretation, where there is no express provision. In the Ingmar case, the ECJ clarified that, in the case of a commercial agent in the territory of a Member State, the claims of the commercial agent under the harmonised law applicable to commercial agents must be applied even where the parties have freely chosen the law of a third country as the law governing the contract (see, on this issue, the account given concerning public order under Union law, in paragraph 15).6 This specific problem may not have been entirely cleared up in the sense of being expressly regulated by the internal market clause in Article 3 section 4 of the Rome I Regulation (see below Section 9 paragraph 4).7 For the rest, the harmonisation of conflict rules by the Rome I Regulation should reduce the need for specific conflict rules under secondary law. It cannot however be entirely removed. Accordingly, Article 23 states that the regulation is without prejudice to the application of other conflict-of-law provisions of Union law.

II. Hierarchy of norms and precedence of application

In the same way as substantive law, conflict rules must yield to higher-ranking law. Before the harmonisation of conflict rules by the Rome I Regulation and the Rome II Regulation, when the conflict of laws was a matter principally for national law, the principal issue was the precedence of application of Union law. According to the doctrine of the precedence of application, European law leaves conflicting domestic law unaffected in regard to its claim to apply, but inhibits it to the limits of contradiction.8 In that connection, the fact that conflict rules can produce effects running counter to Union law is generally acknowledged.9 In regard to precedence of application, the Bremen Labour Court, for example, addressed a request for a preliminary ruling to the ECJ asking whether

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4 Listed in MünchKomm-Sonnenberger, Einl. IPR paragraph 187.
5 See for more detail on the various directions, Staudinger, ZfRV 2000, 93, 94 et seq.
6 ECJ RIW 2001, 133 – Ingmar.
7 But see Hoffman, EWS 2009, 254, 258; doubts as to the possibility of maintaining this case law under the Rome I Regulation in Pretelli, Europa e diritto privato 2009, 1083, 1126.
8 ECJ ECR [1964] 1251, 1270 – Costa; BVerfGE 85, 191, 205; BVerfGE 75, 223, 244; BVerfGE NJW 2009, 2267, 2284 et seq. – Lisbon.
the lower wages and reduced employers’ contributions to social insurance associated with the conflict rule in Paragraph 21 section 4 of the legislation on the Law of the Flag (Flaggenrechtsgesetz – FlRG) (cf. Section 2 paragraph 11,) could constitute unlawful subsidies\textsuperscript{10} under Article 87 EC (now Article 107 TFEU), which was answered by the ECJ in the negative.\textsuperscript{11} Even though wide areas of the international law of obligations have been harmonised and, as a result, the question would be whether the Rome I Regulation or the Rome II Regulation is compatible with the higher-ranking primary law, the example shows that, even today, national conflict-of-laws rules would have to be subjected to that examination. For the provision in Paragraph 21 section 4 FlRG subsists irrespective of the Rome I Regulation. Its compatibility with higher-ranking law has however become questionable on another ground namely from the perspective as to whether such a special provision still has a place under the aegis of the Rome I Regulation.\textsuperscript{12}

The higher-ranking primary law which may be contravened by the connecting rules for determining the applicable law under the conflict rules consists primarily in the fundamental freedoms.\textsuperscript{13} Alongside the prohibition on discrimination on the ground of nationality, they also contain prohibitions on abridgment.\textsuperscript{14} There is also the general prohibition on discrimination under Article 18 TFEU. That may be illustrated by an example. German international company law follows the theory of the company seat, which is also of significance in terms of the law applicable to co-determination.\textsuperscript{15} Under the theory of the company seat, the law of the place of the actual administrative seat of the company governs the company, whilst the establishment doctrine, which is upheld in many other countries, connects with the place of incorporation (which is freely chosen) for the purpose of determining the applicable law. Thus, the legal capacity of a company having its seat in Germany is to be determined according to German law even if it was incorporated in accordance with English law. Transfer of a company seat to Germany was therefore not without problems for foreign companies because they do not satisfy the conditions as to incorporation under German law. Initially, the ECJ made clear in the Daily Mail decision that it was not to be inferred from freedom of establishment (Article 49 TFEU) that it must be possible for a company to effect a cross-border transfer of its seat whilst retaining its identity.\textsuperscript{16} However, in the Überseering case the ECJ decided, on a request for a preliminary ruling by the Federal Supreme Court\textsuperscript{17}, that a Member State must in
any event recognise a company as having legal capacity if it enjoys that capacity in the state of its incorporation and indeed even if the other Member State would deny recognition of its legal capacity under the company seat theory. Thus the ECJ, without stating this expressly, has inferred from freedom of establishment a disguised conflict rule. In the continuation of the proceedings the Federal Supreme Court followed that and decided that a company enjoying freedom of establishment, after transferring its seat to Germany under its Articles of Association, is to be recognised as having legal capacity to the same extent as is recognised by the law governing its incorporation.

From both perspectives (primacy of application of Union law and primacy of primary law) it is necessary to adopt a prudent attitude in regard to the question of whether a conflict rule is contrary to Union law. For the incompatibility with Union law as a general rule stems not from the conflict rule itself but from the application of the substantive rules which, by operation of the conflict-of-laws rules, are called into play. Only the interaction of both will give rise to a result contrary to Union law. For a legislature this may mean that there is a possibility to react either substantively or under a conflict rule. However, these possibilities are not afforded to the person applying the law without further ado. Only if, by way of exception, it is the conflict rule itself which infringes Union law, and the infringement cannot be made good by an interpretation in conformity with Union law, will application of the conflict rule be precluded. It was possible for that to happen, for example, under former Article 38 EGBGB a. F. (old version): no claims could be brought against German nationals who had committed tortious acts abroad, other than those that could have been brought under German law. That was capable of giving rise to discrimination on the ground of nationality, depending on the configuration of the case, solely on the basis of that conflict rule. The rule was subsequently replaced by Article 40 EGBGB, which has in the meantime been partially superseded by the Rome II Regulation. In all other cases, a substantive-law solution is required with the means which are available in accordance with general principles for that purpose.

In that connection, for example, interpretation in conformity with Union law can be

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17 BGH EuZW 2000, 412.
18 ECJ RIW 2002, 945 – Überseering. Although the company has to be recognised as having legal capacity according to its law of establishment, that principle only applies to companies established in a legal order which follows the theory of establishment, Leible/Hofmann, RIW 2002 925, 931 et seq. Further it is necessary that the law of the state in which the company is established recognised the maintenance of legal personality where the company seat moves, ECJ DB 2009, 52 – Cartesio.
19 MünchKomm-Sonnenbger, Einl. IPR paragraph 140.
20 BGH NJW 2003, 1461. For further particulars see Deinert, Internationales Arbeitsrecht, Section 17 paragraphs 73 et seq.
21 See Kropholler, Section 10 1 2, p. 74 et seq.
22 See Roth, GS Lüderitz p. 635, 639 et seq.
23 Koch/Magnus/Winkler von Mohrenfels, Section 1 paragraph 12.
European primary law further plays an important role when it comes to preventing social undercutting in the context of the exercise of cross-border freedoms. Four cases which were decided by the ECJ concern the subject in the broadest sense and have led to considerable debates about the interrelationship of fundamental freedoms and social rights and about the sensitivity of the ECJ to social issues (cf. Section 10 paragraphs 63 et seq.).

9 The Viking case concerned industrial action by the International Transport Workers Federation (ITF) and a Finnish Union against the reflagging of a vessel to Estonia. In that decision the ECJ recognised the right to take collective measures as a fundamental right but at the same time pointed out that this had to be exercised in accordance with the fundamental freedoms. The restriction of freedom of establishment by the exercise of the fundamental right to take collective measures to pursue **overriding reasons of general interest**, including also employee protection, had to be necessary and appropriate (cf. Section 10 paragraph 67).

10 The Laval case concerned collective measures (blockades of building sites) by Swedish trade Unions against a Lithuanian building company carrying on building works in Sweden, in order to bring about the conclusion of a collective agreement under Swedish law for posted workers. The ECJ assessed this measure against the fundamental freedoms, in this case the freedom to provide services. It decided that such measures were impermissible where they went beyond the enforcement of minimum working conditions, as provided for in the posting directive (see Section 10 paragraphs 63, 67).

11 The posting directive also played a role in the **Rüffert** and **Commission v. Luxembourg** cases. The **Rüffert** case concerned a requirement to abide by collective agreements in the context of public building work procurement contracts. The ECJ held that, in the context of public tenders for building works, undertakings could not be required to commit themselves to pay their workers at least the local rate of wages where they were not bound by the relevant collective agreement. The **posting directive** encompasses only the possibility of extending to posted workers statutory minimum wages or suchlike laid down in universally binding collective agreements. Loyalty to the collective agreement was not relevant in either respect. Nor did the objective of employee protection justify the interference with freedom to provide services occasioned by loyalty to the collective agreement. In that connection, the ECJ was concerned that loyalty to the...
collective agreement covered only public contracts, not private ones, and that the minimum wage under the collective agreement went beyond that provided for under the law on the posting of workers (Section 10 paragraph 64). In the Commission v. Luxembourg case, finally, the question arose as to whether the directive on the posting of workers had been correctly transposed in the Grand Duchy of Luxembourg. In this decision the ECJ confirmed the statements already made in Laval and Rüffert to the effect that the directive on the posting of workers was conclusive. The application by a Member State to workers posted to its territory under Article 3 section 10 of the directive of other working and employment conditions, for public policy reasons, was an exceptional measure which was to be interpreted strictly because it constituted a derogation from freedom to provide services (Section 10 paragraphs 58 et seq.).

Common to all four cases is that they initially disclose no conflict-of-laws content. Nor is it, for instance, the case that a possible infringement of Union law stems from a combination of a conflict-of-laws rule and substantive law. Rather the problem in all cases is to be found in the substantive law (see, for the Laval case, also Section 15 paragraph 27). Nonetheless, the decisions in Laval, Rüffert and Commission v. Luxembourg are nonetheless significant from the point of view of conflict-of-laws rules because Union law lays down limits under freedom to provide services on the application to posted workers of overriding mandatory provisions under special connecting rules. The issue will therefore be discussed in more detail in the context of overriding mandatory rules (see Section 10 paragraph 61). Conversely, the Viking decision does not raise a conflict-of-laws problem but an issue as to the extent to which in domestic law limits may be laid down as regards the exercise of cross-border freedoms. The subject will therefore be touched upon only briefly (Section 10 paragraph 67).

III. National public policy in a European mould

Both Article 21 of the Rome I Regulation and Article 26 of the Rome II Regulation contain a reservation in respect of public policy. Under those articles, application of a provision may be refused if such application would be incompatible with the public policy of the forum. The determining factor is the public policy of the forum. That does not mean a European public policy, but a national one. Yet that does not preclude fundamental values of the Union legal order, which form part of the national legal order, from influencing the content of German public policy.

Reference had been made to this already in the Giuliano/Lagarde report (Section 2 paragraph 18). That was why the Max Planck

31 ECJ AP No. 16 on Article 49 EC – Rüffert.
33 Koch/Magnus/Winkler von Mohrenfels, Section 1 paragraph 16; on the creation of European public policy by legislation, see Remien, CMLRev. 2001, 53.
34 V. Bar/Mankowski, Section 3 paragraph 46; Baumert, Europäischer ordre public und Sonderanknüpfung zur Durchsetzung von EG-Recht unter besonderer Berücksichtigung der sog. mittelbaren horizontalen Wirkung von EG-Richtlinienbestimmungen, Frankfurt/M 1994, 47 et
Institute for Foreign and International Private Law pressed for the insertion of relevant clarificatory wording in the Rome I Regulation.\footnote{Giuliano/Lagarde, BT-Drucks 10/503, p. 33, 70.} This suggestion was not, however, taken up.

One may therefore speak of a \textit{national public policy within a Union law mould}\footnote{MPI, RabelsZ 71 (2007), 225,337 et seq.}. That concerns specifically the legal principles in Article 6 EU.\footnote{MünchKomm-Sonnenberger, Einl. IPR paragraph 209; Martiny in v. Bar (Ed.), Europäisches Gemeinschaftsrecht und IPR, p. 211, 220 et seq.; Koch/Magnus/Winkler von Mohrenfels, Section 1 paragraph 16.} Where such fundamental legal principles are exceptionally contained in directives, for example, the principles of anti-discrimination law (see in that connection also Section 5 paragraph 17), the directive will however require to be transposed in the forum in order for its content to be deemed to form part of public policy.\footnote{Deinert, Jahrbuch Junger Zivilrechtswissenschaftler 1997, p. 257, 270; also Koch/Magnus/Winkler von Mohrenfels, Section 1 paragraph 16.} In addition, for public policy to come into play there must be an adequate connection with a national situation. A mere connection with an internal market situation is not sufficient.\footnote{MünchKomm-Sonnenberger, Einl. IPR paragraph 209.}

Conversely, it must be assumed that membership of the Union is based on the assumption of a certain level of agreement as to the fundamental conceptions underlying the Member States’ legal systems, thus calling for very restrained use of the public policy reservation \textit{in regard to other Member States}.\footnote{MünchKomm-Sonnenberger, Einl. IPR paragraph 211.} In the context of harmonised substantive law there is no place at all for the application of the public-policy reservation.\footnote{MünchKomm-Sonnenberger, Einl. IPR paragraph 210.} Outside of harmonised substantive law, on the other hand, the application of the public-policy reservation is not precluded from the outset, even though it must be handled with restraint in view of the concurring fundamental conceptions. That cannot be taken so far that the public-policy reservation is not applied for fear of political ill-feeling in cases where its application would otherwise be indicated. Yet, application of the public-policy reservation can give rise to a curtailment of fundamental freedoms, which will require justification.\footnote{See to that effect, Kraushaar, Anm. zu AiB 1990, 479, 480 et seq.} Of course, that which constitutes public policy will normally be an overriding general interest, which will provide the requisite justification.

\footnote{seq.; Böhm, Verbraucherschutz im Internationalen Privatrecht, Bayreuth, Univ., Diss. 1993, p. 204; Biagioni, NLCC 2009, 911, 914 et seq.; see also BGH NJW 1969, 978, 979 et seq.}
IV. Mandatory public policy under Union law

Since EU directives require to be transposed into national law, and there may therefore be transposition deficits in individual Member States, the question arises as to whether, in terms of mandatory public policy, the transposed law of directives can nonetheless be in the nature of overriding mandatory law (Section 5 paragraph 5) within the meaning of Article 9 of the Rome I Regulation. That would allow that law to be applied under a special connecting rule determining applicability, rather than merely averting the application of foreign law. The issue originally arose in the “Gran Canaria cases”. The definitive issue, on which these cases turned, was the question whether German holidaymakers who had participated in sales events in Spain and had acquired items at those events, had a right to cancel their agreements, although the contract was governed by Spanish law, and the directive in question concerning cancelation of doorstep contracts had at the material time not been transposed into Spanish law.\(^\text{45}\) In order to resolve these cases it was, inter alia, suggested that the right to cancel should be construed as an overriding mandatory provision, since directives seek to create binding law on a European-wide basis, with the result that the German transposing law was also to be regarded as an overriding mandatory provision.\(^\text{46}\) After all, the directive itself produces no direct effect, so it is the relevant law transposing it in the forum which is significant.\(^\text{47}\) Although the Federal Supreme Court has not expressed a view on this doctrine,\(^\text{48}\) some academic writers object that such \textit{incidental horizontal direct effect} of directives under private international law would run counter to the prohibition under Union law on directives having direct effect to the detriment of private individuals.\(^\text{49}\) It is true that it accords with the ECJ’s settled case law that directives may not produce direct effect to the detriment of private persons\(^\text{50}\) and can produce such direct effects only under certain conditions in relation to the defaulting Member State (vertical direct effect).\(^\text{51}\) Of course, the exclusion of horizontal direct effect is principally based on the fact that, normally, where a person relies in domestic law on a directive which has not been transposed in that country, there is no legal rule

\(^{48}\) Left open by BGHZ 135, 124, 135 et seq.; rejected in the case of excessive transposition of directives in regard to the excessive domestic part BGHZ 165, 248, 259.
which is binding on the individual. However, there is no such lack of a rule where overriding mandatory provisions are deemed to be applicable. For there is a national transposing rule which can be applied if, by operation of the conflict-of-laws rules, it is called upon to apply as a special connecting rule. Any more far-reaching prohibition on immediate direct effect is to be found neither in Article 288 TFEU, nor has it been postulated by the ECJ in the context of the further development of the law. Rules for transposing directives in the employment-law sector may also be deemed to be special connecting rules determining applicability. The decisive point in the final analysis is whether an international implementing intention in line with Article 9 section 1 of the Rome I Regulation may be inferred from the stated purpose of the directive. On the issue of a restriction under the directive on the posting of workers, see under Section 10 paragraphs 65 et seq.

It is true that the Ingmar decision (paragraph 5) produces nothing of immediate relevance to the current problem. First, that was an issue of implementation as against citizens of non-Member States; secondly, the ECJ did not form a view on the conflict-of-laws issue. Nonetheless, the ECJ saw no problem in the fact that it was a situation as between private individuals in which only in the forum was there a rule which could operate specifically to determine applicability. Above all, however, one may conclude that, where the contents of directives are so significant that they demand to be applied also in relation to non-Member States, although the non-Member State is not an addressee of the directive, this must apply a fortiori within the Union in which the Member States are the addressees of the directive.

Of little further significance for employment law is another restriction elaborated by the Federal Supreme Court from the conflict-of-laws doctrines. For consumer agreements, Article 29 EGBGB a. F. (old version) (today Article 6 of the Rome I Regulation) is, in regard to its sphere of application, intended to be a Lex specialis to Article 34 EGBGB a. F. (old version) (today Article 9 of the Rome I Regulation). No such restriction has incidentally been postulated by the French Court of Cassation. However, it will have to be clarified at a later stage whether the logic of this argument carries conviction and needs to be transposed to employment law (see Section 10 paragraph 31).

53 In more detail Deinert, Jahrbuch Junger Zivilrechtswissenschaftler 1997, p. 257, 274 et seq.
54 Koch/Magnus/Winkler von Mohrenfels, Section 1 paragraph 15.
56 See Liukkonen, p. 142 et seq. Simplified in Hoffman, EWS 2009, 254, 260, according to whom employment law directives served merely to protect the weaker party.
57 For another view see Kindler commentary on ECJ BB 2001, 11,12.
58 BGHZ 123, 380, 391.
The result thus arrived at is not called in question by Article 3 section 4 of the Rome I Regulation. The European legislature has laid down that the provisions of directives are mandatorily enforced against a choice of law in the case of a purely internal market situation. It cannot be inferred therefrom that those directive provisions cannot also be enforced in the case of an objective rule with internationally binding validity providing for applicability. The Rome I Regulation refrains from any statement in that connection. The only question is whether the national transposing law is deemed to be in the nature of such an overriding mandatory provision. That is, for example, the case with the anti-discrimination law. See also Section 10 paragraph 71, Section 12 paragraph 88.

The same restraint is called for, in terms of the positive application of public policy, in regard to other Member States’ legal systems as that already encountered in the case of the public policy reservations (paragraph 14). At least since the judgement in Commission v. Luxembourg (paragraph 11), there has been a basic principle of mutual recognition in the area of harmonised substantive law. This precludes the implementation of overriding mandatory law based on directives as against the transposing law of other Member States (see, in greater detail, Section 10 paragraphs 71 et seq). Nevertheless, according to the younger ECJ case law it is possible that Member States enforce mandatory rules implementing a European directive that go beyond the minimum standard of a directive – also in a case where the enterprise in question is a service provider from another Member State.

60 But see Hoffmann, EWS 2009, 254, 260.
61 See also Däubler in Däubler/Bertzbach (Eds.), AGG, 2. Aufl., Baden-Baden 2008, Einl. paragraphs 248 et seq.; in more detail Lüttringhaus, Grenzüberschreitender Diskriminierungsschutz – Das internationale Privatrecht der Antidiskriminierung, Tübingen 2010, 216 et seq. who is in favour of German anti-discrimination law as ‘relative overriding mandatory law’ giving way to the anti-discrimination law of other Member States (p. 255 et seq.).
62 ECJ 17 October 2013 – C-184/12 – Unamar; cf. in this regard also BAG NZA 2016, 473, no. 98.
Chapter 2: General doctrines of private international law of relevance to employment law

1 The general doctrines of private international law are, as it were, the ‘general part’ of private international law. They are bracketed out and govern all other sectors. In what follows certain questions arising out of the general doctrines of private international law will be investigated with a view to their significance for employment law. This is not, however, intended to be a comprehensive treatise on this particular matter. In that connection, reference is made to the relevant literature on private international law. The focus will be directed at questions which call for a specific employment-law answer (classification [Section 4] and public policy [Section 5]) or which do not immediately occur to the reader not versed in matters of conflict of laws (renvoi and double renvoi and preliminary and incidental questions [Section 6]).

2 Matters pertaining to the general doctrines were scarcely touched upon in the European regulations, apart from in regard to the public-policy reservation (Section 5). That is because of the specific subject-matter related method of enactment in regard to the private international law of contractual and non-contractual obligations.¹ The task of developing an overall European concept in that connection has hitherto scarcely been tackled.² Yet to have automatic recourse to the general doctrines of autonomous private international law is not a permissible method. What is required is to allow the regulations to form the starting point for developing the ‘general part’ laying down the foundations applicable to the concept as a whole.³

4 Classification

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I. Problem

1 The classification problem is in discovering the relevant conflict rule. The legal issue must be subsumed under the applicable subject-matter of a conflict rule (paragraphs 2 et seq.). In that connection two questions arise: one is the interpretation of the conflict rule; that will be discussed subsequently in connection with the employment contract (paragraphs 14 et seq.). The second question is: from

¹ Francq, JDI 2009, 41, 49.
³ Deinert, RdA 2009, 144, 154 et seq.
the perspective of which legal order is the legal issue to be classified under a conflict-of-laws rule (paragraphs 10 et seq.)?

Frequently, classification presents no problems. If a German travelling representative employed by an English undertaking wishes, for example, to claim leave entitlement, Article 8 of the Rome I Regulation is the authoritative conflict rule. Problems of classification may, however, arise in two respects:

- The conflict of laws works with systemic concepts. Whole areas of substantive law are more or less referred to en bloc. Thus, problems of succession are dealt with in the Rome V Regulation, contract law is dealt with generally in Articles 3 and 4 of the Rome I Regulation, and individual employment contracts in Article 8 of the Rome I Regulation. Whether the driver of a vehicle offering deep-frozen products for sale is entitled to the continued payment of remuneration in the event of illness depends on which conflict rule is applicable to the case, and whether, consequently, the contract is a general one or, specifically, an individual employment contract. It turns therefore on the sphere of application of the conflict rule.\(^1\) As the Federal Labour Court made clear in its well known ‘Eismann’ decision, there may be an employment relationship, depending on the situation, irrespective of any franchising arrangement.\(^2\) Yet, the substantive concept does not have to be identical with the concept underpinning the conflict rule. The problem here discussed may with good reason be termed a question of subsuming the issue under the conflict rule.\(^3\) Moreover, the example shows that the problem is not merely one relating to the conflict of laws. Ultimately, the concept of a salesman is a generic term which determines access to a whole area of law. The concept of an employee also ultimately raises a classificatory question determining access to employment law.\(^4\)

- Even when we are dealing with an individual employment contract under the conflict rule in Article 8 of the Rome I Regulation, further classificatory problems may arise. Not all problems which can arise in connection with an employment contract have to be classified as problems to do with the individual employment contract. Claims in connection with inventions by employees could be classified as questions concerning intellectual property (see Section 12 paragraphs 9 et seq.). The protection of the holder of a mandate under the company’s constitution (Paragraphs 15 KSchG [Kündigungsschutzgesetz], 103 BetrVG [Betriebsverfassungsgesetz]) may be classified from the point of view of the law on protection from dismissal and thus from the point of view of the employment contract or the company’s constitution (see Section 13 paragraph 52); a challenge to a notice of dismissal under Paragraph 105 of the Austrian Labour Constitution Law (Arbeitsverfass-

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1. Kropholler, Section 151, p. 114.
2. BAG NZA 1997, 1126.
4. See Gamillscheg, IAR, p. 42.
The starting point of the classification problem, which here again also presents itself as a question of discovering the authoritative conflict rule, must first be the **scope-defining provision** under Article 1 of the Rome I Regulation or Article 1 of the Rome II Regulation. These provisions govern the question as to which obligations each Regulation is to apply to. In that connection, Article 1 section 1 of the Rome I Regulation covers all *contractual obligations* in civil and commercial matters. Under Article 1 section 2 administrative matters are excluded from the provision. However, that does not preclude public-law provisions from being of significance for employment law (see Section 1 paragraphs 32 et seq.). Article 1 section 2 further removes various matters from the scope of application of the regulation. Of significance in this connection is that certain contracts concerning old-age assurance are under subparagraph (j) not covered by the Rome I Regulation. The same is also true under subparagraph (i) of obligations arising out of dealings prior to the conclusion of a contract.

Staying with the above-mentioned example, the problem may be illustrated by the **dismissal of a representative** under the company’s constitution. Suppose that we are dealing with an employee posted by a group of companies headquartered in France who has been working in Germany for some years and has been voted on to the works council and whose employment contract is subject, under Article 8 of the Rome I Regulation, to French law owing to a closer connection with that country. The question is whether he can rely on the special dismissal protection under Paragraph 15 of the law on protection from dismissal (KSchG). At first sight, one may be inclined to answer the question in the negative by reference to the fact that French law is applicable to the *employment contract* under Article 8 of the Rome I Regulation. On the other hand, one may think that this is a **problem concerning the law governing the company’s constitution**. For under the case-law the provision in question is intended to protect not only the relevant member of a body representing certain interests but also the proper functioning of the works representation and its continuity in terms of its staff.\(^5\) Were one to classify this special dismissal protection from the point of view of the law governing the company’s constitution, German law would be applicable. For, according to German private international law, the law applicable to a company’s constitution is determined by the location of the undertaking.\(^6\)

The problem again has several aspects. First, one can view the problem from the perspective of the conflict rule. What is involved, then, is its scope of application, that is to say, ultimately, the interpretation and subsuming of the issue under the conflict rule. But one can also view it from the vantage point of the

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\(^5\) Cf. e.g. BAG AP No. 14 on § 15 KSchG 1969.

\(^6\) See *Deinert*, Internationales Arbeitsrecht, § 17 Rn. 10 ff.
substantive law. Then the question is whether a specific substantive rule of law is called upon to apply. That too is a question of interpreting and subsuming the issue under the conflict rule. In principle the question is the same. Whilst, however, from the one perspective the question asked is what is covered by the conflict rule, from the other perspective, the question is which conflict rule is relevant. In terms of the classification problem it is thus clear that what is entailed is the allocation of a legal issue to a conflict rule. Whilst such matters of classification are left under autonomous private international law predominantly to the courts and academic commentators, the uniform European international contract law provides statutory assistance, in particular, in Articles 10 and 12 of the Rome I Regulation. These questions which concern the scope of the employment contract will be investigated in detail in Chapter 4 (Sections 11-14).

At this stage we are concerned only with methodology.

The peculiarity of the question is that classification concerns a legal issue and points the way to the relevant rule of substantive law whilst it is only when looking at the applicable rule of substantive law that the possible legal question is delineated. It has therefore been correctly stated that classification is not a linear process but demands multiple changes of perspective between the conflict rule and the rule of substantive law.

Classification leads to a demarcation of the substantive rules of law called upon to apply. It is not then, for instance, the lex causae which is authoritative under every conceivable point of view but only to the extent determined by the classification. Thus, for example, claims by the spouse (and worker) based on family law are not covered by referral to Article 8 of the Rome I Regulation because such claims are excluded from its scope of application under Article 1 section 2(b) of the Rome I Regulation. The applicable rule in the case of family law questions is Brussels IIa Regulation. The systemic concept of the conflict rule thus demarcates the law called upon to apply. No further classification in then required at a second stage where the question is asked as to how the lex causae conducts its classification. The unadulterated application of the foreign law in no way requires that. Whether classification at a second stage is necessary is solely a conflict-of-laws question to be answered by the lex fori. Herein lies an important key to the question of dealing with public-law employment protection law. In keeping with a functional classification in accordance with the lex fori it must not be asked at this point whether the rule of law that may be at issue is a public-law rule of law and therefore excluded from the scope of application of the Rome I Regulation. The question is rather whether the rule of law in question makes provision for the employment relationship and thus is therefore part of the lex causae. Public-law provisions may therefore also

\[\text{See Sonnenberger, FS Kropholler, 2008, p. 227, 239 et seq.}\]

\[\text{Kropholler, Section 15 II 3, p. 119.}\]

\[\text{Kropholler, Section 17 II, p. 129.}\]

\[\text{Kropholler, Section 17 II, p. 130.}\]
be liable to be classified as part of the law governing individual employment contracts.\(^{11}\) Whether a rule is to be classified as a rule of public law can of course then only be answered by the *lex causae*.\(^ {12}\) If it is to be so classified, then the further enquiry to be made under the *lex causae* is whether it requires nonetheless to be considered from the point of view of the law governing the contract.\(^ {13}\) Irrespective of that, it may be deemed to apply as an overriding mandatory provision or under another special connecting rule determining its applicability. It will then be a question of interpreting the substantive law in order to determine whether the provision in question also applies to cross-border activities.\(^ {14}\) Further particulars in this regard will be found under Section 10 paragraphs 110 et seq.

A problematic point is whether there can be a *renvoi* to the law of the forum (see Section 6 paragraph 2) where that law operates a different classification. According to the foregoing (paragraph 6), the problem is that the application of the provisions of the foreign law, where the foreign law classifies differently, may lead to an erroneous application of the foreign law. Where a legal relationship classified as an employment relationship would, under the relevant substantive law, be a provision of services by a self-employed person, to apply to it the employment-law provisions there pertaining would be an application of the law which would not be entertained by the court making the *renvoi*. That militates in favour of a denial of *renvoi* where a different classification is operated.\(^ {15}\)

On the other hand, total *renvoi* does require heed to be paid to the private international law of the legal system called upon to apply (see Section 6 paragraph 2); its private international law must be applied in such a way as the court in the foreign country would apply it, that is to say in light of the different classification as well.\(^ {16}\) Accordingly, *renvoi* on the basis of a different classification must be recognised. However, since at this point the chain of referrals is broken in German PIL (Article 4 section 1, second sentence, EGBGB), one cannot proceed on the basis of a demarcation of the substantive rules of law called upon to apply, rather one must apply the rules of the relevant substantive law of the forum concerning classification since otherwise there would inevitably be a lacuna in the rules.\(^ {17}\) *Renvoi* on the basis of a different classification can only occur in so far as *renvoi* or further *renvoi* are significant from a conflict-of-laws point of view which will scarcely be the case in international employment law (see Section 6 paragraph 2 et seq.).\(^ {18}\)

\(^{11}\) *Birk*, NJW 1978, 1825, 1830.

\(^{12}\) *Gamillscheg*, IAR, p. 58. A different view is, however, expressed by the Swiss Federal Court, BGE 80 II 53, 62 et seq.

\(^{13}\) Similarly BGE 80 II 53, 62.

\(^{14}\) Also *Birk*, NJW 1978, 1825, 1830.

\(^{15}\) Thus, for instance, *Gamillscheg*, IAR, p. 57.

\(^{16}\) See MünchKomm-Sonnenberger, Art. 3 EGBGB paragraph 39; *Kropholler*, Section 24 II 1 a, p. 168.

\(^{17}\) *Winkler von Mohrenfels*, Jura 1992, 169, 172.

\(^{18}\) See also v. *Bar*, IPR 2, Section 4 paragraph 446.
II. Method of classification and law applicable to classification

Where, therefore, on the one hand, it is a problem of classifying a legal relationship as such and, on the other hand, of classifying individual legal issues arising under this relationship, the question in the case of both problems is how the classification is to be made. In the area of the international law on industrial action that is prescribed (see Section 16 paragraph 5) but otherwise it remains open. First of all, it is clear that classification is not to be carried out simply in accordance with the substantive-law concepts of the forum, even though the starting point as a general rule will be the analogous concepts of the substantive law of the forum.\(^{19}\) The concept of the employment contract for conflict-of-laws purposes may be different from what it is in substantive law. In that regard, classification under the conflict of laws is autonomous.\(^{20}\) In addition, it must be borne in mind that there may be legal institutes in foreign laws which have no comparable equivalent in the substantive law of the forum. One may mention, in this connection, the bargaining unit under the US law on collective agreements.\(^{21}\) An approach based exclusively on the concepts of national substantive law would fall short because then no conflict rule appropriate to the matter would be found. \(^{22}\) Rabel has suggested that classification should be on a comparative-law basis. The conflict-of-laws concepts would therefore be determined in regard to their content on the basis of comparative law. This approach has the advantage that, if all conflict rules were applied in this way international uniformity of decisions would be achieved. However attractive this proposition is, there is an obvious objection in that it runs up against harsh reality\(^{23}\) because in practical terms views based on a comparison of laws cannot stand much scrutiny. From the point of view of legal doctrine, there is the further objection that the comparative-law method of interpretation is not reckoned generally to be a recognised canon of interpretation. What then is needed is a substantiated argument demonstrating why the comparative-law interpretation is appropriate. In that connection one can certainly deploy the argument that this would be a way of prising open systemic concepts in such a way as potentially to comprehend the specific features of the legal systems of the whole world. Yet there is an easier route to this objective.\(^{24}\) This is the functional classification. Accordingly, the conflict rule is to be broadly interpreted and to be classified according to the objective of the referring rule in order to encompass analogous functional concepts of foreign law.\(^{25}\) This approach enables suitable referring rules to be found for all issues.

19 See Kropholler, Section 16 II 2, p. 124 et seq.
20 Kropholler, Section 16 II 2, p. 124.
21 See Deinert, Internationales Arbeitsrecht, Section 15 paragraph 8.
22 Rabel, RabelsZ. 5 (1931), 241, 287; Kropholler, Section 16 II 3, p. 125 et seq. is of the same view; Audit/d’Avout, paragraph 208.
23 Bureau/Muir Watt, paragraph 389; Koch/Magnus/Winkler von Mohrenfels, Section 1 paragraph 28.
24 According to Gamillscheg, IAR, p. 56, there is ‘more than unites than divides’.
Controversy turns on whether classification is to be carried out in accordance with the *lex fori* or the *lex causae*. This is the question concerning the **law applicable to classification**. Classification according to the *lex causae* is no longer advocated in Germany although it sometimes is abroad. It naturally has the disadvantage of requiring a peculiar dual-stage procedure. First of all, the *lex causae* has to be identified. In order to find it, one must first proceed to classification in accordance with the *lex fori* for the purpose of determining the relevant conflict rule in order then, under the specific *lex causae* called upon to apply, to assess whether the correct conflict rule has been chosen. This step can be repeated as many times as necessary until both elements fit together. One is reminded to some extent of a labyrinth in which one must enter every passageway in order to determine whether it is the right one. Conversely, the prevailing opinion in private international law is to classify according to the *lex fori*. This avoids the practical problems of classification by reference to the *lex causae*. But chiefly this is in keeping with the circumstance that, in the process of classification, one is still operating at the level of conflict-of-laws rules and thus in the area of the *lex fori*. Since it remains the case that in this context a functional classification is necessary (paragraph 10), the conflict rule may also catch legal concepts which are classified differently in the relevant *lex causae*. Thus, for example, it is conceivable that prescription is classified as being a matter of contract law although, under the substantive law, it will be classified as a matter of procedural law. Foreign institutes of law which are unknown to domestic law may thus also be classified according to the *lex fori*. In that connection the question arises as to which domestic legal concept may be comparable to a foreign legal concept, following an assessment of its significance from the point of view of the foreign law, or if there is no such concept, how domestic substantive law would settle the question. It also appears that classification according to the *lex fori* without the *lex causae* is not feasible. In order to be able to classify the contract, it is necessary to assess the legal obligations which are to be deduced from the potential *lex causae* (cf. paragraph 5, and cf. also, paragraph 38). This solution is also widespread from the point of view of comparative

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25 Rauscher, Second Part, 3rd Section B IV, p. 101 et seq.; Kegel/Schurig, p. 346 et seq.; Kropholler, Section 17, p. 126 et seq.; Verschraegen, paragraph 1172; similarly, in the case of international employment law, Gamillscheg, p. 53 et seq.

26 Cf. in regard to employment law Dicey, Morris & Collins, paragraphs 33-065 et seq.; Hartley, Rec. 1997, 341, 375; Morse, ICLQ 1992, 1, 13; Liukkonen, p. 115; Plender/Wilderspin, paragraphs 11-010 et seq.

27 BGHZ 119, 392, 394; Palandt-Thorn, Vor Art. 3 EGBGB paragraph 27; see also, for international employment law after the Rome Convention, Dübler, RIW 1987, 249, 250; and for international employment law after the Rome Convention and the Knöfel, IPRax 2006, 55 et seq.

28 Gamillscheg, IAR, p. 54 et seq, nonetheless deems that not be valid.

29 BGH NJW 1960, 1720, 1721; see on that Koch/Magnus/Winkler von Mohrenfels, Section 1 paragraph 27.

30 Cf. BGHZ 55, 188, 191 et seq.

31 BGHZ 29, 137. 139.

32 Palandt-Thorn, Vor Art. 3 EGBGB paragraph 27.
law. Thus, under Swiss PIL the *lex fori* is used.\(^{34}\) The same is true of France.\(^{35}\) Likewise the Austrian Supreme Court has demarcated the criteria for determining the applicable law of the employment contract according to the structural concepts of Austrian law.\(^{36}\) The same procedure is followed in Spain.\(^{37}\) Likewise Chinese PIL law provides for classification under the *lex fori*.\(^{38}\)

There is, however, an exception in the case of *renvoi*.\(^{39}\) In the context of total *renvoi* the foreign conflict rule applies (Section 6 paragraph 2) whereby the law called upon to apply itself determines its own scope.\(^{40}\)

An exception from the functional classification according to the *lex fori* is also provided for in respect of international treaties. In their case classification must be in accordance with the international treaty concerned. In employment law, of course, that is without any practical significance. What is more important is that the conflict rules contained in the Rome I Regulation and the Rome II Regulation are European rules. In this context what is required is an **autonomous interpretation** of concepts at **European level**.\(^{41}\) There are no instructions as to how this is to be done with the result that elucidation is a task for the courts and academic doctrine. Here, as well, a functional classification is necessary.\(^{42}\) In that connection too, it must also be the perspective of the forum and not of the *lex causae* which is determinant\(^{43}\) and, in this case, specifically not the view of a national forum but of a forum which is part of the European legal order.\(^{44}\) If, for example, there is a referral to US law, it has to be determined, from the perspective of European law, whether one is dealing with a problem concerning an individual employment contract. This process may be

\(^{33}\) The *lex fori* thus also contains a classification referral. That does not of course mean a referral to the *lex causae* seeking classification, but referral to the *lex causae* in order to ascertain the specific criteria for the purpose of classification under the *lex fori*; for an instructive account, see Mankowski, BB 1997, 465, 469.

\(^{34}\) BGE 127 III 553, 556: Patocchi/Geisinger, Art. 13, No. 2.1.

\(^{35}\) Audit'd'Avout, paragraph 209; Bureau/Muir Watt, paragraph 391.

\(^{36}\) OGH DRdA 1989, 411, with criticism E. Bydlinski; OGH ArbSlg, No. 12.076 (= DRdA 2002, 56, with criticism Ganglberger); Schwimann, p. 22 et seq.


\(^{40}\) See Kropholler, Section 16 I, p. 122.

\(^{41}\) Bariatti, RDIPP 2006, 361, 371 et seq; Bertoli, RDIPP 2006, 999, 1014 et seq.; Block, p. 87 et seq.; Bureau/Muir Watt, paragraph 395-1; Dicey, Morris & Collins, 3rd supplement, paragraphs 33-063 – 33-066; Hafel, JDI 2010, 761,763 et seq.; Staudinger – Magnus, Art. 8 Rom I-VO paragraph 21; Reithmann/Martiny-Martiny, paragraph 160; Czernich/Heiss-Rudisch, Art. 6 paragraph 6; Rummel-Verschraegen, Art. 6 EVÜ (Rome Convention) paragraph 8; Stone, p. 356; Ziegler, Arbeitnehmerbegriffe im Europäischen Arbeitsrecht, Baden-Baden 2001 (and Bochum, Univ., Diss. 2010), p. 387 et seq; see also Schlachter, NZA 2000, 57, 58; and Azzi, D. 2009, 1621 et seq.

\(^{42}\) Sonnenberger, FS Kropholler, 2008, p. 227, 240.

\(^{43}\) Correct as far as it goes Carillo Pozo, REDT 2011, 1023, 1029.

\(^{44}\) On the facts see also Block, p. 95 et seq., also Reithmann/Martiny-Martiny, paragraph 160; similarly apparently Bariatti, RDIPP 2006, 361, 371 et seq.; Bonomi, in: Bonomi (Ed.), Diritto internazionale privato e cooperazione giuridiziarìa in materia civile, p. 1, 35.
described as classification by reference to a commonality of laws.\textsuperscript{45} In that connection, \textbf{comparative-law insights} are important not only for the functional determination of the legal topic subject to referral under the connecting rule but also in the context of European methods of interpretation (see Section 2 paragraph 18).\textsuperscript{46} And that brings us back to the comparative-law method of interpretation on which doubts have already been cast (paragraph 10).\textsuperscript{47}

\textbf{III. The individual employment contract}

Article 8 of the Rome I Regulation concerns individual employment contracts. What is to be understood by that is initially a question of interpretation on which a preliminary ruling by the ECJ may be obtained under Article 267 TFEU. Conversely, classification of a legal relationship or of a concept is a conflict-of-laws process which concerns the application of the law and, consequently, is not capable of being referred for a preliminary ruling.\textsuperscript{48} What is necessary here is a uniform European interpretation (see paragraph 13) which can also not be ousted by an alternative classification under the \textit{lex fori}.\textsuperscript{49} In this connection the suggestion has been made that a European concept of worker shall be established.\textsuperscript{50} However, it may be objected that there exists no such concept.\textsuperscript{51} The ECJ has only provided an autonomous interpretation of the concept of worker in regard to different specific contexts.\textsuperscript{52} A characteristic element in that connection is a person who, for a certain period of time, performs services for and under the direction of another person in return for which he receives remuneration.\textsuperscript{53} The \textbf{concept of worker} as indicative of status which, under \textbf{German}}
law, means admittance to the protective regime of employment law, is not defined by law. For the purposes of definition, the case law and prevailing academic opinion have recourse to two statutory provisions which provide clues, in that connection. Under Paragraph 84 section 1, second sentence, of the Commercial Code (Handelsgesetzbuch – HGB) a self-employed person is a person ‘who can essentially organise his activity freely and can determine his working time’. Under Paragraph 106 of the Business Regulation (Gewerbeordnung – GewO) the employer ‘can at his discretion determine the content, place and time of the work to be carried out’. Both provisions give expression to the recognition that being bound by instructions is the determining criterion in demarcating workers from self-employed persons. The basis of the binding nature of instructions, which may also be described as personal dependency, is the employer’s right to give directions which has found its way in regulatory terms into Paragraph 106 of the Business Regulation (Gewerbeordnung – GewO). A further precondition for the existence of an employment relationship is the obligation to carry out work under a private-law agreement. Personal dependency is ascertained by reference to a typological method. In that connection a number of criteria characterise the concept of worker; not all need to be met at the same time. It is enough if, on an overall assessment, they correspond to the image of a typical worker. The fact that the principal may determine the time and place of work may, depending on the circumstances, have greater or less weight. Thus, the Federal Labour Court did not find that binding broadcasting personnel to a scheduling timetable was sufficient for a finding of personal dependency because coordination of timing is a condition of any activity in the radio broadcasting sector.

In order to assess whether there is a contractual obligation to be bound by instructions, the wording formulated by the parties is not the only relevant factor. What is actually agreed is more significant. For that purpose, the agreement between the parties may be ascertained also by reference to the actual configuration of the employment. If the contract being performed as a contract of employment, it cannot be made into a type of self-employment under which services are provided merely by being so designated by the parties. In that connection, the law corresponding to the type of contract cannot be ousted at the behest of the parties to the contract of employment. Conversely, where there is, on an objective view, a provision of services by a self-employed person, the courts will

54 BAG AP No. 104 on § 611 BGB Abhängigkeit (dependency).
55 BAG AP No. 34 on § 611 BGB Abhängigkeit (dependency); see Gamillscheg, KAR II, p.309.
56 In detail on these criteria Kittner/Zwanziger/Deinert–Deinert, Section 3 paragraphs 30 et seq.
57 BAG AP No. 16 on § 611 BGB Arbeitnehmerähnlichkeit (persons analogous to employees).
58 BAG AP No. 1 on § 611 BGB Freier Mitarbeiter (independent workers); BAG AP No. 104 on § 611 BGB Abhängigkeit (dependendy).
59 Kittner/Zwanziger/Deinert – Deinert, Section 2 paragraph 5.
allow employment law to apply by virtue of an employment relationship being agreed.60

Other legal systems as well often lack statutory definitions of the concept of worker; where the law uses concepts these are often abstract and not very specific.61

16 **Austrian law** follows the German idea of personal dependency.62 Here, too, there are different criteria (e.g. subjection to instructions, duty on the individual to carry out work, economic success accruing to the employer, incorporation in the working organisation, tools of the trade made available by the employer); these are to be investigated in the context of an overall examination as to whether there is an employment contract.63 It is worthy of note that the Austrian Supreme Court presumes there to be a contract of employment only if the service is provided ‘for another person’ which will be lacking where a person is working for religious, charitable or social reasons or merely in his own interest and there is, therefore, no financial interest on the part of the employer.64

17 Under Article 7:610 NBW there is a contract of employment in the Netherlands where the employee undertakes to perform work for the employer for a certain period in return for remuneration. The essential requirement in that connection is subjection to instructions.65

18 Without there being any substantive difference, **French law** proceeds on the basis of legal dependency as a distinguishing criterion of an employee.66 The decisive factor here as well is the employer’s authority to give directions and the subordination of the employee.67 However, economic dependency has been used to substantiate status as an employee where it is of such weight as to result in actual fact in a relationship of subordination.68

19 **In Italy**, there is an employment relationship under Article 2094 of the Civil Code where a person undertakes to perform work in the service and subject to the instructions of a principal in return for remuneration. The decisive factor here is the concept of subordination (*subordinazione*).69 It is based on Article 2222 of the Civil Code under which self-employed persons are characterised by...
the fact that they are not in a relationship of subordination which substantively ought to correspond to dependency under other legal systems.\textsuperscript{70} In the case of very subordinate and previously determined work the courts, instead of subordination, will uphold secondary criteria for establishing the status of employee such as, for instance, the duration of the employment relationship, the nature and manner of consideration and the duration of working time.\textsuperscript{71}

Under Article 1.1 of the \textbf{Spanish} Workers’ Statute (ET), the statute is applicable to employees who voluntarily provide their services on behalf and for the account of another person and under the organisation and direction of such other person for remuneration.\textsuperscript{72} Senior employees, to whom special provisions apply, are outside the scope of the ET.\textsuperscript{73}

Under \textbf{English} employment law the concept of employee is tested against various yardsticks. Of particular importance is the mutuality of obligation test.\textsuperscript{74} If this test is not satisfied, there are no contractual obligations for the future. This is a manifestation of the doctrine of consideration (see Section 11 paragraph 2). Consideration may specifically be lacking where under a framework agreement individual agreements may be entered into without the person concerned being obliged to perform the work concerned. A further yardstick is the control test to determine whether the employer has the authority to give directions,\textsuperscript{75} then the integration test, to see whether an employee is integrated into the undertaking’s organisation; the risk test is to determine whether the person concerned has to bear entrepreneurial risks. It may be that there will be found to be an employment relationship by reference to financial dependency. Since, however, the mutuality test is the primary one,\textsuperscript{76} the practical significance of the economic criterion is small.\textsuperscript{77} Unlike in German law, for example, contractual arrangements militating against classification as an employee will more easily elude the application of employment law.\textsuperscript{78} Mere designation cannot prevent a contract from being classified as an employment contract.\textsuperscript{79} Where, in accordance with the actual agreement of the parties to the contract, a contract of employment is found to exist, that cannot be disguised by a contractual document laying down other obligations.\textsuperscript{80}

\begin{thebibliography}{99}
\item \textsuperscript{70} \textit{See Rebhahn}, RdA 2009, 154, 164; also Henssler/Braun – \textit{Radoccia}, Italien paragraphs 29 et seq.
\item \textsuperscript{72} \textit{See Montoya Melgar}, p. 281 et seq.
\item \textsuperscript{73} \textit{See Selenkevitsch}, NZA 2006, 352 et seq.
\item \textsuperscript{74} Global Resourcing v Docherty [2012] IRLR 727.
\item \textsuperscript{75} Although that does not exclude the possibility that in regard to self-employed persons there may be cases of subjection to direction and control Tiffin v Lester Aldridge LLP [2011] IRLR 105 (EAT); confirmed in [2012] IRLR 391 (CA).
\item \textsuperscript{76} \textit{See Deakin/Morris}, paragraph 3.29.
\item \textsuperscript{77} Rebhahn, RdA 2009, 154, 170.
\item \textsuperscript{78} Deakin/Morris, paragraphs 3.21 et seq.
\item \textsuperscript{79} Tiffin v. Lester Aldridge LLP [2011] IRLR 105.
\item \textsuperscript{80} Autoclenz v Belcher [2011] ILRL 820 (UKSC).
\end{thebibliography}
In other legal systems as well the concept of employee is in the final analysis the entrance door to the protection afforded by the application of employment law. An exception may apply in the case of Denmark where employment law is in practical terms regulated only by collective agreements. In addition it is also important in delimiting social security law and tax law. A comparative-law examination also shows that self-employed persons are those persons who have at their disposal an entrepreneurial organisation and, in particular, employ persons whose labour is at their disposal. A problem is posed by persons who are personally active but have no employees dependent on them. Amongst this group of person there are those who, by competing in the market and working for a multiplicity of contractual partners, may indubitably be said to be self-employed. In general, such persons will be regarded as employees if their work is determined by another person and they are integrated into the works organisation of the contracting partner. Ultimately, it is subordination to the instructions of another that is the determining criterion on a comparative-law view for determining whether a person has the status of employee. It is characterised in the various legal systems by a multiplicity of elements or indicators. However varied the weight attached to these factors may be, what connects all these elements is predominantly the typological method. Conversely, the mere economic dependency of the contracting party is not in itself sufficient in order to assume that there is an individual contract of employment. Nor, at the same time, is it a precondition for assuming there to be an employment relationship. Remunerability of the activity is not a precondition under all legal systems for the determination of the status of employee.

The foregoing observations ought to have shown that classification on the basis of the concept as formulated by the ECJ in other contexts falls short of what is required in regard to conflict-of-laws issues. In terms of conflicts of law, the

82 Nogler, The concept of ‘subordination’ in European and Comparative Law, Trento 2009, p. 129.
83 Rebhahn, RdA 2009, 154, 158.
84 Rebhahn, RdA 2009, 154, 155.
85 Rebhahn, RdA 2009, 154, 156.
86 See OGH 20.1.1999-9 Ob A 247/98 h, cited in Schacherreiter, leading decisions zum Internationalen Privatrecht, Wien 2008, paragraph 182; see Gamillscheg, IAR p. 43 et seq.; Staudinger – Magnus, Art. 8 Rom I-VO paragraph 37; Rummel-Verschraegen, Art. 6 EVÜ paragraph 10; Junker, Internationales Arbeitsrecht im Konzern p. 172; see Nogler, ZESAR 2009, 461, 465 et seq.; to the same effect The concept of ‘subordination’ in European and Comparative Law, Trento 2009, p. 71, 134 et seq.; Engels in Blanpain (Ed.), p. 339, 349; see also Cavalier/Upex, ICLQ 2006, 587; see further Rabel, Conflict of Laws III, p. 181 et seq.; for Switzerland see also BGE 78 II 32, 36; Geiser/Müller, paragraph 108; Rehbinder, paragraph 23; for Poland see Franek, ZfRV 2000, 161; in regard to the international law of jurisdiction see also Tribunale di Pesaro RDIPP 2008 1111.
87 Rebhahn, RdA 2009, 154, 173.
88 See Nogler, ZESAR 2009, 461 et seq.
89 Rebhahn, RdA 2009, 154, 163, 165.
90 Rebhahn, RdA 2009, 154, 168.
European concept of employee is too narrow\textsuperscript{91}, even if subordination proves to be of particular significance in that context as well.\textsuperscript{92} That is illustrated by the example of remunerability. It is well-known that under German law whether work is remunerated is not a criterion in determining the concept of employee. Rather is it the case that a contract for carrying out unremunerated work under the direction of another is \textit{contra bonos mores} yet, notwithstanding Paragraph 139 BGB, is valid, together with a claim under Paragraph 612 section 2 BGB to the usual remuneration.\textsuperscript{93} Here the question to be asked must in the end concern the purpose pursued by the conflict rule. The relevant question is why the conflict of laws waives neutrality and in Article 8 section 1 of the Rome I Regulation provides for limits to be set to the choice of law.\textsuperscript{94} However, in reflecting on that question, the focus must be on the further issue as to why the employee requires protection. Above all, the answer to that question is the subordination to instructions, that is to say, as determined by another person. This consideration, namely the \textbf{dependency of the person concerned}, is the relevant criterion on account of which both conflict rules and substantive law provide for employee protection.\textsuperscript{95} Though there may be legal orders which, as for example the Italian legal system does, focus on the remunerability of the work performed, that ought not to be considered from the point of view of conflict of laws. For in that connection, occupations which are not financially motivated would have to be bracketed out such as, for example, in the case of an occupation in the interest of the person occupied (such as work opportunities under Social law or work therapies).\textsuperscript{96} Which specific employee-protection rules apply to such persons under such configurations will be determined by the rules applicable to such dependent work. For these occupations as well are subject to special protection for which the general contractual connecting rules in Articles 3 and 4 of the Rome I Regulation are not appropriate.

This seems to be confirmed by the scanty case-law of the ECJ in relation to \textbf{international jurisdiction} for contracts of employment. Initially, in the \textit{Ivenel} case in determining the work performed as the characteristic criterion founding jurisdiction, the ECJ had regard to the employee-protective intention of the Rome Convention and then, as the next step, directed the law of the place of work as having the closest connection in order to confer jurisdiction on the court whose law was called on, by operation of the conflict rule, to apply.\textsuperscript{97} The ECJ described contracts of employment as dependent activities revealing specific characteristics as a result of the permanent integration of the person in the orga-

\textsuperscript{91} But see \textit{Deinert}, RdA 2009 144, 154.
\textsuperscript{92} \textit{Rebhahn}, EuZA 2012, 3, 31.
\textsuperscript{93} BAG AP No. 2 on § 138 BGB; see Kittner/Zwanziger/Deinert-Deinert, \textit{Section 3 paragraph 29}.
\textsuperscript{94} See \textit{Bitter}, IPRax 2008, 96, 100.
\textsuperscript{95} And OGH ArbSlg No. 12.076; see \textit{Heilmann}, p. 40 et seq.
\textsuperscript{96} \textit{Rebhahn}, RdA 2009, 154, 168.
\textsuperscript{97} ECJ IPRax 1983, 173 – \textit{Ivenel}. 

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nisation. The later version of Article 5 of the Brussels Convention on jurisdiction and enforcement (see today Article 19 of the Brussels I Regulation) built on this. For its part, the ECJ saw this as doing justice to the protection of the employee as the socially weaker bargaining party. From this case law, which admittedly is not very pithy, the following characteristics of the employment contract may be deduced for the purposes of the Brussels Convention on jurisdiction and enforcement (and thus henceforth under Article 20 of the Brussels I Regulation): dependent activity of a certain duration in the course of which integration within the organisation takes place, thus giving rise to a relationship of dependency. This, too, is a consideration militating in favour of founding the concept of the individual employment contract for the purposes of Article 8 of the Rome I Regulation on dependency of the person, thereby abandoning the criterion of remunerability. In the context of the case law on international jurisdiction the latter criterion has hitherto played no role.

ILO Recommendation No 198 would appear to support the view here advocated. Under Point 13 of that recommendation, ILO members are to consider laying down specific indicators for the existence of an employment relationship. The recommendation provides a list of possible indicators. Subjection to control and supervision by another and integration in the organisation of the undertaking are mentioned in the first place, in addition to financial indicators (for instance, payment of periodic remuneration, the fact that such remuneration constitutes the principal source of income, and the absence of financial risk for the employee).

Ultimately, that is the summation of the classification problem, such as it emerges from a functional comparative-law survey. What has to be verified is whether under the potentially applicable contract law the legal relationship at issue is directed at the performance of work determined by another under a contract whereby that determination by another person may be characterised by different criteria including, not only, subjection to control and direction as well as integration in the works organisation of another person but also economic criteria. Under this typological method the payment of regular remuneration is then an indicator of the existence of an employment relationship, though its absence would not preclude the existence of an employment relationship.

One problem area is whether classification as an employment relationship can be solely dependent on the contractual agreement or whether attention should be focused on the implementation of the contract. Whereas, for instance, in England classification appears to depend more on the contractual agreement, in Germany it is a question also of how the contract operates in actual practice. In that

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99 ECJ IPRax 199, 365– Rutten.
101 See also Mankowski, BB 1997, 465, 467, who also seeks to elevate remunerability to a criterion (p. 469).
connection, as well, it would appear necessary, for the purposes of a functional classification, to apply generous yardsticks and also to include contracts which, from a formal point of view, concern services provided on a self-employed basis but in reality are not.

The foregoing observations show that it can easily happen that classification of the contract under employment law can lead to a substantive law which classifies a contract as being other than a contract of employment. But that does not mean that, owing to the demarcation of the substantive rules of law called upon to apply (paragraph 6), no relevant rules of law are to apply. Article 8 of the Rome I Regulation is after all a special provision in relation to Articles 3 and 4 of the Rome I Regulation, with the result that the facts would be determined under the relevant contract law of the lex causae.

Not only employees and workers are appointed under private-law contracts, as well as senior employees, classed as employees. Persons undergoing training will also have to be subsumed under the concept of employee unless the training takes place entirely outside the ambit of the undertaking. It is immaterial whether the relevant individual employment contracts are coordinated in a company group. Group employment relationships are also covered.

Self-employed persons are not employees. The status of employee and that of self-employed persons are mutually exclusive. Sham self-employment occurs where a contractual relationship is described as a self-employed legal relationship but where in reality what is involved is dependent employment. From a substantive-law point of view that is treated under German law as an employment relationship. From the conflict-of-laws point of view the same must apply in light of the functional classification. Certification of self-employed status issued in the home country for social insurance purposes can in that connection produce no binding effect. Of course, it must be borne in mind that classification as an employment contract is normally binding in respect of the specific contract with the result that a person who in this respect is to be regarded as an employee may nevertheless generally and in other respects be a self-employed person.

102 Reithmann/Martiny-Martiny, paragraph 4832; Rummel-Verschraegen, Art. 6 EVÜ paragraph 12.
103 Bamberger/Roth-Spichkoff, Art. 8 Rom I-VO paragraph 9; Rummel-Verschraegen, Art. 6 EVÜ paragraph 12.
104 See also MünchKomm-Martiny, Art. 8 Rom I-VO paragraph 18.
105 Gamillscheg, ZfA 1983 307, 333; Staudinger-Magnus, Art. 8 Rom I-VO paragraph 34; Rummel-Verschraegen, Art. 6 EVÜ paragraph 11.
106 Kittner/Zwanziger/Deinert-Deinert, Section 2 paragraph 5.
107 Mankowski, BB 1997, 465 et seq; also Palandt-Thorn, Art. 8 Rom I-VO paragraph 3; Rummel-Verschraegen, Art. 6 EVÜ paragraph 12; Venturi, NLCC 2009, 771.
108 Mankowski, BB 1997 465, 470 et seq.
109 Mankowski, BB 1997 465, 466 et seq.
pealed. Currently, there is in Netherlands law such a presumption contained in Article 7:610 in BW, which is triggered by work for remuneration during a specific period and infers from those facts a presumption in favour of an employment contract.\textsuperscript{110}

In German substantive law dealing with members of the bodies of legal persons is by no means straightforward. An appointment is as a general rule underpinned by a service contract. It is possible, however, for there to be a service relationship subject to control and direction, that is to say an employment relationship. This is particularly illustrative in the case where the management of a group company is governed by obligations under an employment contract with another group company.\textsuperscript{111} There may also be an employment relationship under general principles also in relation to the company whose board member is the person concerned. Even when there is an employment relationship, the application of specific provisions of employment law is precluded. Thus, members of bodies are not employees for the purposes of the law on the organisation of undertakings (Paragraph 5 section 2 (1) BetrVG (Betriebsverfassungsgesetz)). Nor do they enjoy protection from dismissal (Paragraph 14 section 1 (1) of the law on protection from dismissal- KSchG (Kündigungsschutzgesetz)). They are also denied access to the employment courts since, under Paragraph 5 section 1, third sentence, of the law on the employment courts (Arbeitsgerichtsgesetz – ArbGG), they are not deemed to be employees for the purposes of that statute. In that connection, it is then immaterial whether an employment relationship exists. Those provisions, at any rate, preclude the protection of employment law for the sector concerned. Even if the person concerned is an employee, according to normal criteria, he will, for example, enjoy no protection from dismissal.\textsuperscript{112} A separate question is whether members of bodies are to be classified from a conflict-of-laws point of view as employees. For persons who would be so classified under German substantive law, there is no problem. Conversely, the question remains whether members of bodies who, according to the substantive law of the forum, are not employees, are, nonetheless, to be classified as such. In this context it is correct to say that the law applicable to appointment is not the law applicable to the company, but the applicable contract law.\textsuperscript{113} Nonetheless, the law applicable to the company is indispensable as well. For under conflict-of-laws rules, prevailing opinion classifies members of bodies as employees if they are subject to control and direction.\textsuperscript{114} That is a manifestation of the functional classification as here advocated (cf. in particular, paragraph 23). This question can of course

\begin{footnotes}
\item[110] Jacobs, NZA 1999, 23, 24; Waas, Modell Holland, p. 115 et seq.
\item[111] See BAG NZA 2008, 168. Such configuration may just about be found in relation to the management of a foreign company by an employee of the parent undertaking, see Falder, NZA 2000, 868 et seq.
\item[112] See BGH NZA 2007, 1174, 1175.
\item[113] LAG Baden-Württemberg, ZIP 2010, 1619; criticised by Mankowski, EWiR 2010, 513.
\item[114] MünchKomm-Martiny, Article 8 Rome I Regulation, paragraph 20; Palandt-Thorn, Art. 8 Rom I-VO paragraph 3.
\end{footnotes}
only be answered by reference to the law applicable to the company.\textsuperscript{115} Subjection under company law to control and direction by certain shareholders or a meeting of shareholders can therefore entail subjection to control and direction under conflict-of-laws rules with the result that managing directors of a private limited company may be subject to control and direction, but the board members of a public limited company will not be.\textsuperscript{116} In this context, it is immaterial whether the person concerned is allowed access to the German employment courts under Paragraph 5 of the relevant law (Arbeitsgerichtsgesetz – ArbGG). A member of a body who, from a conflict-of-laws point of view, is also to be classified as an employee can in Germany only bring an action before the ordinary courts.\textsuperscript{117}

Even though Paragraph 84 of the Commercial Code (Handelsgesetzbuch – HGB) deals with the self-employed commercial agent, a commercial agent may be an employee (see Paragraph 84 section 2 HGB). Other legal systems may take a stricter view and largely remove the commercial agent from the protection of employment law, as is, for example, the case under English law.\textsuperscript{118} From a conflict-of-laws perspective, one should assume an employment-law classification where there is dependency in the above-mentioned sense of the word.\textsuperscript{119} That is not precluded by the fact that the law on commercial agents has been the subject-matter of substantive harmonisation at European level.\textsuperscript{120}

In regard to family law matters, specifically in marriage, a person may be employed in a family business. Such family-based employment does not, as a rule, give rise to an employment relationship.\textsuperscript{121} This is also the case in other legal systems. It does not then come under Article 8 of the Rome I Regulation (see paragraph 6).\textsuperscript{122} Nonetheless, family members may enter into an employment relationship, which would be dealt with under Article 8.\textsuperscript{123} The assumption that Article 1 section 2 (b) would exclude this from the scope of the Rome I Regulation does not carry conviction because these will not be claims arising ‘out of a family relationship’, but claims under a contract.\textsuperscript{124} Application by analogy of Article 8 of the Rome I Regulation is therefore not necessary\textsuperscript{125} because the provision is directly applicable. What is decisive for the classification is whether the employment is anchored only in the family-law connection or

\begin{itemize}
\item \textsuperscript{115} Reithmann/Martiny-Martiny, paragraph 4832.
\item \textsuperscript{116} See Mankowski, RIW 2004, 167 et seq; see also Bamberger/Roth-Spickhoff, Art. 8 Rom I-VO paragraph 7.
\item \textsuperscript{117} Also LAG Baden-Württemberg, ZIP 2010, 1619.
\item \textsuperscript{118} Levy v Goldhill [1917] 2 Ch. 297.
\item \textsuperscript{119} Czernich/Heiss-Rudisch, Article 6, paragraph 20; see also Staudinger-Magnus, Art. 8 Rom I-VO paragraph 42.
\item \textsuperscript{120} Tribunale di Pesaro, RDIPP 2008, 1111, 1113.
\item \textsuperscript{121} Kittner/Zwanziger/Deinert – Deinert, Section 3 paragraph 124.
\item \textsuperscript{122} Venturi, NLCC 2009, 771; Ubertazzi, p. 92.
\item \textsuperscript{123} Staudinger-Magnus Art. 8 Rom I-VO paragraph 46; Rummel-Verschraegen, Art. 6 EVÜ paragraph 12.
\item \textsuperscript{124} \textit{v. Bar}, IPR 2, Section 4 paragraph 447.
\item \textsuperscript{125} Opposing Koch/Magnus/Winkler v. Mohrenfels, Section 9 paragraph 3.
\end{itemize}
whether a contractual obligation independent thereof was entered into.\textsuperscript{126} The former question is, moreover, a self-standing preliminary question to be answered under the conflict-of-laws rules (see Section 6 paragraph 12).

In light of the functional method of classification, the ‘partial employment relation’ between the user of a temporary work agency and the worker must be classified as an employment relationship.\textsuperscript{127} The Austrian Supreme Court also classifies this as an employment relationship. However, it founded claims in that connection on the relevant law of contract pursuant to Paragraph 44 of the PIL law (IPRG) applicable to the relationship between the worker and the agency.\textsuperscript{128}

Under Article 6 of the Rome Convention, the relevant conflict rules also covered employment relationships. Conversely, Article 8 of the Rome I Regulation concerns only ‘individual employment contracts’. Void, implied or mistaken employment relationships\textsuperscript{129} are nonetheless covered by the provision; this is because Articles 10 section 1 and 12 section 1 (e) of the Rome I Regulation direct questions going to material validity and the consequences of nullity, respectively, to be governed by the proper law of the contract.\textsuperscript{130}

Nor are contracts in relation to the State precluded from being classified as employment contracts.\textsuperscript{131} On the other hand, the civil-servant relationship appears problematical. Here the functional European classification according to the \textit{lex fori} compels one to acknowledge that a legal relationship which is not found in a contract cannot fall within the Rome I Regulation.\textsuperscript{132} That also follows from Article 1 section 1 of the Rome I Regulation. This is a self-standing preliminary question under conflict-of-laws rules (see Section 6 paragraph 12). The relevant connecting provision is provided by the referral to the law of the State whose civil service is concerned.\textsuperscript{133}

For the employees of \textit{international organisations}, there are often special Staff Regulations concerning their conditions of employment. Their international employees will often be subject, under such Staff Regulations, to a closed public-law system.\textsuperscript{134} For this system, the Rome I Regulation will have no relevance at all since it only covers contractual obligations (Article 1 section 1). Where, on the other hand, there is a contractual basis, the applicable law is not to be ascertained by reference to the organisation’s Statute, but in accordance

\textsuperscript{126} See \textit{v.Bar}, IPR 2, Section 4 paragraph 447.
\textsuperscript{127} \textit{Hk-ArbR-Däubler}, EGBGB, paragraph 12.
\textsuperscript{128} OGH IPRax 1988, 360, 363; \textit{Rebhahn}, IPRax 1987, 368, 369.
\textsuperscript{129} Those are employment contracts which were executed on a legally erroneous basis. Kittner/ Zwanziger/Deinert-Becker, Section 21 paragraphs 5 et seq. See for Italian law, Article 2116 C.c.; on this ELL-Treu, Italy, paragraph 126 et seq.
\textsuperscript{130} \textit{Junker}, RIW 2006 401, 402; \textit{Erk-Schlachter}, Rom I-VO paragraph 3; \textit{Hk-ArbR-Däubler}, EGBGB paragraph 12; MünchKomm-Martiny, Art. 8 Rom I-VO paragraph 21; \textit{Deinert}, RdA 2009 144, 152; see also \textit{Audit/d’Avout}, paragraph 833; on the old law: \textit{Gamillscheg}, ZFA 1983, 307, 332; Giuliano/Lagarde, BT-Drucks 10/503, p. 57 et seq.
\textsuperscript{131} MünchKomm-Martiny, Art. 8 Rom I-VO paragraph 18; \textit{LAG Berlin IPRax} 2001, 144.
\textsuperscript{132} Mosconi/Campiglio, p. 401.
\textsuperscript{133} \textit{Gamillscheg}, RabelsZ 37 (1973), 28 4, 294.
\textsuperscript{134} MünchKomm-Martiny, Art. 8 Rom I-VO paragraph 23.
with the Rome I Regulation, in which connection references to the content of the organisation’s Statute will normally operate only as a referral in respect of substantive-law matters.\textsuperscript{135}

Classification under individual contract of employment law can also raise a problem in regard to the demarcation line to be drawn with the collective labour law. In that connection, for example, the Austrian Supreme Court, albeit on the issue of jurisdiction, had to determine whether an action against dismissal under Paragraph 105 of the Labour Constitution law (Arbeitsverfassungsgesetz – ArbVG) could be classified as relating to an individual employment contract in view of staff integration within undertaking’s organisation. It answered that question in the affirmative, having regard to various individual law elements, and in particular the individual interest in protection of the employee concerned.\textsuperscript{136} One would arrive at the same result under international employment law: the trend to individual protection and the individual protective effect characterising the lex causae (on the relevance of the lex causae to determination of the characteristics, see paragraph 11\textsuperscript{137}), requires the action against dismissal to receive an autonomous European classification as being a matter of individual employment contract law. For further details see Section 13 paragraph 34.

Many legal systems reveal internal differentiation, with the consequence that certain legal rules apply only to specific employees\textsuperscript{138}. As far as classification is concerned, however, such internal differentiation does not play any role. They have to be examined under the lex causae.

Between the two poles of the employee, on the one hand, and the self-employed person, on the other, German law is also familiar with the intermediate category of the person with employee-like status. Such persons enjoy protection under certain employment laws that extend their scope to this group of persons, such as Paragraph 2, second sentence, of the Federal law on leave entitlement (Bundesurlaubsgesetz – BUrlG) or Paragraph 6 section 2 (3) of the General law on equal treatment (Allgemeines Gleichbehandlungsgesetz – AGG). A characteristic feature of that group is economic dependency (not personal dependency) as well as a personal need for protection comparable to that of an employee.\textsuperscript{139}

The category of persons with employee-like status is also encountered under the laws of Austria\textsuperscript{140} and Switzerland.\textsuperscript{141} In France, there is no corresponding provision for persons with employee-like status.\textsuperscript{142} However, there is a series of provisions specific to occupational

\begin{thebibliography}{9}
\bibitem{135} MünchKomm-Martiny, Art. 8 Rom I-VO paragraph 24.
\bibitem{136} OGH IPRax 2011, 89; Mankowski, IPRax 2011, 93 et seq.
\bibitem{137} See also with regard to international jurisdiction, Mankowski, IPRax 2011, 93.
\bibitem{138} Rehbinder, paragraph 25.
\bibitem{139} BAG AP No. 40 on Paragraph 5 ArbGG, 1979.
\bibitem{140} Löschnigg, paragraph 4/140 et seq; Marhold/Friedrich p. 53; Wächter, ZIAS 2000, 250 et seq.
\bibitem{141} Rehbinder, paragraph 25.
\end{thebibliography}
groups which, in specific situations of economic dependency, provide for a notional employment relationship or confer special protection. That is functionally comparable to the protection conferred under German law on persons with employee-like status.

Under **Italian law** there is a group of self-employed persons who are, however, included under the jurisdiction of the employment courts and in the social insurance scheme, only where collaboration is coordinated and continual (collaborazione coordinata e continuativa –co.co.co). In that connection, the concept of para-employees (parasubordinati) has gained currency. As a consequence of the most recent legislation on growth of 2012, restrictive preconditions were laid down. Conversely, the laws do not provide for application of the employment-law provisions.

In **Spain** Ley 20/2007 on self-employed work has been enacted (Trabajo autónomo). Article 11 et seq. of that law contains rules concerning economically dependent work, for example, weaker protection against dismissal. The precondition is that the person concerned carries out the work himself and receives at least 75% of his income from the contractual partner.

The legal position in **England** is complicated. Alongside employees who work on the basis of an employment contract, there is the category of workers. Under Section 230 (3) ERA 1996 workers are individuals who work under a contract of employment or any other contract whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not that of a client or customer. Yet, here again, a mutuality of obligations is necessary (see paragraph 21, and also Section 11 paragraph 2). Provided a person does not seek work in the market and does not have his own business organisation he will normally be a worker, with the result that their number should be bigger than that of persons with employee-like status. Economic dependency is no formal precondition. From a formal point of view this category may be described, not as constituting a category additional to employees, but as an overarching category comprising, as it were, persons with employee-like status and employees. Various employment protection provisions apply to workers, such as working time, but not, for example, protection against dismissal.

The comparison shows that different legal systems are familiar with the concept of persons analogous to employees, who are not themselves employees but
are protected to a lesser degree by specific employment-law provisions or by special individual provisions.\textsuperscript{150} It is true that the protection of persons in analogous situations to employees are very differently configured where legal systems provide for protection at all.\textsuperscript{151} Nonetheless, from the perspective of a functional classification, persons with employee-like status may be presumed to be classified as employees and their contractual relationship to be subsumed under Article 8 of the Rome I Regulation,\textsuperscript{152} even though by definition they are not employees.\textsuperscript{153} For the objective in having a specific provision for individual employment contracts, namely to ensure the protection of interests under conflict-of-laws rules, also applies to the category of persons with employee-like status which is protected in the different legal systems, albeit not to the same degree, but more so in comparison to other contracts. That then also includes homeworkers as a subgroup of persons analogous to employees.\textsuperscript{154}

The contractual arrangements subsumed under the foregoing principles all come under Article 8 of the Rome I Regulation. The \textbf{extent of protection} under that legal relationship is then defined by the \textit{lex causae} as determined by operation of Article 8.

\textsuperscript{150} See also \textit{Contouris} in Casale (Ed.), The Employment Relationship, p. 35, 43 et seq; \textit{Perulli} in Casale (Ed.), The Employment Relationship p. 137, 164 et seq.; \textit{Däubler}, ZIAS 2000, 326 et seq.

\textsuperscript{151} Comparative law overview in \textit{Rebhahn}, RdA 2009, 236; see also \textit{Fuchs}, NZA 2010, 980, 982.

\textsuperscript{152} See Reithmann/Martiny-Martiny, paragraph 4832; Rummel – \textit{Verschraegen}, Art. 6 EVÜ paragraph 12; v. Bar, IPR 2, Section 4 paragraph 447; \textit{Mansel}, FS Canaris, 2007, p. 809, 822; \textit{Timelini}, Il diritto del lavoro 2003, 223, 227, footnote 21; for Paragraph 44 IPRG Austria, see \textit{Ganglberger}, observations on OGH, DRdA 2002, 56, 59.

\textsuperscript{153} \textit{Broggini}, Jus 2004, 5, 14; for a critical view, see \textit{Carillo Pozo}, REDT 2011 1023, 1030 et seq.

\textsuperscript{154} \textit{Mansel}, FS Canaris, 2007, p. 809, 822; for another view, see Fenski FA 2000, 41, 42.
5 Public policy

I. Overview

If the application of a foreign law leads to a result which, according to the domestic conceptions of law, does not appear acceptable, it offends against public policy (ordre public). That comes up in all areas of PIL, including in employment law. The number of examples from employment law is rather small (paragraph 17). The reservation clauses provided for in such cases (paragraphs 2 et seq.) prevent the foreign law from being applied. Sometimes, this gives rise to difficulties because a replacement law is needed (paragraph 26). Conversely, overriding mandatory provisions are a manifestation of what is known as positive public policy; they seek to protect specific values in such a way that they must be applied irrespective of the legal system that is otherwise applicable (paragraph 5).

II. Function

Article 21 of the Rome I Regulation provides that the application of a provision of the lex causae may be refused only if its application is manifestly incompatible with the public policy of the forum. This provision takes priority as a lex specialis in the area of international contract law, that is to say it prevails when the Rome I Regulation applies. Within the confines of autonomous national law, like Article 6 EGBGB of the Introductory Law to the German Civil Code (Einführungsgesetz zum Bürgerlichen Gesetzbuch – EGBGB) that states nearly the same, will apply. Article 26 of the Rome II Regulation contains a provision analogous to Article 21 of the Rome I Regulation. This provision is also a lex specialis.

These provisions address public policy. In terms of conflict-of-laws rules, public policy is a manifestation of national identity. The concept of public policy is, however, multifaceted and sometimes encompasses more than merely averting, under Article 21 of the Rome I Regulation and Article 26 of the Rome II Regulation, the law that would in itself be applicable. Aside from negative public policy (paragraph 4), this addresses specifically what is known as positive public policy (paragraph 5). The understanding of public policy in English PIL goes yet further, to encompass the rejection of actions against the national interest.

1 Magnus, IPRax 2010, 27, 42.
3 Cf. Carter, ICLQ 1993, 1 et seq.
Negative public policy is described as the exclusion of the application of foreign law because in a specific case it must not be allowed to lead to intolerable results. Gamillscheg described this, as ‘a restriction inherent, as it were, in any reference to foreign law’.\(^4\) It is an exception to the application of the legal system that would otherwise prevail. Ultimately, the provisions addressed in paragraph 2 are general clauses\(^5\). Generally, these clauses may therefore be termed reservation clauses.

In addition, the legal systems influenced by Roman law often have analogous rules (‘loi d’ordre public’, ‘règle d’ordre public’ or ‘norme di applicazione necessaria’).\(^6\) These are substantive rules of the forum, which are intended to apply, irrespective of any overriding conflict rule which would otherwise be applicable. Unlike in the case of negative public policy, the application of this positive public policy implies no value judgement. It is even conceivable that a substantively similar foreign provision would be overridden by the positive public policy rule. The difference to the negative public policy reservation clause is to be found in the fact that the positive public policy rule determines by referral which specific rule should apply.\(^7\) In that connection, the semantic criticism is justified, inasmuch as, where a matter is designated as one of positive public policy, no connecting factors are mentioned.\(^8\) For, as a general rule, the application of an overriding mandatory provision of the forum presupposes a certain connection with the forum (see Section 10 paragraph 36); in terms of employment law, that will generally be the domestic place of employment, but under certain conditions, also the nationality or seat of the employer. The truth is that positive public policy seeks to elaborate a self-standing referring rule,\(^9\) or special connecting rule.\(^10\) In this regard international contract law, and thus international employment law with it, elaborated a self-standing unilateral referring rule calling upon overriding mandatory provisions to apply, irrespective of the proper law of the contract. They will be dealt with along with the other special connecting rules in Section 10 paragraphs 11 et seq. of Chapter 3 concerning connecting factors.

The law relating to policing (and security) is frequently mentioned in connection with positive public policy. The concept may, however, be intended to be a narrow one in the sense of a police law in terms of the public-law concept (Section 1 paragraph 32).

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4 Gamillscheg, IAR, p. 62.
5 Cf. Kropholler Section 36 III 1, p. 248. The framers of the new PIL law expressly wished to leave to the courts the task of shaping developments in this area, BT-Drucks. 10/504, p. 43.
6 Article 17 law No. 218/1995 (Italian PIL law), cf. Calò, p. 17 et seq.; Conetti/Tonolo/Vismara-Conetti, p. 53 et seq.; also Mosconi/Campiglio, p. 262 et seq.
8 Gamillscheg, IAR, p. 67.
9 Gamillscheg, IAR, p. 63; see also Kegel/Schurig, p. 517.
10 Kropholler, IPR, p. 245; Biré, RabelsZ 46 (1982), 384, 388.
Finally, in the legal systems influenced by Roman law the concept of ‘ordre public interne’ is often used.\(^\text{11}\) It describes the *ius cogens* nature of a provision. Whilst in that connection in 1959 Gamillscheg was able to write that ‘this has nothing to do with the law determining the applicable law’, that view is no longer valid. The mandatory domestic rules of the proper law of the contract restrict the choice of law possibilities under Article 8 section 1, second sentence, of the Rome I Regulation (see Section 9 paragraph 47). This concept is therefore out of place at this point and falls to be discussed in relation to the proper law of the contract.

All legal systems are acquainted with saving or reservation clauses. Thus, under Article 17 of the Swiss PIL law, the application of a provision of foreign law is precluded if it leads to a result that is irreconcilable with public policy. Article 18 of the Swiss PIL law provides for the application of overriding mandatory provisions of Swiss law; under Article 19 of the Swiss PIL law, it is possible even to apply foreign overriding mandatory provisions in the case of manifestly overriding interests of a party, which are worthy of protection, and there is a close connection with the foreign law. In the Anglo-American sphere, *ordre public* goes under the name of public policy (see also paragraph 3).\(^\text{12}\)

### III. Principles

The subject matter of public policy, which justifies the endeavour to avert the application of a foreign rule of law, is the *public policy of the forum* – not, for instance, of the EU.\(^\text{13}\) The public policy of a foreign legal system can only be taken into consideration (and indeed then must be) in the case of renvoi.\(^\text{14}\) The public policy of the forum may also be overlaid with values stemming from the European legal order (cf. Section 3 paragraph 13), as it may also be overlaid by international law implications.\(^\text{15}\) Conversely, membership of the EU calls for extraordinary restraint in applying the reservation clause as against the law of another Member State (cf. Section 3 paragraph 14). In addition, its application is precluded where substantive law has been harmonised (cf. Section 3 paragraph 14).

Whilst the German reservation clause under Article 6 EGBGB clearly states that the *result of the application of the law* must be incompatible with the essential principles of German law, the same does not follow with like clarity from the reservation clauses of the Rome Regulations. In the result, however, the

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\(^{11}\) Cf. for instance *Bureau/Muir Watt*, paragraph 464; Calò, p. 68 et seq.; *Mosconi/Campiglio*, p. 248 et seq.

\(^{12}\) See *Dicey, Morris & Collins*, paragraph 5R-001.

\(^{13}\) *Leible/Lehmann*, RIW 2008, 528, 543: *Deinert*, RdA 2009, 144, 150.

\(^{14}\) *V. Hoffmann/Thorn*, Section 6 paragraph 149; *Junker*, IPR, paragraph 289; also (for an application of the public policy of a third State on grounds of fairness in the application of private international law) see *Brüning*, Die Beachtlichkeit des fremden ordre public, Berlin 1997 (Pas-sau, Univ., Diss. 1995/96), p. 244 et seq.

\(^{15}\) *Forteau*, JDI 2011, 3 et seq.; and *Mosconi/Campiglio*, p. 252 et seq.
same must apply there. The crucial consideration is that there is no question of subjecting the foreign rule of law to a moral appraisal. The referring law must be content with averting its application in an individual case. There can be no in abstracto review of the rules of foreign law. That was already the case under the Rome Convention on the law applicable to contractual obligations, which after all became the model for the Rome Regulations. In that connection, an example from the case-law may be instructive: the Federal Labour Court left open a question whether the exclusion of any protection against dismissal offended against public policy, although it held that there was no such contravention in the case of dismissals at the beginning of the employment relationship, because at this stage an employee would not be able to claim for unfair dismissal under German law either.

The result of the application of the law must be incompatible with public policy or with the essential principles of the domestic law. The essential principles may in general terms also include those of an employment-law nature. Regard may not however be had to principles which have already been discarded under national law, such as prohibitions on agencies and hiring. In the meantime, the Italian Court of Cassation has expressly abandoned earlier authorities under which the favourability principle comes within the remit of public policy. This principle would mean that all provisions falling short of the degree of employee protection afforded by the forum would fall foul of public policy. Such a view of the matter could not be brought into line with the system of the Rome I Regulation and has therefore also been subject to criticism in Italian academic writings. Public policy protects not all principles of national law, but only essential ones. The mandatory principles of national law under the favourability principle laid down in Article 8 section 1 of the Rome I Regulation (see Section 9 paragraph 47) can only brought to bear against a choice of law differing from the objectively applicable law of the contract.

16 Cf. Audit/d’Avout, paragraph 838; Plender/Wilderspin, paragraph 12-058.
17 To that effect see Gamillscheg, IAR, p. 63, footnote 1 a; cf. e.g. BGHZ 55, 188, 192.
18 BAG AP No. 12 on Internationales Privatrecht – Arbeitsrecht; see v. Hoffmann/Thorn, Section 6 paragraph 150; see also v. Bar/Mankowski, Section 7 paragraph 265.
20 Cf. Giuliano/Lagarde, BT-Drucks. 10/503, p. 70; similarly Italian law: Conetti/Tonolo/Vismara -Conetti-, p. 51.
21 BAG AP No. 30 on Interanationales Privatrecht – Arbeitsrecht; following the BAG the Hess. LAG IPRspr. 1992, 161, 164; too undifferentiated a conclusion drawn from that by LAG Köln NZA-RR 1999, 118.
22 See on Italian law, Burragato, RIDL 1990 II, 33 et seq.
26 See Timelini, I diritto del lavoro 2003, 223 et seq.
The contradiction to our views of the law must be so blatant that it is to be described as *untenable*. In the context of procedural public policy (Article 34 (1) of the Brussels I Regulation), the ECJ puts it in terms of an intolerable contradiction with one's own legal system. That may be transposed to public policy in terms of conflict rules. The German Article 6 EGBGB mentions fundamental rights. It is true that fundamental rights are not mentioned in the reservation clauses of the Rome Regulations, but they are also significant because it is the public policy of the forum which is at stake. French case law also acknowledges that the infringement of fundamental human rights is an offence against public policy (see Section 10 paragraph 22). Also of relevance are internationally recognised universal principles and international instruments such as the European Convention on Human Rights. Yet not every *infringement of a fundamental right* is in itself sufficient for there to be a contravention of the public policy reservation. Thus, e.g., the courts have upheld, for example, provisions on the law concerning maintenance which run counter to equality as between spouses as long as the outcome does not run counter to the welfare of the children. It is by no means the case that everything *which is unknown to us* is to be avoided. Even if an employer gives notice of dismissal for a good reason, and the employee of at least 50 years of age and with at least 20 years of service to the firm may, under Article 339 of the Swiss law of obligations, claim a *severance payment* of normally between two and eight months’ salary, this by no means constitutes an intolerable conflict with our concepts of justice, although the German system focuses on protecting the status quo and not on protecting the outcome of settlements. See also Section 13 paragraph 35.

Overall, considerable restraint is called for in the application of the public-policy reservation. It must remain the absolute *exception*. In accordance with recital 37 in the preamble to the Rome I Regulation and recital 32 in the preamble to the Rome II Regulation, it is only to be resorted to ‘in exceptional circumstances’. On the other hand, the reservation clause makes a reservation in favour of the public policy of the forum. Since it is a general clause, it is to be fleshed out by the national courts. An *unreasonable application* of it can of course be

27 BGHZ 50, 370, 375 et seq.; BAG AP No. 12 on Internationales Privatrecht – Arbeitsrecht; see also in that connection German government’s explanatory memorandum, BT-Drucks. 10/504, p. 43.
28 ECJ NJW 2000, 2185, 2186 – Renault/Maxicar and Orazio Formento.
29 See also Sonnenberger, FS Kropholler, 2008, p. 227, 244.
31 Audit/d’Avout, paragraph 309; on the question whether fundamental rights are called to come into play directly or by way of public policy, see Callsen, in: Alleweldt/Callsen/Dupendant (Eds.), Human Rights Abuses in the Contemporary World, Bern, p. 125, 136 et seq.
32 Junker, IPR, paragraph. 272: Kropholler, Section 36 IV 1, p. 251.
33 Cf. BGHZ 120, 29, 36.
35 Audit/d’Avout, paragraph 838; Junker, IPR, paragraph 271; Leible/Lehmann, RIW 2008, 528, 543; Timelini, Il diritto del lavoro 2003, 223, 234 et seq.; Plender/Wilderspin, paragraph 12-056; also BGE 125 III 443, 447; Patocchi/Geisinger, Article 17 No. 1.2.
contrary to European law inasmuch as it would call in question the system of connecting rules under the Rome I Regulation or the Rome II Regulation, which makes it desirable for the ECJ to indicate where the limits lie in this regard.\textsuperscript{36} In relation to public policy in regard to procedural law, the ECJ stressed that it does not define the content of the public policy of a contracting state, but monitors its limits; that specifically precluded any departure from the national rules of law, or any alleged misapplication of law, from being automatically regarded as an offence against public policy.\textsuperscript{37} Whether in fact, there will be any such monitoring of boundaries seems to be highly doubtful since no appropriate provision has been made for such a procedure.

Even if reliance on public policy has to be the exception that does not mean that application of the public-policy reservation will \textit{seldom} be countenanced. Where the application of foreign law would lead to intolerable consequences, then it must be precluded. Correcting instead the connecting rule would be incorrect, and therefore only a fall-back solution.\textsuperscript{38}

In the course of the appraisal an \textit{overall view} is to be taken. Were one, for example, to regard the absence of protection against dismissal as a contravention of public policy (see on this issue, paragraph 21), there may nonetheless, in the end, be found that there is no such contravention because, for example, the \textit{lex causae}, instead of providing for protection against dismissal, makes provision for claims settlement (see Section 13 paragraph 35).\textsuperscript{39}

There must be an adequate \textit{domestic connection}.\textsuperscript{40} Where the \textit{lex fori} is not affected, there is no ground for implementing the principles of domestic law.\textsuperscript{41} There would, for instance, be no adequate domestic connection in a case where a commercial agent active in Switzerland on behalf of a German employer is subject to a significantly exaggerated restraint of trade clause (cf. paragraph 23). Nor would an unusually low level of remuneration, or starvation wage, contravene public policy if it did not concern interior work or was not agreed under an employment relationship between German nationals resident in the forum. What is in domestic relations regarded as a starvation wage may count abroad as a significant income.\textsuperscript{42} It would also be problematical, at the very least, to apply the public-policy clause without any close domestic connection if a person in the Arab-speaking world works seven 12 hour shifts per week.\textsuperscript{43}

\begin{footnotesize}
\begin{enumerate}
\item Thus \textit{Staudinger}, AnwBl 2008, 8, 15.
\item ECJ NJW 2000, 2185, 2186 – Renault/Maxicar and Orazio Formento.
\item \textit{Gamillscheg}, IAR, p. 6 et seq.
\item See further also \textit{Gamillscheg}, IAR, p. 65 et seq., who considers it possible for higher wages to be an adequate compensating factor.
\item BGHZ 120, 29, 34; BGH JZ 2007, 738, 740; \textit{Audit/d’Avout}, paragraph 310; \textit{Kegel/Schurig}, p. 527; \textit{Kropholler}, Section 36 II 2, p. 246.
\item \textit{Koch/Magnus/Winkler von Mohrenfels}, Section 1 paragraph 47.
\item \textit{Mankowski}, IPRax 1996, 405, 410.
\item Not discussed in OGH ZAS 1999, 47.
\end{enumerate}
\end{footnotesize}
IV. Examples

17. A substantial area of application for public policy was earlier provided by discriminatory rules of law.⁴⁴ Nowadays, that is, to some extent overlaid by the fact that anti-discrimination provisions under Paragraph 2 (7) of the law on the posting of workers (Arbeitnehmer-Entsendegesetz – AEntG) which implements the posting directive apply as overriding mandatory law under Article 9 of the Rome I Regulation in terms of positive public policy (see Section 3 paragraph 15). Of course, this is directed only against employers and other private-law subjects, yet does not operate to set aside expressly conflicting rules of law. To that extent, it is still today the case that the application of discriminatory provisions can be averted by means of the public-policy saving clause. Should, for example, a foreign rule of law make provision for periods of notice, whereby, akin to Paragraph 622 section 2, second sentence, BGB, periods before completion of the 25th year of age of the employee are left out of account in determining seniority, that provision in an individual case would have to remain unapplied because it contravenes the prohibition of discrimination on the ground of age.⁴⁵

18. Conversely, the equal treatment of employees is, in general, no ground for applying the saving clause. Irrespective of the clear provision in regard to prohibitions of discrimination (paragraph 17) cases of unequal treatment will not in every case be so intolerable as to warrant the imperative implementation of the principle of equality.⁴⁶ Of course, it may be otherwise in regard to a specific case.

19. A classic example of a public-policy case of is the life-long tie on an employee. This tie will then be superseded by the possibility of giving the longest period of notice of termination provided for under the lex causae (in general, on legal substitution where the public-policy reservation prevails, see paragraph 26).⁴⁷ Conversely, under German law there is no excessively long tie where the five-year limit under Paragraph 624 of the BGB, which does not apply to employment contracts, is exceeded.⁴⁸

20. As a matter of priority, the public policy saving clause upholds the prohibition on slavery.⁴⁹

21. The absence of protection against dismissal cannot generally be regarded as contrary to public policy (see paragraph 15 and Section 13 paragraph 35).⁵⁰ Under the case law of the Federal Labour Court, the absence of protection of the

⁴⁴ See Gamillscheg, IAR, p. 71.
⁴⁵ ECJ NZA 2010, 85 – Küçükdeveci; BAG DB 2010, 2620.
⁴⁶ Gamillscheg, IAR, p. 71; thus the LAG München, IPRax 1992, 97, 99, declined to apply the public policy clause in a case with differing provisions on termination under Italian law which, according to the Italian view, were compatible with the constitutional principle of equality.
⁴⁷ But see (application of Paragraph 624 BGB) Gamillscheg, IAR, p. 72.
⁴⁸ Gamillscheg, IAR, p. 72.
⁴⁹ See Cass.soc. D 2006, 1400; on that see Pataut/Hammje, Rev.crit.DIP 2006, 856.
status quo in the case of a transfer of an undertaking does not contravene public policy.\textsuperscript{51}

Conversely, the question arises whether the inability under foreign law of the employer to terminate an employment relationship contravenes public policy.\textsuperscript{52} It follows from Paragraph 626 BGB German law states that, where it would be unreasonable to expect a continuance of the employment relationship, terminating such an employment relationship is mandatory and cannot be negotiated away.\textsuperscript{53} Therefore, provisions that render it impossible to terminate employment relationships are to be construed as merely excluding dismissal, as provided for in legislation.\textsuperscript{54} A foreign provision under which it is not possible to terminate an employment relationship should therefore be overridden by the public-policy saving clause. There is also much to be said for adopting termination with the longest period provided for under the \textit{lex causae} (cf. the case of the employee’s life-long tie, paragraph 19).

\textbf{Prohibitions on competition} may also lead to results which are not reconcilable with public policy. But here, too, the rule is that it depends on the individual case.

The absence of any claim to residual commission after termination of an agreement (cf. Paragraph 87 section 3 German Commercial Code (Handelsgesetzbuch – HGB)) does not contravene public policy.\textsuperscript{55} The French courts did not regard a 20-day period for bringing an action as contravening public policy because the employee was not thereby deprived of the protection of mandatory provisions.\textsuperscript{56} In regard to short prescription periods, which are upheld in German law,\textsuperscript{57} the same view must be taken here. Only if access to the courts is in practical terms barred can application of the reservation clause be considered.

\section*{V. Legal consequences}

The legal consequence of the application of the public-policy saving clause is the non-applicability of the substantive rule of law that would in itself be applicable. From time to time this may suffice in order to bring about an appropriate result,\textsuperscript{58} such as, for example, where the Swiss Federal Court refused to uphold a

\begin{thebibliography}{99}
\bibitem{50} Thus, without specific reasoning, LAG Köln NZA-RR 1999, 118. In favour of applying public policy clause in a case where was no protection against dismissal, see BAG AP No. 8 on § 28 ZPO; leaving the matter open, BAG AP No. 30 on private international law – employment law. \textit{Gamillscheg}, IAR p. 74, is right to state that a decision of the Dresden Higher Regional Court (OLG Dresden) of 25 January 1907 enforcing the German law on protection against dismissal on public-policy grounds ‘probably overstretched the permissible limits’.
\bibitem{51} BAG AP No. 31 on Internationales Privatrecht – Arbeitsrecht.
\bibitem{52} According to \textit{Gamillscheg} it does not, IAR, p. 74 et seq.
\bibitem{53} Palandt-\textit{Weidenkaff}, § 626 BGB, paragraph 2.
\bibitem{54} ErfK-\textit{Müller-Glöge}, § 626 BGB, paragraph 194.
\bibitem{55} BAG AP No. 23 on Internationales Privatrecht – Arbeitsrecht.
\bibitem{57} BAG NZA 2006, 149; BAG AP No. 1 on § 310 BGB.
\end{thebibliography}
dismissal under the National Socialist race legislation. Overall, that will always be the case where a rule of law restricts a right under substantive law in a manner contrary to public policy. If there is no such right that is being restricted, the saving clause does not say which provision is to be applied, but only says which is not to be applied. The specific problem that thus arises is in regard to the issue of the applicable substitute law. In enacting the new law on private international law (Section 2 paragraph 6), the German legislature expressly left this question open in order to allow ‘for flexible and differentiated solutions in practice’. Under the hitherto prevailing opinion in Germany, any gap is first to be filled by application of the *lex causae*. Only if that is not possible is the *lex fori* to be applied as a substitute law. If, however, that leads to an unreasonable result, a rule of substantive law tailored to the case must be formulated.

In France, one proceeds on the basis that the *lex fori* is to apply. Yet it is unclear how far this reaches. Italian law provides in Article 16 of the law on private international law (law No. 218/1995), first, that recourse be had to other elements of the relevant conflict rule. It is therefore not to be wondered at that academic writers in Italy have proposed transposing this solution to Article 21 of the Rome I Regulation.

It is to be noted that, for example, in China different provision has been made. Under Paragraph 5 of the Chinese law on private international law in the event of a public policy contravention by a foreign law, not only is the foreign law to be declared inapplicable but Chinese law must be applied in its place.

Employing the *lex fori* as a substitute law seems only at first sight to be irreconcilable with the fundamental connecting rule. For the saving clause is also a connecting rule. Even if it initially limits itself to precluding the applicability of foreign law, it brings domestic law to the forefront by allowing the values of the *lex fori* to impede the application of the foreign law. From there it is only a small step for those values to be manifested in the substantive application of the law of the forum. That also has a parallel in the earlier operation of public policy in its positive configuration which nowadays finds expression in regard to the specific applicability of overriding mandatory provisions (see paragraph 5).

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58 Junker, IPR, paragraph 281; cf. Gamillscheg, IAR, p. 71.
60 German government’s explanatory Memorandum, BT-Drucks. 10/54, p. 44.
61 Palandt-Thorn, Art. 6 EGBGB paragraph 13 with further references; Hönsich, NZA 1988, 113, 116; but see Kegel/Schurig, p. 539: to the effect that the foreign law is arbitrarily distorted, the smallest intervention will mean the formulation of new substantive provisions; in favour of application of the *lex fori*, see v. Bar/Mankowski, Section 7 paragraphs 285 et seq.
63 Junker, IPR, paragraph 282.
64 Cf. Bureau/Muir Watt, paragraph 468.
Here a public-policy contravention was considered possible by virtue of the fact that a provision corresponding to a rule of law of the forum was precluded from being applied. An example of the use of the substantive law of the forum would be the application of the rules on compensation under Paragraphs 74 et seq. HGB in the event of a public-policy contravention by virtue of a prohibition on competition after termination of a contract which is unsupported by any compensatory amount (see Section 14 paragraph 3).

In this connection, BAG AP No. 30 on 1 of the law on collective agreements (Tarifvertragsgesetz – TVG) in the building sector, queried whether ‘by the non-application of the universally binding provisions of collective agreements in the building sector to employment contracts governed by foreign law the aim pursued by the agreements is so seriously jeopardised that Article 30 EGBGB (the public policy clause at the time) requires social security rates to be applied to the employment contracts governed by foreign law’.

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6 Further questions under the General Part

1 The subsequent sections concern two further issues arising out of the general doctrines of PIL, which also arise in regard to conflict-of-laws questions in employment law. The first issue to be dealt with concerns the legal sequence. The conflict rule refers either to its own law (lex fori) or to a foreign law. In that connection, it has to be clarified whether the referral to the foreign law is sufficient in itself, or whether that foreign law refers back to the lex fori or makes a further referral to another law, and as to the significance of that (paragraphs 2 et seq.).

Finally, the problem of the preliminary question will be discussed. That concerns not the sequence of laws, but a matter provided for by a law. Those are legal situations which are posited as existing under the terms stated in a rule of law. It is a matter of determining the law which will appraise whether that legal situation subsists (paragraph 12).

I. Simple and multiple renvoi and renvoi in the case of states with multiple legislations

2 A central issue under private international law is the significance of renvoi (simple renvoi) or double or multiple renvoi. If, for example, German PIL refers to French law, it has to be further elucidated whether French law can then be applied without further consideration or whether it is material that the French PIL refers (back) to another law, e.g. English or German law. The specific issue therefore is whether the referrals under PIL are directed to the relevant substantive law of another country (substantive-law referral) or to its law as a totality, including private international law (total referral). In the latter case there may be double or multiple renvoi.

Example: a trades union established in B organises a strike in A. It is sued for damages before the courts in B. The PIL in B refers to the place where the action was conducted. If the PIL in A refers to the seat of the trade union carrying out the action, in the case of a substantive-law referral that is immaterial: the substantive law of A will be applicable. In the event of total referral, it would again be a matter of determining, by reference to the PIL of State A, the law under which the facts are to be assessed. Since the PIL of A points to the seat of the trade union, we are dealing here with a renvoi.

3 The advantage of a renvoi accepted by the legal system to which the renvoi is made is that the courts can decide in accordance with their own substantive law, especially as the legal system to which its own PIL referred does not itself wish to decide the case.¹ Thus, implementation of renvoi in practice is attributed above all to the endeavour to apply one’s own familiar law, which may be described as striving homewards.² Conversely, the international uniformity of

1 Kropholler, Section 24 I 3 a, p. 166.
decisions (Section 1 paragraph 22) is not promoted by the significance of renvoi where the other legal system pays heed to and accepts the renvoi. Example: in the event of a renvoi from a foreign law, a German court decides in accordance with German law, whereas the foreign court would decide the same case, after renvoi, according to its own substantive law. However, the international uniformity of decisions is furthered where reference is made to a third law and this law accepts the referral.

Before adoption of the new German PIL law (see Section 2 paragraph 6) renvoi played a significant role only in regard to the question of legal capacity. Conversely, in regard to the law governing employment contract law, there was an assumption that a choice of law entailed a substantive-law referral because the parties could scarcely have intended to include the PIL provisions of the chosen law. Nor in determining the hypothetical will of the parties with regard to the main connecting factors should there be any ground for a difference of view as to the significance of renvoi. The earlier provision in Article 27 EGBGB recognised renvoi in certain cases, which are not relevant for present purposes, and left the question of other cases to clarification by the courts and academic writers. With the law amending the PIL the problem was given a statutory basis in Article 4 EGBGB. This provision provides that there is in principle to be a total renvoi unless otherwise apparent from the referral. A renvoi to German law will not, however, be a total renvoi. Rather, under Article 4 section 1, second sentence, of the EGBGB only the substantive provisions of German law are referred to. The renvoi is to be accepted. Conversely, a further renvoi is to be followed and the prevailing opinion is that every further referral must also be followed so that the chain of renvois is not broken, for instance, after the first further renvoi.

From a comparative-law point of view the picture in regard to the recognition of renvoi was rather fragmentary. Before the Rome Convention applied in Austria, referrals under international individual employment law were total referrals. Under Paragraph 5 of the PIL law a renvoi was also significant in terms of employment law. In Swiss international contract law as well, renvoi and multiple renvoi are precluded under Articles 14 and 116 of the Swiss PIL law. In France, renvoi has been and continues to be significant. In Italy, too, it retains significance outside the scope of application of the Rome I and Rome II Regula-
tions; yet a further renvoi will occur only in the event of acceptance by the State to whose law reference is made under Article 13 section 1(a) of Law No. 218/1995 (PIL law). In Spanish law only single renvoi is accepted under Article 12 of the Civil Code (Código Civil), but not double or multiple renvoi.

6 Section 187 (3) of the US restatements (Second) of conflict of laws (Section 9 paragraph 7) answers affirmatively as to whether the parties, should they wish, may expressly make a choice of law, including the PIL of the law chosen. Under the Rome I Regulation this is a controversial issue: at any rate, it appears to be of a purely academic nature as far as employment law is concerned.

7 Under Article 15 of the Rome Convention referrals under international contract law were to be construed as applying to substantive rules of law. Article 20 of the Rome I Regulation and Article 24 of the Rome II Regulation henceforth also preclude renvoi. In the geographical area within which the Regulations apply, the international uniformity of decisions is thereby secured because in every State in which the Rome I Regulation and the Rome II Regulation are applicable, referral will be to the same law.

8 Problems may arise where referral is to a legal order which does not wish to take cognizance of the facts, as may happen for example under English law and US law. The law called upon to be apply by virtue of the referral does not itself wish to be applied to employees who normally work outside the United Kingdom or the United States. Those are self-limiting rules. At first sight, this would appear to give rise to an absence of rules which manifestly is not desired. Acceptance of a disguised renvoi is precluded by the fact that renvoi is not taken into account under Article 20 of the Rome I Regulation. The correct solution is not to accept the disguised renvoi, with the consequence that it would be treated as not relevant. That can be constructively solved by construing as a public-policy contravention the complete failure of protection under all the legal systems falling to be considered, or preferably by applying to the case a negative

13 Mosconi/Compiglio, p. 227 et seq.
14 Cf. on the state of the dispute, with further references, Reithmann/Martiny-Martiny, paragraph 218.
15 Cf. e.g. EEOC v. Arabian American Oil Company 499 U.S. 244; Hay/Borchers/Symeonides, Sections 3.65 et seq.; ELL – Goldman/Corrada, paragraph 982; Casebeer/Minda, p. 1172; Lawson v. Serco [2006] IRLR 289 (H. L.); Deakin/Morris, paragraph 2.46; Dicey, Morris & Collins, paragraphs 33-069, with exposition of individual laws in paragraphs 33-089 et seq.; Pledger/Wilderspin, paragraph 11-060 et seq.; see further Section 13 paragraph 28. But see also statements in Section 10 paragraph 78. The landmark decision in EEOC was however superseded in regard to the subject-matter of the decision (anti-discrimination law) by 42 U.S.C. Paragraph 200 (e) (1) (c) by virtue of the fact that Title VII of the Civil Rights Act henceforth also comes into play for employees of American or American-controlled companies abroad. For an instructive account of the current state of protection against dismissal, see Krebber, p. 150 et seq.
16 See on that Krebber, p. 266 et seq.
17 For another view, however, before the Rome Convention, Gamillscheg, RIW/AWD 1979, 225, 233.
18 Junker, observation on BAG SAE 317, 327; MünchKomm-Martiny, Art. 8 Rom I-VO paragraph 119.
unilateral conflict rule in accordance with the notions underlying Article 20 of the Rome I Regulation in respect of renvoi. Exceptionally, English law will then also be applicable to work performed outside the United Kingdom. A different result can be achieved only if, in fact, the self-restraint – not normally the case – is intended by its purpose to operate from a substantive-law point of view and is not simply a manifestation of restraint by the State actuated by conflict-of-laws notion in not wishing to interfere with the sovereignty rights of other States. To be distinguished from the problem of total referral is a similar problem of a collective bargaining nature. Collective agreements typically contain provisions determining their spatial applicability. Those are substantive law provisions without any conflict-of-laws content. The question whether work performed outside the spatial sphere of applicability of the collective agreement is covered by it is therefore a question of substantive law. Accordingly, the Austrian Supreme Court correctly held, in regard to Paragraph 44 of the PIL law, which contains a total referral, that in the case of work abroad and renvoi to Austrian law, it is immaterial that the spatial sphere of application extends over the territory of the Republic of Austria. Whether of course that is the end of the matter, and whether, as the Supreme Court appears to be doing, one can dispense with examination under the collective agreement as to whether foreign work is included, is then however, a question going to the conflict-of-laws rules.

On the supposition that the substantive law applicable to the collective agreement declines applicability to work performed abroad, which as a matter of Austrian law will not be enquired into at this juncture, the same solution as in the case of the self-restraining substantive rule (paragraph 8) would seem to commend itself: the disguised referral contained therein is to be ignored, in the same way as the Austrian case-law cited therein ignored it. Of course, there is a difference from other rules of law. Whereas the legal system of the State is at pains to ensure completeness, this may not be the case in regard to the law governing collective agreements. The parties to collective agreements may instead forego provisions with the consequence that, in the absence of a provision in the collective agreement, State law will intervene. There is therefore no danger that there will be a lacuna in the rules. The decision of the parties to the collective agreement not to make provision for certain factual situations must be respected. It is then a case of a situation in which the collective agreement does not apply. The factual situation is then to be assessed according to the otherwise applica-

19 Junker, Internationales Arbeitsrecht im Konzern, p. 177.
20 Junker, Internationales Arbeitsrecht im Konzern, p. 177.
21 To that effect see Krebber, p. 266 et seq.
22 See Deinert, Internationales Arbeitsrecht, Section 15 paragraph 68.
23 OGH ZAS 1999, 47; OGH DRdA 2000, 33, 34.
ble substantive law of the lex causae. To that extent, therefore, the solution of the Supreme Court is to be rejected.

Since the Rome I Regulation also contains, in Articles 11 and 13, connecting factors concerning formal validity and legal capacity, which thus are likewise to be construed as substantive-law referrals, there is in practical terms no room in international employment law for total referrals.

A State may have several territorial units with their own legal rules for contractual or non-contractual obligations. This legal division occurs, for example, in particular in the USA. In that case, under Article 22 section 1 of the Rome I Regulation or Article 25 section 1 of the Rome II Regulation, each territorial unit is deemed to be a country for the purposes of identifying the applicable law. The rules governing inter-regional private law in a State with several territorial units are therefore of little significance. That is also true in relation to non-Member States since the Regulations contain universal connecting factors (Section 2 paragraph 9).

There is of course a danger of legal situations not being able to proceed owing to interregional private law being excluded. Where a choice of law refers to a State with several territorial units without naming the relevant unit of the legal system the relevant legal order is to be determined by way of interpretation. Normally the one most closely connected with the matter will be the one intended.

II. Preliminary question

Questions as to a prior legal relation (see paragraph 1) may arise in regard both to the conflict rule and to application of the substantive law. The conflict-of-laws question as to the prior legal relation is termed a primary question. Where, for example, a conflict-of-laws rule applies in relation to the parent-child relationship, the question as to descent is a primary question. An example from employment law is the question to be discussed for the purposes of classification as to whether work by members of a family is performed on the basis of family law (Section 4 paragraph 33). In order to reply to that conflict-of-laws question, regard must be had to the lex fori.

That follows from the fact that this question arises in the context of the conflict-of-laws examination where lex fori and lex causae are always the same law. The applicable conflict-of-laws rules are those of the place of the court (see Section 16 paragraph 13).

24 See the earlier provision in Article 19 section 1 Rome Convention.
25 Reithmann/Martiny-Martiny, paragraph 220.
26 Cf. Reithmann/Martiny-Martiny, paragraph 220.
28 Reithmann/Martiny-Martiny, paragraph 307.
29 Kropholler, Section 18 II, p. 134 et seq.
30 On the direct subsuming of the preliminary question under the lex fori, see BGHZ 43, 213, 218 et seq.
The precondition for there to be a primary question (as for the existence of a preliminary question, paragraph 14) is the need for clarification as to a pre-existing legal relation and not the existence of a fact. As a general rule, it is not difficult to make a distinction in this regard. But borderline cases are possible. Thus, Article 9 section 3 of the Rome I Regulation permits the specific application of certain overriding mandatory provisions of the place of performance. At first sight ascertainment of the place of performance would appear to concern a pre-existing legal situation. On a proper view, however, it is not the provisions of the place of performance that are referred to, but the provisions at the place where the work for fulfilment of the obligations is actually carried out or is actually necessary (Section 10 paragraph 94).

Conversely, a question as to a pre-existing legal relation may also arise in the context of the application of the lex causae (preliminary or incidental question). Thus, in connection with the question of whether an advisory council is to be elected in an undertaking, the law governing the constitution of the undertaking must be ascertained in accordance with the location of the undertaking. Since in the case of an undertaking established in Göttingen that will be German law, the further question may arise as to whether the wife of the owner of the undertaking is an employee within the meaning of Paragraph 5 of the law on the constitution of undertakings (Betriebsverfassungsgesetz – BetrVG). Under Paragraph 5 section 2 (5) thereof, that is precluded in the case of a spouse who lives together domestically with the employer. If there is a foreign connection here, then one is dealing with a preliminary question under the conflict-of-laws rules. In the context of the application of the substantive law (Paragraph 5 BetrVG), the substantive law question arises as to whether there is a marriage. Now, the preliminary question relates to which law will answer this preliminary substantive-law question. Likewise, in the context of the legal assessment of a challenge to a collective agreement, a preliminary question may arise as to whether industrial action was lawful. However, prudence is required: whether the legal issue is a preliminary one is a matter to be determined by the lex causae not the lex fori. This may be illustrated by an example taken from a decision by the English courts. The case concerned a contract which had come into existence as a result of pressure exerted by a boycott in Sweden. The House of Lords examined in the context of a challenge to this agreement, to which English law was applicable, whether it had come into existence as a result of unlawful economic pressure. The House of Lords refused to accept that it was justified as industrial action that was lawful under Swedish law because English law takes cognizance of duress wherever it arises without needing to raise the question of justification under the law of the place of the duress (Section 16 paragraph 24).

32 The question may be placed in a conflict-of-laws setting (examination of renvoi) or in a substantive-law setting, see Winkler von Mohrenfels, RabelsZ 51 (1987), 20, 21.
In theory four solutions may be taken into consideration for the purpose of determining the preliminary question:

1. The preliminary question can be answered in accordance with the *lex causae*, thus in the example under German marriage laws.
2. It can also be answered by a self-contained referral to the PIL rules of the *lex causae*, in this example, by Article 13 EGBGB.
3. The preliminary question may be answered under the substantive law of the *lex fori*; in the example given that would likewise be the German marriage laws.
4. Finally, consideration may be given to a self-contained referral of the preliminary question to the *lex fori*, which, in the example given, would once again entail the application of Article 13 EGBGB.

There is consensus that the preliminary question must be dealt with separately. Otherwise the preliminary question would be answered according to rules under which it would not otherwise be answered by any court. That would affect the internal conformity of decisions under which a legal situation should be dealt with uniformly under its various aspects. To revert to the example: the application of the *lex fori* would be founded on the international jurisdiction in relation to the law governing the constitution of plants. Application of the *lex causae* would be founded on the location of the plant. Neither would happen under the divorce laws or the laws of descent. Thus the solutions at (1) and (3) cannot be availed of.

The only question then arising is as to the (autonomous) referral to the *lex fori* or referral to the *lex causae*, which will not be stand-alone. The latter would certainly have the preference of ensuring the international uniformity of decisions (see in this connection Section 1 paragraph 22). The prevailing view is that only in a limited number of cases would that apply in the case of the favoured option of (autonomous) referral to the *lex fori*, namely only when the conflict rule applying to the pre-existing legal relation is also the same. On the other hand, autonomous referral to the *lex fori* has the decisive advantage of ensuring the internal uniformity of decisions. A family court of the forum would answer the question of the existence of a marriage in the same way as a Labour Court or an old-age pension institution. The prevalent view is justifiably to value the internal uniformity of decisions more highly. Of course, as a matter of legal policy that is understandable. What is more important, however, is that determining
the preliminary question under the *lex causae* represents a departure from the system of conflict-of-laws rules. For in regard to the legal situation concerned, there is a conflict rule, which demands application. Not to apply it would require substantiation which has hitherto been lacking. Inasmuch as the Rome I Regulation and the Rome II Regulation make no provision for the issue of the preliminary question, it seems to me that this line of argument in view of the autonomous German PIL must also apply to the European Regulations. However, it has been rightly pointed out that the last word on this issue must rest with the ECJ; pending such ruling, the risk of a differential treatment in regard to the issue of the preliminary question must continue to subsist, which may well encourage forum shopping.

Autonomous referral of course occasions *imperfect or limping legal situations* in the sense that a legal situation may be treated as valid by the *lex fori* while under the *lex causae* or the PIL rules of the *lex causae*, and the resulting application of law, it will be regarded as invalid. The converse configuration is also possible and conceivable. Nonetheless, such imperfect legal situations must, in general, be tolerated. It may in fact be a requirement in regard to constitutional law, as pointed out by the Federal Constitutional Court in the in the so-called Spanish national decision. Conversely, whether in the context of the principal question an imperfect legal situation will be sufficient to constitute a pre-existing legal situation is a question to be answered by the *lex causae*.

Only exceptionally will preference for international uniformity of decisions give way to a *particular requirement*. That concerns, for instance, the law relating to names because it is not reasonable to expect a person to be dealt with differentially in regard to his name. Furthermore, it concerns for example acquisition of nationality and finally cases in which conflict rules under international treaties arise. Here the preliminary question must be dealt with autonomously under international law. But in regard to the sector of international employment law, there are no grounds for giving preference to the international uniformity of decisions with the result that the preliminary question must be dealt with by direct reference to the *lex fori*.

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37 See in more detail Schurig, FS Kegel, 1987, p. 549 et seq.
39 BVerfGE 31, 58, 86.
40 Koch/Magnus/Winkler von Mohrenfels, Section 1 paragraph 32. The most prominent example of where an imperfect legal situation sufficed on constitutional grounds was the widows pension decision BVerfG 62, 323. Against that background Winkler von Mohrenfels, RabelsZ 51 (1987), 20 et seq., advocates application of the *lex fori* and the *lex causae* cumulatively in order to enable account to be taken in substantive-law terms of imperfect legal situations.
41 On that see Kropholler, Section 32 IV 2, p. 226 et seq.
42 BGHZ 90, 129, 140.
43 Koch/Magnus/Winkler von Mohrenfels, Section 1 paragraph 227.
Chapter 2: General doctrines of private international law of relevance to employment law

Insofar as the primary question (preliminary question under conflict of laws) and preliminary question are dealt with in accordance with the same rules, the terminological distinction is not important, so that the terms may be regarded as interchangeable.\textsuperscript{44}

\textsuperscript{44} Also to that effect, see Kropholler, Section 18 II, p. 135.
Chapter 3. Connecting factors

The basic connecting factor for the employment contract is to be found in Article 8 of the Rome I Regulation (Section 9). There are special connecting factors, however, for the specific questions of legal capacity (see Section 7) and formal validity (Section 8). However, all these connecting factors may be superseded, either wholly or in part, by special connecting factors (Section 10).

Sections 11 to 15 of Chapter 4 investigate, in the light of numerous substantive questions relating to the employment relationship, whether those issues are governed by the law applicable to the employment contract or by another applicable law; they also inquire to what extent special connecting factors override, or are superimposed on, them, either wholly or in part.

7 Capacity and contractual capability

Capacity is a specific question with a connecting factor separate from the law applicable to the contract. It is determined by the law applicable to the person, which is generally governed by nationality. A specific problem arises in relation to the protection of transaction. In that connection, Article 13 of the Rome I Regulation contains a special provision which, for its part, calls for a specific employment-law interpretation (paragraph 15).

I. Substantive law

German law is based on the contractual incapability of minors, but provides in Paragraphs 106 et seq. BGB for restricted capacity for minors from the age of seven years. In that connection, in order to conclude a contract the assent or approval of the legal representative is required. For a unilateral legal transaction, the prior consent of the representative is required under Paragraph 111 BGB. If authorisation is given to enter work, the minor will, however, under Paragraph 113 BGB, have unrestricted legal capacity in regard to the conclusion, cancellation and performance of the agreement.

Under Austrian law minors, that is to say persons under the age of 18 years who have reached the age of responsibility which, under Paragraph 21 section 2 ABGB (General Civil Code for Austria) occurs on attainment of 14 years of age, are permitted under Paragraph 152 ABGB to undertake to provide services. However, the legal representative may, for an important reason, terminate the contractual relationship at any time under paragraph 152, second sentence, ABGB. Entry into an apprenticeship or training agreement will require the consent of the legal representative of the minor person under Paragraph 12 section 1, third sentence, of the law concerning occupational training.
Under Swiss law full contractual capability to act exists under Articles 12 et seq. ZGB (Swiss Civil Code) from 18 years of age, provided that the person is of sound mind. Under Article 19 ZGB, persons below the age of responsibility may, provided they are of sound mind, enter into agreements with the approval of their legal representative. This provision applies also to employment contracts since there is no special capacity required to enter into employment contracts.\footnote{Rehbinder, paragraph 55.}

In the Netherlands, persons up to the age of 15 years require, under Article 7:612 section 3 of the Dutch Civil Code (BW), the approval of their legal representative in order to enter into an employment contract. If, however, the parents do not object within four weeks of commencement of employment, their consent will be irrefutably presumed under Article 7:612 section 2 BW. If the employment contract comes into existence with consent or presumed consent, the minor will be treated in regard to the employment contract in all respects in the same way as an adult (Article 7:612 section 3 BW). Under Article 1:233 BW full capacity to act under civil law exists only from the age of 18 years, with the result that until then, under Article 1:234 BW, capacity to act will be dependent on the consent of the legal representative. However, that rule is departed from in Article 7:612 section 1 BW, inasmuch as 16-year-olds are already able to conclude an employment contract without the consent of their parents.\footnote{Jacobs/Massuger/Plessen, Arbeidsovereenkomst, Deventer 1997, p. 23.} They may thus enter into employment contracts against the will of their parents.\footnote{Nishitani, p. 88.} In relation to the employment contract, Article 7:612 section 1 BW treats them in every respect in the same way as persons who have reached the age of majority.

Under Italian law, every person has contractual capability in accordance with Article 1 of the Civil Code. Persons have capacity to enter into employment contracts from the age of 15 years. Where there is no such capacity, the employee nonetheless retains a claim to remuneration under Article 2126 section 2 of the Civil Code.

Japanese law provides for the employment contract to be entered into by a minor with the consent of the parents or the legal representative, but, in the interests of the protection of the child, precludes the possibility of the representative entering into the contract on behalf of the child.\footnote{Giuliano/Lagarde, BT-Drucks. 10/503, p. 33, 66.}

II. Conflict of laws

The Rome Convention on the law applicable to contractual obligations already excluded from its scope of application questions of capacity to act and left them to be determined under rules of private international law.\footnote{Giuliano/Lagarde, BT-Drucks. 10/503, p. 33, 66.} The same applies to the Rome I Regulation (cf. Article 1 section 2(a)). Yet Article 11 of the

\begin{footnotesize}
\begin{enumerate}
\item Rehbinder, paragraph 55.
\item Jacobs/Massuger/Plessen, Arbeidsovereenkomst, Deventer 1997, p. 23.
\item Nishitani, p. 88.
\item Giuliano/Lagarde, BT-Drucks. 10/503, p. 33, 66.
\end{enumerate}
\end{footnotesize}
Rome Convention provided for protection in favour of the contracting party in good faith. This provision had various comparative-law forerunners, and thus it was explained in regard to that provision that it was a feature of States which made these questions subject to the law of the State of nationality or to the law of the State of residence; only those States which made capacity a matter to be determined by the applicable law of the contract, had no such provision. In fact the earlier provision in Article 7 sections 1 and 3 EGBGB also provided for contractual capability to be determined by the State of nationality, but with one exception: where a foreigner conducted a legal transaction in the country, he was deemed to have contractual capability, if he had capacity under German law. Thus, it was in no way a question of the good faith of the contracting partner.

The subsequent rule in Article 11 of the Rome Convention, which was reproduced in Article 13 of the Rome I Regulation, placed protection of expectations and good faith in the foreground (see further paragraph 15). Unlike under the earlier German law, transaction protection can also operate against the protection of minors under German law because it is no longer only a question of a national law being subject to a special connecting factor, but it is henceforth a matter of a unilateral conflict rule.

There are special rules conferring protection in Article 17 of the Hague Convention on the international protection of adults and Article 19 of the Hague Convention on the protection of minors.

The question of legal capacity and, therefore, of who can be a party to an employment contract is determined under Article 7 EGBGB by the law applicable to the person. Capacity is likewise a specific question for which a specific connecting criterion must be found. The relevant provision in that connection is Article 7 EGBGB as an autonomous provision of private international law. Under Article 7 EGBGB the law applicable to a person is determined, in the case of natural persons, by the law of the country of which they are nationals. In the case of persons with multiple nationalities Article 5 section 1 EGBGB states that the applicable law is the law with which the persons are most closely connected. However, under Article 5 section 1, third sentence, EGBGB, German nationality takes priority. In the case of stateless persons, the law applicable to the person is determined by the habitual place of residence or, failing that, the current place of residence (Article 5 section 2, EGBGB).

In foreign jurisdictions, it is predominantly the law applicable to the person which determines capacity, thus, for example, in Austria (Paragraphs 9, 12 IPRG). Swiss private international law directs capacity to act to be determined

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5 Giuliano/Lagarde, BT-Drucks. 10/503, p. 33, 66.
6 See also German government’s explanatory Memorandum, BT-Drucks. 10/504, p. 50.
7 Gamillscheg, IAR, p. 81.
8 Both conventions printed in: Jayme/Haussmann, Nos. 20 and 53.
9 Rauscher-v. Hein, Art. 8 Rom I-VO paragraph 71.
10 For a comparative-law perspective, see Staudinger-Hausmann, Art. 7 EGBGB paragraphs 4 et seq.
by the place of residence, whilst legal capacity is, as a matter of principle, subject to Swiss law (the law of the forum) (Articles 34 and 35 IPRG). The latter element serves to implement the principle that under Article 11 section 1 ZGB every person is deemed to have legal capacity.

The legal capacity of a natural person is, as a matter of principle, normally a given. Were it otherwise public policy would intervene\(^\text{11}\) (cf. likewise, the abovementioned value judgment in Article 34 of the Swiss IPRG).

The question whether legal capacity is attributed to the bodies of workers’ representatives is, in the end, dependent on the formulation of the law applicable in a given case to co-determination and falls therefore to be determined by those provisions. Where, however, what is at issue is capacity in relation to a specific aspect, such as in regard to the works council under German law,\(^\text{12}\) such capacity will be recognised only if recognised by the law of the forum.\(^\text{13}\)

The law applicable to capacity likewise determines restrictions on capacity.\(^\text{14}\) Partial capacity, in terms of capacity to enter into an employment contract under Paragraph 113 BGB, is also determined in accordance with the German law applicable to capacity and not by the law applicable to the contract.\(^\text{15}\) The same applies to the capacity of a 16-year-old Dutchman to enter into an employment contract under Article 7:612 section 1 BW paragraph 5.

The question as to which of several potential employers is the actual employer is not a question going to legal capacity, for example, in the case of a group of companies. This question is therefore not dealt with under Article 7 EGBGB, but is determined in accordance with the law applicable to the employment contract\(^\text{16}\) since it is ultimately a question concerning the coming into existence of the contract under Article 10 section 1 of the Rome I Regulation.\(^\text{17}\)

The question of capacity ought to arise more frequently in regard to the employee then in regard to the employer. But also in relation to the employer a lack of capacity or limited capacity may be an issue. That being the case, the same rules determining applicability will apply.\(^\text{18}\) The determining of capacity by the law of the State of nationality can mean that an employment contract of an Austrian minor, who has reached the age of responsibility, is entered into lawfully in Germany under Paragraph 152 ABGB (cf. paragraph 3), even though that has not been authorised by the legal representative.\(^\text{19}\)

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11 Ferrari-Schulze, Art. 9 Rom I-VO parapraph 9.
12 BAG AP No. 55 on § 80 BetrVG 1972; Däubler, AR 1, paragraph 893 a.
13 Gamillscheg, IAR, p. 93. On the law applicable to companies as legal persons according to German PIL, see in more detail Deinert, Internationales Arbeitsrecht, Section 17, paragraph 73 et seq.
15 C. Müller, p. 325; Staudinger-Hausmann, Art. 7 EGBGB, paragraph 38.
16 Cassoni, Rev, Crt. DIP 1986, 633, 654 et seq.
18 Gamillscheg, IAR, p. 92.
19 Cf. Staudinger-Hausmann, Art. 7 EGBGB paragraph 38.
The restrictions on the capacity of wives – few traces of which remain today\textsuperscript{20} – are determined in accordance with the law applicable to the validity of the marriage (Article 14 EGBGB)\textsuperscript{21} and not by the law applicable to a person; moreover, by reference to Article 3 section 2 GG, they will be set aside under the public-policy reservation (Article 6 EGBGB).\textsuperscript{22} That need not, however, be the case if protection of transactions comes into play (cf. paragraph 15).

Article 13 of the Rome I Regulation also makes provision for employment contracts to enjoy specific transaction protection. In a contract concluded between persons who are in the same country, a natural person who would have capacity under the law of that country may invoke his incapacity resulting from the law of another country, only if the other party to the contract knew, or ought to have known, of that incapacity at the time of the conclusion of the contract. This ensures protection of good faith in capacity under the law of the place where the contract is entered into. Where, for example, an agreement is entered into in the Netherlands, the limited capacity of a 17-year-old German can only be invoked against the employer if the employer was in bad faith because, under Netherlands law, the employee has capacity to act (see paragraph 5).

In regard to the earlier provision concerning the protection of transactions in Article 7 section 3 EGBGB (see paragraph 8), Gamillscheg proposed a corrective interpretation under which the terms, ‘where a foreigner conducts a transaction in this country …’, relates not to the place where the employment contract was entered into, but to the place where the work is to be performed.\textsuperscript{23} Unlike transactions of everyday life, the focus of employment contracts is not the place where the contract was entered into, but the place where the work agreed under the contract is to be performed. Article 13 of the Rome I Regulation nowadays allows this result to be reached more easily because what it is about is ‘a contract concluded between persons who are in the same country’. That wording specifically does not require the parties to be present in the same state ‘at the time of conclusion of the contract’.\textsuperscript{24} The English wording (‘contract concluded between persons who are in the same country’), the French wording (‘contrat conclu entre personnes se trouvant dans un même pays’), and the Netherlands version (‘overeenkomst die is gesloten tussen personen die zich in eenzelfde Land bevinden’) give sufficient room for that interpretation. In actual fact, this view would appear to be substantively correct because in this way a person with limited or no contractual capability will not be treated, under the more or less random law of the place where the contract was entered into, as if he did have a

\textsuperscript{20} Staudinger-Hausmann, Art. 7 EGBGB paragraph 57, mentions only Chile as an example; different again are the comparative-law findings by Gamillscheg, IAR, p. 89 et seq.
\textsuperscript{21} Gamillscheg, IAR, p. 90.
\textsuperscript{22} Staudinger-Hausmann, Art. 7 EGBGB paragraph 57.
\textsuperscript{23} Gamillscheg, IAR, p. 79.
\textsuperscript{24} But presumably the general view, Staudinger-Hausmann, paragraph 37; MünchKomm-Spel- lenberg, Art. 13 Rom I-VO paragraph 58; see also German government’s explanatory Memorandum, BT-Drucks. 10/504, p. 50.
capability, but this will be determined only under a law that governs the employment contract under the basic applicability rule in Article 8 of the Rome I Regulation, to which the person with no or limited contractual capability can adjust accordingly. It appears preferable, therefore, that transaction protection should relate to contractual capability under the law of the place of employment. Contractual capability may, as it were, be split in this way; the fact that the law governing capability in respect of employment contracts will be determined according to another law than for other contracts is immaterial. In other contexts as well, the same substantive laws do not apply across a range of different contracts. The fact that the principle enshrined in Article 11 of the Rome I Regulation is thereby somewhat relativized can be justified by the protection of the weaker party in conformity with the scheme of the Regulation which is expressly pursued by the Rome I Regulation in accordance with recital 23 in its preamble. In the event of a dispute, that question will, however, have to be clarified by the ECJ under the preliminary-ruling procedure.

However, the issue as to the period of time for which the employee can tie himself is not a question of contractual capability. Instead, this question will be dealt with under the applicable contract law. The possibility of termination provided for by German law in Paragraph 624 BGB for such a case will be subordinate to the applicable law of the contract (cf. Section 13 paragraph 31).
8 Law governing formal validity

Like the specific question concerning legal capacity (Section 7), formal validity has its own autonomous connecting factor. However, other formal provisions have to be distinguished from provisions concerning formal validity (paragraphs 16 et seq.). Formal validity is not governed by the law applicable to the employment contract. Referral in respect of formal validity covers not only constitutive formal requirements but also others (paragraph 16). The connecting rule relevant to formal validity in Article 11 of the Rome I Regulation seeks to act in favour of the validity of legal transactions (favor negotii). In regard to formal requirements in connection with employee protection that is open to question from a legal-policy point of view, but is enshrined in legislation (paragraph 12).

I. Substantive law

The conclusion of employment contracts is, to a very large extent, free of any formal requirements in Germany. Formal requirements, where they exist, frequently do not entail the consequence of nullity, if they are not adhered to. For example, requirements under collective agreements as to written form are frequently only of a declaratory nature. In Norwegian employment law as well, where there is a plain requirement for there to be a written employment contract, the validity of the contract is not affected by the fact that it is not in written form. The same is said to be true of Poland. The same applies to Estonia where a written contract is required, but there is a presumption in favour of an employment contract, irrespective of the lack of written form, where the employee has commenced work which, under the circumstances can only be expected to be for remuneration. In the People’s Republic of China, under Article 5 of the Regulation implementing the law on employment contracts, the employer is to terminate the employment relationship, if the employee, despite being requested to do so, does not enter into a written employment contract within one month of taking up employment.

At the cross-over point between formal requirements and evidence a principle of English law is to be encountered. Under that principle employment contracts may indeed be entered into free of formal requirements. Where, however, an employment contract was reduced to writing, implied terms to the contrary may

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1 Dicey, Morris & Collins, 3rd supplement, paragraph 33-079.
2 Kittner/Zwanziger/Deinert-Deinert, Section 11 paragraph 76, with further references; see BAG AP No. 2 on § 125 BGB. In regard to formal requirements in Austrian law, see Marhold/Friedrich, p. 19.
3 See also Schwarz/Enkegaard, p. 78.
4 Lassmann, p. 141.
5 Franek, ZRV 2000, 161, 162.
6 Muda, IJCLLIR 2010, 347, 353.
7 Printed as an appendix to Däubler/Wang, RdA 2009, 353 et seq.
be incorporated into the contract only if the written clause does not accurately reflect the actual agreement between the parties. Under US law an employment contract is invalid under the Statute of Frauds if it cannot be completely performed within one year and was not reduced to writing. However, in light of the employment-at-will doctrine performance within a year will normally be presumed because the agreement can be terminated at any time (cf. Section 13 paragraph 29); but also in the case of a just-cause agreement the agreement can be fully performed within one year, if it is terminated for just cause with the result that the requirement of written form is also ultimately dispensed with in that connection.

Yet, in almost all legal systems, there are **special formal requirements**. They concern specific types of contract, such as, for example, in France and England, the seafarer’s employment contract (Article L. 5542 – 3 Code des transport [Article 9 Code du travail maritime, old version], Section 25 (1) of the Merchant Shipping Act), in Austria for apprenticeship agreements (Paragraph 12 section 1, second sentence, of the Professional Training Law [Berufsausbildungsgesetz]), in Switzerland for temporary work (Article 19 section 1 AVG) or in France for part-time employment contracts\(^\text{11}\) (Article 3123–14 CT: if written form is not observed the employer must prove that the relationship is not one of full-time working\(^\text{12}\)), certain contract clauses such as prohibitions on competition (e.g. in Switzerland, Article 340 section 1 of the Law of Obligations (OR)), or agreement for a trial period (see, for example, Article 2096 section 1 of the Italian Civil Code), as well as unilateral declarations such as, in particular, in respect of termination (see, for German law, Paragraph 623 BGB). In addition, an employment contract for a fixed period will frequently be required to be reduced to writing so that, in the absence of written form, there will be an employment relationship for an unlimited period, such as for example in Germany (Paragraphs 14 section 4 and 16 of the law on fixed-term and part-time employment – TzBfG) or France (Article L 1241 – 12 of the Labour Code – CT).

No requirements are contained in the **notification directive\(^\text{14}\)** or in the national laws enacted in order to transpose it (such as in Germany, the notification law (NachwG), in England, Sections 1 et seq. of the ERA,\(^\text{15}\) in Austria, Paragraph 2 (AVRAG) of the law adapting the employment contract on written terms of service\(^\text{16}\)). Notification of terms of employment is intended to ensure the provision

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9 ELL – Goldmann/Corrada, USA paragraph 143.
10 ELL – Goldmann/Corrada, USA paragraphs 143 et seq.; see also Thau, paragraphs 122 et seq.
11 On the coming into existence of a part-time employment contract, see Ahumada, RPDS 2011, 209 et seq.
13 For Italy, see Vallebona II, p. 89; Henssler/Braun-Radoccia, Italy, paragraph 37.
15 ELL – Hardy, Great Britain paragraphs 139 et seq.
of information about the agreed terms and conditions, but is subsequent to the agreement.

II. Conflict of laws

In regard to formal requirements Article 11 of the Rome I Regulation provides that, in the case of contracts, the relevant law applicable to the contract will be authoritative (lex causae, see Section 9). Alternatively, the contract will also be valid if the requirements as to form of the place where the contract was entered into (lex loci actus) have been adhered to (locus regit actum). There was already consensus under comparative law on the alternative recognition of the formal requirements of the locus actus, even before the Rome Convention, which found normative expression in Article 9 thereof. It is also followed in Switzerland (Article 124 of the PIL law – IPRG). The possibility to reject a declaration, e.g. termination of contract, if the representative does not prove his power-of-attorney as foreseen in Paragraph 174 of the German Civil Code is no question of formal requirement according to the Federal Labour Court.

Alternatively, under Article 11 of the Rome I Regulation, in the case of the cross-border conclusion of a contract, the law of the place of residence of the parties or of their representatives and the law of the habitual residence of a party can be considered. In that connection, it is sufficient if the formal requirements of one of these laws is adhered to. There is a corresponding provision for Switzerland in Article 124 section 2 of the IPRG.

By providing alternatives for applicability, Article 11 of the Rome I Regulation seeks to favour formal validity (favor negotii). If, under the applicable law, the contract is free of formal requirements, formal requirements at the place of performance are no longer significant. Conversely, a formal requirement under the law applicable to the contract does not preclude the validity of the contract where the formal requirements of the place of performance have been adhered to.

A special connecting factor applies under Article 11 section 4 of the Rome I Regulation in regard to consumer agreements where the law of the habitual residence of the consumer is solely applicable. Conversely, generous connecting rules concerning formal requirements apply to employment contracts. That is all the more so since the Giuliano and Lagarde Report already indicated that

16 See Löschnigg, paragraph 5/057.
17 Giuliano/Lagarde, BT-Drucks. 10/503, p. 33, 62 et seq. and 97 et seq.; on the earlier Austrian law (contract entered into by national in his own country normally governed under Paragraph 36 AGBGB by local law) OGH ZAS 1968, 108.
18 BAG BB 2015, 3068.
19 Giuliano/Lagarde, BT-Drucks. 10/503, p. 33, 63.
20 MünchKomm-Spellenberg, Art. 11 Rom I-VO paragraph 2.
21 Hergenröder, ZfA 1999, 1, 10; for another view see Junker, Internationales Arbeitsrecht im Konzern, p. 62.
analogous provision had been considered for employment contracts, but in the end had been rejected.²² The explanation was, however, only of limited persuasiveness: the law applicable to formal requirements in the case of consumer agreements and the law applicable to consumer agreements run in parallel under that provision, whereas that would have been problematic for employment contracts owing to the possibility of application of the exemption clause in Article 8 section 4 of the Rome I Regulation, with the result that the parties would not be able to forecast with certainty which law would determine the formal requirements. This argument is persuasive insofar as an analogous special connecting factor for employment contracts would not be appropriate. Yet it does not invalidate the legal-policy criticism of the principle of favor negotii for employment contracts (see in that connection paragraph 12). In that connection, the law applicable to formal validity could, for example, have been the law of the place of employment. However that may be, and since the Rome I Regulation, though the problem was known about, contains no other provision, the favor negotii principle must continue to apply to employment contracts.

Nor is any other conclusion reached by consideration of the fact that the Federal Labour Court regards employment contracts as consumer agreements for the technical purposes of Paragraph 310 section 3 BGB concerning unfair contractual clauses.²³ Unlike the BGB, the Rome I Regulation contains a distinct systematic structure that is free of overlap for consumer agreements, on the one hand, and employment contracts, on the other; this was already noted by the Federal Labour Court in its decision on Paragraph 310 section 3 BGB in regard to the earlier provisions of Articles 29, 29 a and 30 EGBGB.²⁴ In addition, construal of consumer understanding under national law does not determine the interpretation of the Rome I Regulation.²⁵

Under Article 11 section 3 of the Rome I Regulation, a special connecting rule applies to unilateral acts relating to the contractual relationship. Such acts are valid if they satisfy the formal requirements of the applicable contract law, or of the law of the place of performance or of the habitual place of residence of the person concerned. In that connection, this provision, it may be inferred from the special connecting factor under Article 11 section 4 of the Rome I Regulation, also applies to unilateral acts relating to an employment contract. The requirements as to form under paragraph 623 BGB, and Paragraph 14 section 4 of the law on part-time employment (Teilzeit- und Befristungsgesetz – TzBfG) may not be evaded because they are rules to protect employees and cannot be evaded by choice of law clauses.²⁶ Application of the law of the place of perfor-

²² Giuliano/Lagarde, BT-Drucks. 10/503, p. 33, 64.
²³ BAG AP No. 1 on § 310 BGB.
²⁴ BAG AP No. 1 on § 310 BGB.
²⁵ Staudinger-Winkler v. Mohrenfels, Art. 11 Rom I-VO paragraph 37.
²⁶ MünchArbR-Oetker, Section 11 paragraph 109.
mance or of the habitual residence of the relevant party may, however, render these protective measures nugatory.

Finally, formal validity is buttressed by Article 3 section 2, second sentence, of the Rome I Regulation under which, in the event of a subsequent choice of law, the formal validity under the previously applicable law is not subsequently rendered inapplicable.

By choosing the lex causae, the lex loci actus will be excluded. Where the law of the place lays down stricter formal requirements, under Article 11 section 1 of the Rome I Regulation the lex causae will nonetheless prevail. The prevailing view is that the lex causae will also prevail against more generous formal requirements of the lex loci actus. That is because the parties could also exclude the more generous law by entering into the transaction within the sphere of application of the lex causae.

The favourable treatment accorded to formal requirements by PIL is therefore open to question from a legal-policy perspective, at least in regard to employment law. As a matter of legal policy, Gamillscheg deployed two arguments against upholding the favor negotii principle in the case of employment law: first, it could not be established that there was any historical tradition of the applicability of this principle to employment law, which was a relatively recent area of law. This is an argument which, after the more than 50 years during which this rule has subsisted, must in the meantime have lost validity. Nor, on the other hand, does the argument of facilitating transactions assist the matter since an interest in speed in the conclusion and dissolution of contracts in matters of employment law is not of comparable significance, for example, to the conclusion of sales contracts. The focus must rather be on the protection of the weaker party as the objective of formal requirements under employment law.

In actual fact, this is to devalue the formal requirements of the law applicable to the contract, which normally favour the employee. A legendary example is that of circumventing the formal requirement in regard to dismissal by dismissal by telephone from the airport of a country with no analogous formal requirement. In the case of simple written form as under Paragraph 623 BGB, that may be scarcely significant because compliance with written form will pose no problems. It may be otherwise where the employer must give prior notice of an intended dismissal for negotiation purposes, as is, for example, the case under Paragraph 30 of the Swedish law on the protection of employees. The consideration of circumvention of the law may assist to some extent, but not in every

27 Staudinger-Winkler v. Mohrenfels, Art. 11 Rom I-VO paragraph 103.
28 BGHZ 57, 337, 339 et seq.
29 Staudinger-Winkler v. Mohrenfels, Art. 11 Rom I-VO paragraph 102.
30 Junker, IPRax 1993, 1, 5.
31 Gamillscheg, IAR, p. 99.
32 Gamillscheg, IAR, p. 99; similarly, ZfA 1983, 307, 355 et seq.; see also Hanau/Steinmeyer/Wank-Wank, Section 31 paragraph 169.
case. The same applies to the objection of misuse of the law as well as the consideration that the reliance placed on the law of the place of performance, without there being any plausible interest on the part of the employer, would contravene the duty of care under the employment contract. It will not be possible, owing to the structure of Article 11 of the Rome I Regulation, to rely on the most favoured principle in Article 8 section 1 of the Rome I Regulation against the law of the place of performance seen by the employee as less favourable because Article 6 section 2 of the Rome I Regulation also extends the most favoured principle to consumer agreements; yet Article 11 section 4 nonetheless contains a self-standing provision in regard to formal requirements for consumer agreements which would otherwise be superfluous.

Nor is deeming formal requirements to be overriding mandatory law free from doubt in that connection. It seems questionable whether the special connecting factor under Article 11 of the Rome I Regulation can be circumvented in this way at the level of the Member States. That is not relativized by the fact that, under the view propagated here, rules may at once be overriding mandatory rules and be subject to an area of substantive law (Section 10 paragraph 31). The favouring of formal validity as a policy of private international law systemically precludes recognition as overriding mandatory law. It therefore seems questionable whether the Swedish courts could still maintain the same approach as they did, before the entry into force of the Rome Convention, in upholding Paragraph 30 of the law on employee protection in the case of work within the country, notwithstanding any contrary provision of the law applicable to the contract. However, it is not excluded that there may be formal requirements which are actually to be regarded as overriding mandatory provisions which will then exclude the doctrine of favor negotii (see paragraph 15). But in that case, the internationally compelling intention for them to apply must be inferred from the formal requirement in itself and cannot simply be conjured up in order to exclude a rule regarded as misplaced from the point of view of conflict-of-laws policy. That will, for example, not be the case in regard to Paragraph 623 BGB.

34 Solution adopted in MünchArbR-Oetker, Section 11 paragraph 109; doubted on the other hand by C. Müller, p. 404 et seq.
36 Staudinger-Magnus, Art. 8 Rom I-VO paragraph 182.
37 Staudinger-Winkler v. Mohrenfels, Art. 11 Rom I-VO paragraph 128; also Rauscher v. Hein, Art. 11 Rom I-VO paragraph 37.
39 AD No. 110/2001, mentioned by Luikkonen, p. 158.
40 Giuliano/Lagarde (BT-Drucks. 10/503, p. 33, 63) refer to that expressly in regard to formal requirements under employment law; similarly Rauscher v. Hein, Art. 11 Rom I-VO paragraph 37.
41 See also Giuliano/Lagarde, BT-Drucks. 10/53, p. 33, 63.
42 Staudinger-Winkler v. Mohrenfels, Art. 11 Rom I-VO paragraph 128.
Analogous considerations prompt us also to challenge any reclassification of formal provisions as substantive rules. The Swiss legislature has dealt with this problem, at least in part by directing in Article 124 section 3 of the PIL law that where the law applicable to the contract prescribes formal requirements that protect a weaker party, that law will apply exclusively to questions of formal validity, with the possibility, however, of renvoi, if permitted, to another law.

A problem of classification arises. In regard to the rule of English law described at the outset on the amendment of a written employment contract (see paragraph 2). If one were to treat this rule as being subject to a requirement of proof, it would, under Article 18 of the Rome I Regulation, be governed by the law applicable to the contract. But as a question of form it would be subject to Article 11 of the Rome I Regulation. In that connection classification as a question of form appears to be preferable because not least, notwithstanding the parties’ desires, the contract cannot be amended other than by a new written contract. If a written employment contract, subject to English employment law, were to be amended by implication in Germany, it would therefore be valid under Article 11 section 1 of the Rome I Regulation, whereas if the question were classified as one of proof, then under the proper law of the contract, namely English law, the original written contract would have to be upheld.

As to the classification of the mandatory preliminary discussion in the case of dismissal under French law, reference is made to Section 13 paragraph 38. A requirement to inform the employee concerning his right to apply to the Labour Court, as provided for in Article 30 (5) of the Polish code of employment law, is to be classified as a formal requirement.

As a matter of principle it is not ruled out that provisions as to formal validity may exceptionally be classified as overriding mandatory provisions under Article 9 of the Rome I Regulation, with an internationally compelling intention for them to be applied (on that point, see Section 10 paragraphs 11 et seq.). In regard to the German PIL, the Federal Supreme Court based its differing view on this matter expressly on the conflicts of laws rules scheme under the new PIL law which for its part differed from the Rome Convention (and, thus, also from the Rome I Regulation). That view does not carry conviction in regard to the Rome I Regulation, nor can it be substantiated in any other way.

Article 11 of the Rome I Regulation in itself governs only formal validity. In employment law, there are, however, frequently formal requirements which are not intended to operate constitutively. In that connection, the question arises as to whether the requirements as to form in that case follow the proper law of the

43 Rauscher-v. Hein, Art. 11 Rom I-VO paragraph 37.
44 See Furrer et al., Chapter 8 paragraph 64.
45 Reported thus in Kiedrowski, EuZA 2009, 500.
46 BGHZ 121, 224, 235.
47 Rauscher-v. Hein, Art. 11 Rom I-VO paragraph 36.
contract or whether the alternative connecting factors in Article 11 of the Rome I Regulation can also apply. Subsumed under the law applicable to formal requirements are all rules whose purpose has to do with proof, publicity or monitory functions, whilst rules focusing on substantive matters are governed by the proper law of the contract.\(^ {48}\) Thus, the law applicable to formal requirements also specifically covers formal provisions as to proof which therefore do not operate constitutively in terms of formal validity. That is, for example, true of the requirement under French law of written form for part-time employment contracts (see paragraph 3). In regard to such provisions, the alternative connecting factors in Article 11 of the Rome I Regulation apply.

On similar grounds, the **period for bringing an action** under Paragraph 4 of the German law on protection from dismissal (Kündigungsschutzgesetz – KschG) is not to be classified as a formal provision. That provision pursues substantive aims as may be inferred from the notional validity under Paragraph 7 of the law. Observance of the requirements for the bringing of an action are secondary because only in this way can a court be called upon. By its nature, it is a substantive-law requirement governed by the proper law of the employment contract.

**Provisions as to languages** are, according to the prevailing view, subject to the law governing form.\(^ {49}\) Therefore it must suffice when a written employment contract concerning work in France, and therefore subject to the applicable French law of the contract, is drawn up in German in Germany, contrary to Article L 1221-3 CT. However, the practical significance of that is slight since the courts will not declare the contract invalid owing to the infringement of that provision but will simply rule that the employee has a claim to be provided with a French language version of the agreement.\(^ {50}\) Provisions as to languages can, generally, constitute overriding mandatory provisions in the relevant country, aiming to protect the country’s language as a legal interest.\(^ {51}\)

The law applicable to form also in principle covers the **agreed form**, provided it is recognised by legal provisions.\(^ {52}\) The *favor negotii* doctrine is also applicable in that connection. A form of writing stipulated under the foreign law which is the proper law of the contract, in regard to an ancillary agreement, does not preclude a contract entered into in Germany from being valid if the conditions in Paragraph 126 BGB were adhered to.\(^ {53}\) It must be verified, however, whether the agreed form is deemed also to constitute a choice of the law governing form under the *lex causae* (see paragraph 11).

\(^{48}\) Staudinger-Winkler v. Mohrenfels, Art. 11 Rom I-VO paragraph 45.

\(^{49}\) Staudinger-Winkler v. Mohrenfels, Art. 11 Rom I-VO paragraph 61; Rauscher v. Hein, Art. 11 Rom I-VO paragraph 11; for another view, see Palandt-Thorn, Art. 11 Rom I-VO paragraph 3.


\(^{51}\) Thus, for example in Latvia, see, on the linguistic requirements there, Dupate, EuZA 2011, 265 et seq.

\(^{52}\) Staudinger-Winkler v. Mohrenfels, Art. 11 Rom I-VO paragraph 42.

\(^{53}\) Staudinger-Winkler v. Mohrenfels, Art. 11 Rom I-VO paragraph 42.
Notification of the terms and conditions of employment under the notification directive is not in itself a formal requirement but concerns merely the employee’s right to be informed concerning his employment conditions. It is therefore governed not by the law applicable to formal requirements, but by the proper law of the contract. That is true also in regard to the formal requirement of notification under the duty to provide information. In view of the fact that notification primarily seeks to protect the interests of the employee, what we are dealing with under the notification law are protective provisions within the meaning of Article 8 section 1 of the Rome I Regulation. There can no longer be an assumption of an overriding mandatory provision. As against other EU states, the enforcement of the German notification law would be unlawful under the case law of the ECJ.

54 Dicey, Morris & Collins, paragraph 33-079; C. Müller, p. 310.
55 C. Müller, p. 310.
56 For another view, see C. Müller, p. 315.
I. Overview

The connecting factor for the employment contract is provided for in Article 8 of the Rome I Regulation. This provision was modelled on Article 6 of the Rome Convention and contains only slight differences in regard to it.

Article 8 of the Rome I Regulation is governed by the primacy of freedom of choice of law under paragraph 1, first sentence, of Article 8 (paragraphs 2 et seq.). The choice of law is a specific legal transaction, that is to say an agreement to appoint an applicable law under the conflict-of-laws rules (paragraphs 14 et seq.). It can also be laid down in a collective agreement (paragraphs 21 et seq.). There may also be a tacit choice of law by the parties which must, however, fulfil specific requirements (paragraphs 25 et seq.). The scope of the choice of law can be substantively limited (paragraph 33). For the protection of the employee, freedom of choice of law is limited under Article 8 section 1, second sentence, of the Rome I Regulation (paragraphs 10 et seq.) by the ‘most favourable’ principle (paragraphs 47 et seq.). Under that principle, the mandatory provisions (paragraphs 51 et seq.) of the legal order which, but for a choice of law, would be applicable cannot be departed from. In addition, there are general limits to freedom of choice of law in domestic and internal market cases (paragraphs 38 et seq.).

The objectively applicable connection (paragraph 65) to a provision of the applicable law based on objective criteria and not chosen by the parties is essential if the parties have not chosen the applicable law, and also when the limits of...
freedom of choice of law have to be ascertained. Primarily, the focus under Article 8 section 2 of the Rome I Regulation is on the habitual place of work (paragraphs 83 et seq.). This is also a determining criterion in the case of temporary postings (paragraphs 97 et seq.). The place of the business through which the employee was engaged is only an ancillary connecting factor under Article 8 section 3 of the Rome I Regulation (paragraphs 117 et seq.). Both connecting factors (place of work and place of business) apply subject to the operation of the escape clause in Article 8 section 4 of the Rome I Regulation in favour of another law with which there is a closer connection (paragraphs 124 et seq.).

The applicable law can change. That is termed a change of the proper law (paragraphs 143 et seq.).

Finally, a few special cases with noteworthy particular features will be examined (paragraphs 150 et seq.).

**Figure 3:** Connecting factor for the employment contract

<table>
<thead>
<tr>
<th>Choice of law (Article 8 section 1 Rome I Regulation)</th>
<th>Objective connecting factor</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Most favourable principle</strong> (Article 8 section 1, second sentence, Rome I Regulation)</td>
<td><strong>Habitual place of work</strong> also in the case of temporary posting (Article 8 section 2 Rome I Regulation)</td>
</tr>
<tr>
<td>No derogation to the detriment of the employee from the protective rules of the law objectively applicable to the contract.</td>
<td>in the alternative: <strong>place of business</strong> through which employee is engaged (Article 8 section 3 Rome I Regulation)</td>
</tr>
<tr>
<td></td>
<td></td>
</tr>
</tbody>
</table>

**Escape clause** (Article 8 section 4 Rome I Regulation)

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**II. The decision based on conflict-of-laws rules policy in favour of freedom of choice of law**

From a conceptual point of view Article 8 of the Rome I Regulation proceeds on the basis of the autonomy of the parties, that is to say the authority of the parties to choose the applicable law. This choice of law is a referral under conflict-of-laws rules. That means that the law chosen applies to the contract. It is not the case that, under the law applicable, a different contractual content has, within the limits of what is permissible, been agreed which accords with a foreign law. That would be a substantive-law referral. A consequence of the conflict-of-laws rules referral is, for example, that the parties, irrespective of their authority to make the referral, cannot depart from the mandatory law of the law chosen to be applicable to the contract. If, for example, German law were cho-

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1 *Lagarde, Rev.crt.DIP 1991, 287, 300.*
sen, one would be unable to make it a condition that protection against dismissal was not to apply even where an objective connecting factor would point to a law upholding the ‘hire and fire’ principle. Conversely, the conflict-of-laws rules referral also permits a law to be deselected. Yet, owing to the ‘most favourable’ principle provided for in Article 8 section 1, second sentence, of the Rome I Regulation (paragraph 47), deselection can exclude only the non-mandatory provisions of the law otherwise applicable, whereas the mandatory provisions continue to apply.

3 Party autonomy is not simply the idea of finding a pragmatic solution to the problem of the connecting factor in order to help the court out of the difficulties surrounding the objective connecting factor. More than that, it is a self-standing right that the parties enjoy to frame their agreements and to have their individual decision-making power respected.

4 However, party autonomy is limited. Article 8 of the Rome I Regulation also lays down the applicable law, where no choice of law is made, that is to say the law objectively applicable to the contract. The mandatory provisions of the law objectively applicable to the contract to be so ascertained cannot be ousted by a different choice of law, unless the law chosen is more favourable.

5 The choice-of-law possibility is generally recognised in international contract law. It is laid down in Article 3 of the Rome I Regulation. Recital 11 describes it as ‘one of the cornerstones of the system of conflict of laws in matters of contractual obligations’. Choice of law possibilities also exist in other areas of private international law, for example, in Article 14 of the Rome II Regulation. Party autonomy is not currently an option at the behest of the parties themselves. In many legal orders, as well, the recognition of party autonomy continues to be widespread, even if there is no worldwide consensus concerning it. It has from early times been discussed in Germany whether party autonomy should also be recognised in the international law governing employment contracts. German case-law initially proceeded on the basis that, in international employment law, freedom of choice of law prevailed.

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2 Philip, in: North (Ed.), EEC Convention, p. 81, 93.
3 Junker, IPRax 1993, 1, 2.
4 E. Lorenz, RdA 1989, 220, 221.
5 Junker, IPRax 1993, 1, 2.
6 A comprehensive account has most recently been attempted by Basedow, RabelsZ 75 (2011) 32 et seq.
7 On the possible objections in legal theory, see Basedow, RabelsZ 75 (2011) 32, 40 et seq. with further references.
8 See in that regard, Bogdan, NIPR 2009, 407 et seq.
9 For a critical angle on developments, see Muir Watt, ERCL 2010, 250 et seq.
10 Gamillscheg, IAR, p. 104 et seq.; see also Giuliano/Lagarde, BT-Drucks.10/503, p. 33, 47 et seq.; Di Marco, Rev. du Marché Commun 1981, 319, 320; v. Bar, IPR 2, paragraph 412; for a comparison with US law, see Symeonides, NIPR 2010, 191 et seq.
11 See on exceptions, in particular in Latin America and in the Middle East, Basedow, RabelsZ 75 (2011) 32, 34 et seq.
12 For details cf. Deinert, Internationales Arbeitsrecht, Section 9 paragraph 6 et seq.
The generous recognition of party autonomy in German PIL with concern to labour contracts was an exception from a comparative-law point of view. Sometimes party autonomy was not at all recognised (Luxembourg) or at least not for employment contracts entered into within the national jurisdiction amongst nationals (cf. for Spain, paragraphs 75, 133). In the USA where conflict-of-laws rules are mostly within the jurisdiction of the federal states, but 23 states nonetheless follow the Restatements (Second) of Conflict of Laws, the choice of law is normally only limited by the need for a substantive connection to the state whose law is chosen and by a reservation in respect of public policy. The same was true of English law. Party autonomy was variously limited by a range of special connecting rules. Under French law, a restriction was operated by the so-called ‘most favourable’ principle whereby the choice of law was recognised only if it led to results more favourable to the employee. In the case of work abroad, the choice of the law of the place of employment was recognised as a matter of principle. The notion of the most favourable principle was evidently already well-known in Italy. The same solution is contained in Paragraph 44 section 3, second sentence, of the Austrian PIL law of 1978.

Japanese law has, for example, adopted an analogous solution for the freedom of choice of law but, under Article 12 of the act on the application of the law, the employee can, where another law was chosen, require the application to the contract of the mandatory provisions of the law otherwise objectively applicable. Also, under South African conflict rules, a similar concept is manifestly adopted whereby mandatory provisions, regardless of any choice of law, are ap-
plied under a special connecting rule where the employee does not derive positive benefit from the choice of law.  

7 Another concept for restricting freedom of choice of law concerns the limitation of the laws available for selection. Thus, for example, in Switzerland under Article 121 section 3 of the PIL law, the parties can choose, in contradistinction to the habitual place of employment or the place of the business as the law objectively applicable to the contract, only the law of the habitual place of residence of the employee or the law of the place of business, residence or habitual residence of the employer. The connection to the place of business is not limited to the seat of the undertaking (Article 21 section 2 PIL law), but includes branches (Article 21 section 4 PIL law). Branches are regarded as businesses where legally they belong to the overall undertaking but have their own organisation. In that connection, a foreign employer may also operate a branch (cf. Article 160 section 1 PIL law) with the result that the employment law of the place where that branch is established can be chosen. But criticism has been voiced in both cases. Whilst some criticise the inclusion of the employer’s place of residence, others do not consider the freedom of choice of law to be far-reaching enough. The concept of restricting the laws available for selection, however, has in its favour the advantage of legal certainty.

8 Overall, therefore, we may say that there has been and continues to be widespread recognition, from a comparative law point of view, of party autonomy in international employment law, of course, with very differing conceptions in regard to whether and, if so, how it should be limited.

9 Gamillscheg was of the opinion that substantive-law protection was enough. The choice of law under the conflict-of-laws rules did not mean casting out certain protective provisions but merely making a selection as to which protective law should apply. There would only be differences of degree. That is, at least nowadays, ultimately not persuasive. For employee protection is configured very differently in the various legal systems of this world with the result that...
even at the conflict-of-laws level protection of the weaker party is required.\textsuperscript{34} Mention need only be made of the American law doctrine of employment at will (Section 13 paragraph 29). It can be no objection to that that the employee is similarly protected there by way of prohibitions on discrimination. In the meantime, German employment law is also familiar with protection against discriminatory dismissals.\textsuperscript{35} Protection against dismissal, however, goes much further than that (cf. Paragraph 1 of the law on protection against dismissal – KSchG).

It is indeed argued that cases of misuse have hitherto been unknown,\textsuperscript{36} but that does not prove that there is no abuse. Even less is that a reason to forego preventive measures against abuse, especially because it is empirically observable that the employer generally \textit{dictates the contents of the contract} and determines a choice of law in accordance with his own interests.\textsuperscript{37} Indeed, there may be less incentive for an abusive choice of law because it is difficult to guarantee that knowledge of foreign law is fool-proof.\textsuperscript{38} However, that is not precluded, in particular, in the case of multinational undertakings as well as undertakings which can afford to be advised by internationally active law firms. It may be conceded that even with the objective connecting factor to the place of work possibilities of abuse are not excluded,\textsuperscript{39} even if the potential for abuse must be considerably less than in the case of a choice of law. As regards, finally, the objection that, in the case of the choice of law, there is no legal order that is being ousted,\textsuperscript{40} this consideration may carry conviction only if, in the absence of a choice of law, one is guided by the hypothetical will of the parties, that is to say if one follows a subjective theory (cf. paragraph 65). However, now that both the Rome Convention and the Rome I Regulation have introduced an objective connecting factor, the argument is rendered superfluous.\textsuperscript{41} For it is the legal order which would otherwise be applicable under the objective connecting factor which is ousted by the choice of law.

In light of the above considerations, to allow an unlimited choice of law is \textbf{open to question}, even if it must be conceded that, even in the case of an unlimited choice of law, the application of overriding mandatory provisions remains possible (cf. paragraph 49).\textsuperscript{42} Parallel with the substantive law, the \textit{protection of the weaker party} has prevailed in relation also to party autonomy under the

\textsuperscript{32} Gamillscheg, ZfA 1983, 307, 323; see also RIW/AWD 1979, 225 226; also RabelsZ 37 (1973), 284, 291; see also Kraushaar, BB 1989, 2121, 2122; MünchKomm-Martiny, Art. 8 Rom I-VO paragraph 2.
\textsuperscript{33} See Birk, RdA 1989, 201, 202 et seq.
\textsuperscript{34} MünchKomm-Martiny, Art. 8 Rom I-VO paragraph 2; Eichenhofer, ISR and IPR, p. 89, 90.
\textsuperscript{35} See with further observations Kittner/Däubler/Zwanziger-Deinert, § 1 KSchG paragraphs 67 et seq.
\textsuperscript{36} Junker, RIW 2006 401, 405.
\textsuperscript{37} Kronke, p. 61 et seq.
\textsuperscript{38} Junker, IPRax 1993, 1, 3.
\textsuperscript{39} Gamillscheg, ZfA 1983, 307, 325; similarly RIW/AWD 1979, 225, 228.
\textsuperscript{40} Gamillscheg, RIW/AWD 1979 225, 226.
\textsuperscript{41} Deinert, RdA 2009, 144, 148.
\textsuperscript{42} Junker particularly refers to this in: IPRax 1993 1, 7.
conflict of laws. The Rome Convention had already sought to achieve the protection of the weaker party in terms of the conflict of laws. Thus, recital 23 in the preamble to the Rome I Regulation provides for the protection of the weaker party by conflict-of-laws rules and makes specific provision for employment contracts in recital 35 under which employees should not be deprived of the protection afforded to them by ‘provisions which cannot be derogated from by agreement or which can only be derogated from to their benefit’. The theory of equivalence is only followed in a limited fashion and it is recognised that the standard of protection is not everywhere the same with the result that the freedom of choice of law needs to be qualified.

The ‘most favourable’ principle circumscribes the limits to the choice of law and precludes abuse or, at least, limits the possibilities of it happening. There is then no longer any need for a substantive review of the choice of law. Overall, freedom of choice of law, together with the ‘most favourable’ principle, may be viewed as the less stringent and more flexible solution, as opposed to the denial of party autonomy. Of course that occurs at the cost of regulatory complication whereby, regardless of a choice of law, the law otherwise objectively applicable to the contract has always to be ascertained or, in an appropriate case, the content of the applicable contract law has to be ascertained, often at considerable expense, and finally, the criteria for assessing what constitutes ‘most favourable’ are not free from doubt (see paragraph 56). Overall, it appears questionable from a legal-policy perspective to render specifically applicable, by way of mandatory provisions, such rules which predominate in employment-law contexts. It would have been simpler from the point of view of legal technique and, from a conflict-of-laws perspective, probably also more honest to deny freedom of choice of law.

By its very nature, it is the protection of the weaker party, in the context of the choice of law, that guarantees effective freedom of choice of law as a freedom in itself. A purely formal freedom for the exercise of which no autonomous free-

43 Spickhoff, in H. Roth (Ed.) Europäisierung des Rechts, Tübingen, 2010 p. 261, 268 et seq.
44 See Giuliano/Lagarde, BT-Drucks. 10/503, p. 33, 57.
45 See German government’s explanatory Memorandum, BT Drucks 10/504 p. 81.
46 See in general Bariatti, in Corneloup/Joubert (Eds.) Le règlement communautaire ‘Rome II’ p. 325 et seq.
47 Schlachter, NZA 2000, 57, 58. The notion is of course older, cf. in more detail Geppert, RdA 1970, 124, 128 et seq.
48 Thus, the Petition by Gamillscheg, ZfA 1983, 307, 323.
49 Maultzsch, RabelsZ 75 (2011), 60, 62. If, conversely, one perceives therein the possibility of excessive protection, it may be a consolation to realise that protection which wrongly goes too far is better than a level of protection for the weaker contracting party that erroneously falls short: Symeondes, NIPR 2010, 191, 198.
50 Cf. E. Lorenz, RdA 1989, 220, 222; Birk, RdA 201, 203. That also applies to the most favourable principle in international consumer law under Article 6 section 2, second sentence, of the Rome I Regulation; Harris, NIPR 2009, 437, 443. Doubts from a legal-policy point of view have been cast on the need for the most favourable principle to protect the weaker party in all cases by McClean/Beevers, paragraph 13-035.
51 Birk, ZIAS 2007 91, 97 et seq.
dom of decision-making is provided for is, in the final analysis, not a freedom. In the end, it can be said that European rules on conflict of laws is a step ahead of the development of European private international law because, in regard to the latter, recognition of necessary guarantees of effective private autonomy is still under development.52

A side-effect of the restriction on the choice of law is that a gap in protection by employers can only be used in competition to a limited extent.53 This consideration points to another aspect: the recognition of choice of law will always, to an extent, mean permitting the circumvention of social policy objectives.54

III. Choice of law (law subjectively applicable to the contract)

1. The choice of law under conflict rules

The choice of law (Article 3 of the Rome I Regulation) is an agreement known as a referral agreement. It is an agreement that is independent of the main agreement and self-standing,55 even if it may have been entered into together with the main contract. The referral agreement operates as a substantive-law referral. Renvoi or further referrals are therefore precluded.56

No special connection to the chosen law is required.57 The selection from amongst all possible laws is not in itself restricted (but see paragraph 23).58 The parties may also choose a law to which there are no connections at all, for example, a neutral law.59 This, too, is a manifestation of the parties’ power under the conflict-of-laws rules to give expression to their intentions (cf. paragraph 3).60 The only cases in which the appropriateness of a referral is called in question under the conflict-of-laws rules are in respect of factual situations occurring in single States cases or in internal market cases (paragraphs 38 et seq.).

In order to be able to assess correctly the coming into existence and validity of the referral agreement, it is necessary to know which law is applicable to this agreement. Article 3 section 5 directs the validity of a choice of law to be determined under Articles 10, 11, and 13 of the Rome I Regulation. Under those provisions, the law to be applied to the referral agreement is the law which would also have been applicable if the choice of law were valid. The chosen law (the lex causae61) thus determines the validity of that choice. Reference to the law

52 Cf. Colombo Ciacchi, ERCL 2010, 302 et seq.
53 Cf. for instance Kronke, RabelsZ 45 (1981), 301, 310 et seq.
55 Leible/Lehmann, RIW 2008, 528, 532. For Swiss law, see Furrer and others, Chapter 7, paragraph 70.
56 Cf. Deinert, Internationales Arbeitsrecht, Section 6 paragraph 10. On the question whether total referral is permissible, see Martiny, ZEuP 2010 747, 755.
57 Lagarde, Rev.crit.DIP 1991, 287, 301.
58 Garcimartín Alférez, EuLF 2008 I-61, I-64; Oppertshäuser, NZA-RR 2000, 393, 394; Schlachter, NZA 2000, 57, 58; Staudinger-Magnus, Art. 8 Rom I-VO paragraph 52.
59 Block, p. 111; E. Lorenz, RdA 1989, 220, 221; Schurig, RabelsZ 54 (1990) 217, 223 et seq.
60 E. Lorenz, RdA 1989, 220, 221.
61 Leible/Lehmann, RIW 2008, 528, 532.
hypothetically applicable to the contract is appropriate. For there is no reason not to respect the autonomy of the parties, if it is recognised by the chosen law.

Conversely, there is no provision under conflict-of-laws rules for a review of the choice of law going beyond the limits regarding validity under the lex causae (paragraph 16). There can therefore be no substantive review (see paragraph 18), or a review as to whether the choice of law has been incorporated into the contract under the law against unfair terms of contract. That is true from a formal perspective because the provisions of the Rome I Regulation determining applicability are not at the disposal of national laws. Nor, however, is there a convincing case for a review of incorporation from a systematic perspective because protection of the employee is not afforded by protection against a surprising choice of a specific legal system, but through the ‘most favourable’ comparison under Article 6 section 1, second sentence, of the Rome I Regulation (cf. paragraphs 6 et seq.). Under this system, the protection of the expectation of the employee as to the applicability of a specific legal system is guaranteed not by rejecting the validity of the choice of law, but by limiting its effects. Nor does that contradict the refusal by the Rome I Regulation to be generous in regard to acceptance of a tacit choice (cf. paragraph 25). For the latter is based on a fictitious intention of the parties which is non-existent.

The choice of law is not subject to substantive review but is only possible under restricted circumstances. The protective mechanism functions differently, that is to say by way of the most favourable comparison. The employee at all times retains the protection of the mandatory provisions of the law objectively applicable to the contract, insofar as the legal system chosen does not afford protection in like measure. For that reason, the choice of law does not fail even if it is deselected a law, at the same time deselects the mandatory provisions of national law. Subject to the overriding mandatory provisions (Section 10 paragraphs 11 et seq.) and to the ‘most favourable’ principle, the essence of the choice of law is that it can also displace mandatory law in favour of another law. That applies to collective agreements in the same way as it does to all other mandatory provisions of employment law.

It is true that at the time when the Brussels Convention on Jurisdiction and Enforcement applied, the ECJ appraised an agreement to confer jurisdiction in a consumer case against the yardstick of Directive 93/13 concerning unfair terms in consumer agreements. The issue of the relationship of the Brussels

62 For another view, see Hk-ArbR-Däubler, EGBGB paragraph 33; Mook, DB 1987, 2252, 2254 et seq.; Hergenöder, ZFA 1999, 1, 20.
63 MünchKomm-Martiny, Art. 30 EGBGB, paragraph 31.
66 Cf. Carillo Pozo, REDT 2011, 1023, 1056 et seq.
Convention to the unfair terms directive was, however, not addressed in that case, and possibly not even recognised. An additional factor is that the demarcation problem in that configuration was not the same since the Brussels Convention did not form part of secondary law. In any event, under the current configuration, the structural argument says that the agreement as to choice of law is not subject to review under Directive 93/13 EEC because under conflict-of-laws rules it is a legal act taking precedence; only after determination of the applicable law would a national law transposing the unfair terms directive become applicable. Indeed, the focus could here be directed in the context of the choice of law to the hypothetical law applicable to the contract. Yet that will often not be of any assistance because the chosen law whose choice is said to be unreasonable will presumably afford as little protection from unreasonable and unfair terms as protection of the employee as the weaker contracting party.

Yet, in case of doubt, a reference to the ECJ will be required as to whether a choice of law clause is to be tested against the requirements of the national law transposing the unfair terms directive. Yet, frequently, the question will lack the requisite relevance to the decision to be given. For owing to the ‘most favourable’ principle, the question whether a party has been unreasonably disadvantaged can be considered only in relation to the non-mandatory provisions ‘deselected’ under the choice of law. The legal system chosen would then have to be one with an appreciable lack of comparable non-mandatory law.

As far as formal requirements are concerned, under Article 3 section 5 and Article 11 of the Rome I Regulation the requirements under the law chosen must be observed or, in the alternative, the formal requirements of the place or of the habitual residence. Where, accordingly, a choice of law may be validly made this may nonetheless have the consequence that the law applicable as a result of this choice of law lays down formal provisions not satisfied by the principal agreement with the result that it is formally invalid. Example: the parties enter into an agreement containing a choice of law clause. The agreement does not meet the formal requirements of the chosen law, but does meet those of the place where it was entered into. The choice of law clause is then valid under Article 3 section 5 and Article 11 of the Rome I Regulation. But then the chosen law does not allow the main agreement to be valid. The relevance of other formal requirements under Article 11 of the Rome I Regulation may be precluded by the choice of law. That is in line with the principle of private autonomy. However, caution should be exercised before assuming that the parties tacitly agreed to discard the alternatives under Article 11 of the Rome I Regulation where they have not directed their minds to that question. For that would infringe the albeit

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69 BGHZ 57, 337, 339 et seq.; MünchKomm-Martiny, Art. 3 Rom I-VO paragraph 110.
The choice of law is also permissible where it leads to a law under which the contract would be null and void.

According to a view now quite prevalent in Germany, choice of law by collective agreement is possible. Even a partial referral by collective agreement is possible in that connection. Its practical relevance was highlighted by a collective agreement (albeit under the law of obligations) by a trades union with a ship-owner which provided for the application of German law to the ships crews. It is true that the choice of law under a collective agreement presupposes that the collective agreement is applicable, which specifically requires persons concerned to be bound by collective provisions. Contrary to the case law of the Federal Labour Court, the employment contract does not have to be governed by German employment law. It cannot be objected to the possibility of choice of law by collective agreement that the connecting factor provides only for the law to be chosen ‘by the parties’. For the provision is surely not concerned with deciding who actually undertakes the legal transaction. Thus, Article 3 of the Rome I Regulation does not preclude a choice of law by the representative. Of much greater significance is how far-reaching the scope of the collective agreement is. It is wrong for it to be objected that the choice of law under a collective agreement cannot be founded on (today) Article 3 of the Rome I Regulation. This argument is no more than an assertion and moreover fails to recognise that the exercise of collective autonomy means private autonomy exercised collectively. Party autonomy is indeed based on self-determination. Yet this does not mean that determination of the applicable law is a highly personal matter which under the general rules of national law could not be undertaken by third parties. There are no mandatory legal provisions militating against choice of law by collective agreement. Finally, it must be assumed that the choice of the applicable law is a term of employment which the collective bargaining parties are called upon to settle. The objection that, in the event of a valid choice of law

70 Cf. LAG Rheinland-Pfalz IP’Spr. 1981, 94; with further observations, Koch/Magnus/Winkler v. Mohrenfels, Section 9 paragraph 6; Däublers-Daubler, TVG, Einl. paragraph 602 ff.; Schlachtner, NZA 2000, 57, 59; Wimmer, p. 65 et seq., 207; Birk, FS Beitzke, 1979, p. 831, 849; for another view, see Ludewig, p. 155 et seq.; Thiising, NZA 2003, 1303, 1304 et seq.; Löwisch/Rieble, TVG, 2 edition 2004, Grundlagen, paragraph 100.

71 Birk, FS Beitzke, 1979, p. 831, 849 et seq.

72 Printed in NZA 1990, 680, see Däublers, NZA 1990, 673.

73 For an alternative view, see Thiising, NZA 2003, 1303, 1305.

74 BAG AP No. 30 on § 1 TVG Tarifverträge: Bau.

75 Cf. Deinert, Internationales Arbeitsrecht, Section 15 paragraph 51.

76 See Birk, RdA 1989, 201, 203.

77 Thiising, NZA 2003, 1303, 1304.

78 On how this is interpreted in German law, see with further observations Kittner/Zwanziger/Deinert – Deinert, Section 8 paragraph 2.

law, a ‘most favourable’ comparison under Article 4 section 3 of the law on collective agreements must permit a different choice of law by the contracting parties concerning which the connecting factor in Article 8 of the Rome I Regulation is silent, confuses several different issues: whether a more favourable provision is permissible can be answered by substantive national law only if that rule is applicable. In that case, Article 8 of the Rome I Regulation has nothing further to say since it is to that extent not a conflict-of-laws issue. If the national law on collective agreements is applicable, there is in fact nothing to preclude a different choice of law, if it is more favourable. Since one legal system will hardly ever be superior to another in all respects, it can in practice never be said that the choice of law under an individual contract will be more favourable than the different choice of law under a collective agreement.

The choice of law having statutory effect is distinct from all other provisions of a collective agreement. Whereas the collective-agreement provisions otherwise form the subject matter of referral, the choice of law clause in the collective agreement is, for its part, the legal act founding referral, that is to say the referral agreement (cf. paragraph 14). Since it is itself the referring transaction, it is not called upon to apply by virtue of the referral but of and by itself. It requires only relevant statutory provisions concerning collective agreements to determine its permissibility (on the law applying to collective agreements and which is provided for under the substantive law on collective agreements) and which is provided for under the substantive law on collective agreements. It would be a matter of similarly clarifying whether under another law there is also an analogous regulatory power. Consensus on and validity of the collective agreement are logically not to be determined under the statutory provisions applicable to the collective agreement but in accordance with the law chosen for the parties to the employment agreement.

Since the collective agreement is itself the referring act in terms of conflict-of-laws rules, the employee protection provided for under the conflict-of-laws rules by the ‘most favourable’ principle under Article 8 section 1, second sentence, of the Rome I Regulation must also come into play here. The choice of law, consequently, cannot deprive the employee of the protective rules of the law that would be objectively applicable but for the choice of law.

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80 Thüsing, NZA 2003, 1303, 1304.
81 Hergenröder, ZfA 1999, 1, 41.
82 Junker, Internationales Arbeitsrecht im Konzern, p. 440, seeks therefore to allow the employee subjectively to determine favourability. There is, however, no reasoning in support which a departure from the general collective bargaining principles could necessitate.
83 Junker, Internationales Arbeitsrecht im Konzern, p. 438; for an alternative view, albeit with the same result, see Winmer, IPRax 1995 207, 213; choice of law under collective agreement called upon to apply as overriding mandatory provision.
84 Cf. Deinert, Internationales Arbeitsrecht, Section 15 paragraph 36 et seq.
85 V. Hoffmann/Thorn, Section 10 paragraph 76.
86 Also Heilmann, p. 50 et seq.
87 Junker, Internationales Arbeitsrecht im Konzern p. 439 et seq.; Staudinger-Magnus, Art. 8 Rom I-VO paragraph 64; also Däubler-Däubler TVG, Intro., paragraph 603.
There is a third stage at which the `most favourable' principle can come into play in the context of the application of the lex causae. Then it is no longer a question whether the chosen law is more favourable than the law which would otherwise be objectively applicable, or of whether a law chosen under an individual contract is more favourable than the law chosen under a collective agreement; rather the question is whether a different individual agreement under the applicable law is more favourable than a substantive law under a collective agreement.\textsuperscript{88}

Where a collective agreement does not have normative effect but, as in England, requires incorporation,\textsuperscript{89} it needs to be examined whether incorporation of the collective agreement which, for its part, contains a choice of law is at the same time to be construed as a tacit choice of law (cf. paragraph 24) applicable to the employment contract.\textsuperscript{90}

In the general international law of contract the question arises as to the possibility of the choice of a non-State law, for example, a Lex Mercatoria. As far as employment law is concerned, this is not exactly self-evident. Rather, the parties could come up with the idea, for example, of choosing ILO law. It is also conceivable to refer to the rulebooks of international sporting organisations.\textsuperscript{91} Although the original Commission proposal\textsuperscript{92} made provision for the possibility of the choice of non-State law, that provision was later deleted. Recital 13 merely points out that the parties would not be precluded by the Regulation from referring to a non-State body of law or to an international convention. Of course, that is something different from a choice of law. The reference can thus only have substantive-law effect.\textsuperscript{94} Recital 13 and the historical antecedents to it point to the fact that the choice of a non-State law is not made possible by Article 3 of the Rome I Regulation.\textsuperscript{95} The US Restatements (Section 187 comment c) seem to follow this solution. After all, international public law is not State law, and individuals cannot be parties to international public law agreements. It therefore seems scarcely conceivable, under the conflict-of-laws rules, for ILO agreements to be rendered applicable as between the parties. Of course, the possibility of a substantive-law referral is not thereby precluded.\textsuperscript{96}
The choice of law agreement will be interpreted neither under the lex causae nor under the lex fori, but according to autonomous European principles (cf. paragraph 36). This will also extend to the question whether the agreement contains a (tacit) choice of a specific law. As a matter of principle, a tacit choice of law is also possible. Yet there is a danger that courts may, in the endeavour to bring disputes home, be too generous in assuming that there has been a tacit choice of law, a tendency which, moreover, is not only to be encountered in Germany. Thus, the French Court of Cassation, for example, was satisfied with a reference to a French collective agreement as constituting a tacit choice of law. It also accepted the presumption of a tacit choice of law on conclusion of a contract between French nationals concerning employment abroad with remuneration in francs, or inferred an implied choice of law from the continued existence of the employment contract with the French parent company in the case of a posting abroad without a contract being entered into with the foreign subsidiary company. The Federal Labour Court, for its part, also views the reference to collective agreements at the seat of the employer as opening the possibility for the acceptance of a tacit choice of law. It is also in favour of a tacit choice of law in the case of a jurisdiction agreement. The Austrian Supreme Court inferred from several choices of law for individual issues arising out of the employment relationship that a choice of law had been made for the whole of the employment relationship. Yet more far-reaching appears to be the proposal in academic writings that on the recruitment of an employee for a specific undertaking a presumption may be made that the law of the place of employment has been chosen. Even under the Rome Convention, Article 3 of which required that the choice of law must be established with 'reasonable certainty', there was little room for an excessively generous acceptance of a tacit choice of law.
choice of law.\textsuperscript{109} For there can be no reasonable certainty that the parties not only wished to rely on the substantive provisions of the collective agreement, as an additional element to the contractual arrangements between them, but at the same time wished to determine the applicable law in respect of the individual agreement. A certain degree of restraint is also required because the alternative to the subjective connecting factor (choice of law) under the Rome Convention, and henceforth under the Rome I Regulation, is the objective connecting factor which, however, is devalued if a choice of law is sought without there being any real indication that there has been one.\textsuperscript{110}

However, in practice, this ordinance enjoining a certain restraint has in part been circumvented. In addition, under the law as formerly drawn there was a presumption that a conclusive choice of law could be inferred from various indications and that a tacit choice of law was to be rejected only in case of doubt.\textsuperscript{111} Irrespective of the question whether this was correct from the point of view of legal doctrine, doubts arise in any event from a legal policy point of view. For an objective connecting factor seeking to do justice to the interests of both parties from a conflict-of-laws perspective is always to be preferred over a subjective connecting factor having an uncertain foundation because it runs the risk of disregarding the intention of at least one of the contracting parties.\textsuperscript{112}

Article 3 section 1, first sentence, of the Rome I Regulation requires, by way of reaction to practice hitherto followed, that a choice of law must have been \textit{expressly} stated or must be \textit{clearly} apparent from the terms of the contract or the circumstances of the case and, therefore, does justice to this consideration\textsuperscript{113} without it being material whether, in the final analysis, a substantial change in the law was effected.\textsuperscript{114} An endeavour to follow up all indications pointing to a choice of law can no longer be justified under the new provisions, even from the point of view of the primacy of the parties’ intentions.\textsuperscript{115} Nor, \textit{a fortiori}, can it be diverted into a hypothetical choice of law.\textsuperscript{116} Even the consideration that acceptance of a tacit choice of law must be permissible if it is in the interests of the employee cannot (any longer) carry conviction.\textsuperscript{117} Of course, the Rome I Regulation in recital 23 aims to protect the employee as the weaker contracting party and recital 35 is based on the understanding that the law objectively applicable to the contract can only be derogated from if that is to the advantage of the employee. Yet none of that can alter the fact that the ‘most favourable’ principle under Article 8 section 1, second sentence of the Rome I Regulation will only

\begin{footnotes}
\footnotetext{109}{Steinle, ZVglRWiss 93 (1994), 300, 308 et seq.}
\footnotetext{110}{Déprez, RJS 1998, 251, 253.}
\footnotetext{111}{Cf. Riesenhuber, DB 2005, 1571, 1576.}
\footnotetext{112}{Cf. Riesenhuber, DB 2005, 1571, 1573.}
\footnotetext{113}{Cf. Lagarde/Tenenbaum, Rev.crit.DIP 2008 727, 736; Lando/Nielsen, CMLRev. 2008, 1687, 1698; Leible/Lehmann, RIW 2008, 528, 532; McClean/Beevers, paragraph 13-012 et seq.}
\footnotetext{114}{But see Garcimartín Alférez, EuLF 2008 I-61, I-66.}
\footnotetext{115}{To this effect on the earlier law, see Hönisch, NZA 1988, 113, 115.}
\footnotetext{116}{Cf. also for the USA Symeonides, paragraph 450.}
\footnotetext{117}{See also Jault-Seseke, Rev.crit.DIP 2005, 253, 273.}
\end{footnotes}
apply when there is first a choice of law and the choice of law must, under Article 3 section 1, second sentence, of the Rome I Regulation, be clear. Conversely, it cannot be argued on the basis of the provision that a tacit choice of law has to be precluded in the context of the employment relationship. However, for there to be a tacit choice of law there must be an awareness that the objectively applicable provision may be departed from.

In case law acceptance of a tacit choice of law by virtue of a [Jurisdiction] clause has a long-standing tradition. However, that was not practised in all Member States. Recital 12 of the Rome I Regulation provides for a jurisdiction clause to be taken into consideration, where it concerns the courts of Member States, in determining whether a choice of law was made. With a view to the requirement of a clear choice of law, this has, of course, already been criticised as misleading. It must however be emphasised that this is only a matter for consideration, with the result that an agreement as to choice of law cannot automatically be inferred from an agreement conferring jurisdiction. In no way can a clause conferring jurisdiction on its own suffice to enable acceptance of a tacit choice of law. For there is a fundamental consideration as to whether, in view of an express agreement conferring jurisdiction, it may really be inferred that there has been a tacit choice of law, or whether, conversely, that a choice of law agreement was not actually intended. However, under Article 21 of the Brussels I Regulation a clause conferring jurisdiction is possible in employment law only to a very limited extent (cf. Section 16 paragraph 9), such a clause should have at most ancillary but not decisive importance in determining whether there has been a tacit choice of law. It is true that the invalidity under European law of an agreement conferring jurisdiction does not militate against the assumption that the parties by means of the (unlawfully) agreed jurisdiction clause also wished to choose the law in force in that jurisdiction. However, a value judgment by the European legislature which is worthy of consideration from the point of view of conflict-of-laws may be discerned in the protection of the weaker party in the context of the law on jurisdiction. Where a choice of law may also be inferred from an invalid agreement conferring jurisdiction, the

118 But see Venturi, NLCC 2009, 771, 773 et seq.
119 Venturi, NLCC 2009, 771, 775.
120 See RG JW 1906, 452; cf. BGH DB 1964, 1297; BAG AP No. 5 on Article 25 GG; BAG EzA Article 30 EGBGB no 11; BAG NZA 2013, 227; Steinle, ZVglRWiss 93 (1994), 300, 310.
121 Lando/Nielsen, CMLRev. 2008, 1687, 1698 et seq.
122 Pfeiffer, EuZW 2008, 622, 624.
124 Francq, JDI 2009, 41. Also BGE 131, III 289, 292 et seq; with reservations also Hayward, p. 112; see further Briggs, p. 167.
127 For a strict distinction between choice of law and jurisdiction clause, see Jault-Seseke, RDT 2008, 620, 623.
will of the parties may also be inferred from the law of a non-Member State, although recital 12 is limited to the choice of the jurisdiction of a Member State. Moreover, the agreement as to jurisdiction will only be capable of being construed as a tacit choice of law if it confers exclusive jurisdiction. For otherwise the applicable law would depend upon which court is called upon to exercise jurisdiction in a dispute. There is no sufficient clarity to enable a tacit choice of law to be accepted in regard to parallel contracts with employees of the same rank. Nor, by the same token, can a tacit choice of law be accepted in favour of the place where the dominant employer is located, in a case of a dual employment relationship with two employers. Of greater relevance is the place of employment in each case whereby account may be taken of the primary exercise of the right to give instructions by the one employer by application of the escape clause in Article 8 section 4 of the Rome I Regulation (paragraph 124 et seq.) in relation to the other employer. Conversely, reference to a collective agreement ought not to be recognised as a tacit choice of law (see paragraph 24). On the other hand, a tacit choice of law may be inferred from the fact that the agreement in other respects refers to provisions of a specific legal order, for example, the periods of notice that are based on a specific law, reference to a certain collective agreement or if the parties in a procedure exclusively bargain on the ground of a certain legal order. The Federal Labour Court deemed the inclusion in the employment contract of Paragraph 14 of the law on part-time and fixed-term-working (Teilzeit- und Befristungsgesetz – TzBfG) to be a conclusive choice of German law. Conversely, the use of clauses tailored to a specific legal order do not normally constitute evidence of a specific choice of law. Where the parties have agreed

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128 Legal-policy criticism in that connection by Lagarde/Tenenbaum, Rev.crit.DIP 2008, 727, 735 et seq.
130 See Leible/Lehmann, RIW 2008, 528, 532; Magnus, IPRax 2010, 27, 33; Mankowski, IHR 2008, 133,135; Wurmnest, EuZA 2009, 481, 489.
131 Lando/Nielsen, CMLRev. 2008, 1687, 1699.
133 But see Cass.soc. JDI 1999, 144.
134 See for a fair criticism, Dion Loye, observations on Cass.soc. JDI 1999, 144, 148.
136 Däubler, RIW 1987, 249, 253.
137 BAG NZA 2013, 1102; BAG No. 7 on § 20 GVG.
138 BAG NZA 2014, 1076, 1077.
139 BAG NZA 2012, 148, 149.
140 Riesenhuber, DB 2005, 1571, 1574; Cf. Vallebona II, p. 795 (at most a partial choice of law). For another view Audit’dAvout, paragraph 819; to that effect also Hayward, p.111; see further Corte cass. RDIPP 1998, 180, where additionally attention was paid to the language of the contract.
that a specific law should be applicable, such clauses do not allow an inference to be made as to a choice of law. The acceptance of a specific legal situation does not imply that it is also desired. Nor does the observance of overriding mandatory provisions at the place of employment permit an inference as to a choice of law.\textsuperscript{141} Even if one can infer a tacit choice of law from the reference to provisions of a specific legal order, a cautious approach is still required.\textsuperscript{142} For reference to specific provisions of a specific legal order may also, under certain circumstances, constitute only a partial choice of law (paragraph 33).\textsuperscript{143}

\textbf{Negotiations towards a specific law} cannot be sufficient for the acceptance of a tacit choice of law.\textsuperscript{144} For this may be founded on an error.\textsuperscript{145} German case law recognises a tacit choice of law in the negotiations on a specific law only if an intention for contractual relations to be configured in that way is discernible.\textsuperscript{146} For example, that would be the case if, irrespective of a judicial indication or after discussions on the applicable law, negotiations were conducted towards a specific law.\textsuperscript{147}

It is conceivable that a tacit choice of law may be discerned in the fact that reference is made to earlier agreements in which a choice of law was agreed. Similarly, in the case of different parallel agreements, a tacit extension of the choice of law in individual agreements to other agreements, can be assumed.\textsuperscript{148} Conversely, of course, on an interpretation, the lack of a choice of law in the most recent agreement may be deemed to be deliberate silence.\textsuperscript{149} It may again be different where previously analogous agreements were entered into only with a corresponding agreement as to choice of law.\textsuperscript{150} On the other hand, a choice of law in respect of a part (see paragraph 33) cannot be extrapolated to a choice of law for the other parts of the contract.\textsuperscript{151} Both the language of the contract or the currency are entirely unsuited to the acceptance of a tacit choice of law.\textsuperscript{152} Nor, finally, may a choice of law be inferred, with the requisite degree of clarity, from voluntary further insurance under a specific social assurance system.\textsuperscript{153}

The question arises as to whether the choice of law may be deemed to persist even in the event of scenarios that were not provided for. For example, an employment relationship between a German employer and a French employee is...

\textsuperscript{141} Lhuillier, JDI 1999, 766, 769 et seq.
\textsuperscript{142} Block, p.114.
\textsuperscript{143} Riesenhuber, DB 2005, 1571, 1574.
\textsuperscript{144} Cf. Furrer and others, Chapter 7 paragraph 87. But also BAG AP No. 9 on Internationales Privatrecht – Arbeitsrecht.
\textsuperscript{145} Junker, IPR paragraph 347; Magnus, IPRax 2010, 27, 33; Schlachter, NZA 2000, 57, 59; Steinle, ZVglRWiss 93 (1994), 300, 313.
\textsuperscript{146} BGH NJW 2009 1205, 1206; BGH NJW 1991, 1292, 1293.
\textsuperscript{147} Magnus, IPRax 2010, 27, 33; Wurmnest, EuZA 2009, 481, 489.
\textsuperscript{148} Birk, RdA 1989, 201, 205.
\textsuperscript{149} Cf. Giuliano/Lagarde, BT-Drucks.10/503, p. 33, 49.
\textsuperscript{150} Cf. Giuliano/Lagarde, BT-Drucks.10/503, p. 33, 49.
\textsuperscript{151} Giuliano/Lagarde, BT-Drucks.10/503, p. 33, 49.
\textsuperscript{152} Steinle, ZVglRWiss 93 (1994) 300, 313 et seq.
\textsuperscript{153} For a different view on the old law, Birk, RdA 1989, 201, 204.
performed permanently in Switzerland and, under the choice of law, is subject to the law of the employee’s country, namely German law; when, after 15 years, the employee is transferred to France, does the relationship continue to be governed by German employment law? If the parties make no further agreement, the assumption of a tacit choice of law in favour of French law is rebutted. Nonetheless, it may be wondered whether the choice of law would in actual fact have also been made in respect of employment in France. But this leads into the realm of speculation, resulting in a hypothetical choice of law with the result that there can be no tacit restriction on the choice of law. This does not run counter to the employee protection afforded by the conflict-of-laws rules because the employee is adequately protected by the ‘most favourable’ principle. In the example mentioned the choice of law would be upheld but with the added protection of the French *lex loci laboris*.

A tacit choice of law must be strictly distinguished from the issue of a hypothetical choice of law. Whilst, in the case of a tacit choice of law, a choice of law has been made and merely has not been verbally articulated, it is different in the case of a hypothetical choice of law. Here, there is no choice of law and one wonders what the parties *would have* chosen. Already under the Rome Convention, this subjective connecting factor was rejected in favour of an objectively applicable connecting factor (paragraph 65). There is no room for it under the scheme of the Rome I Regulation. Nor can it be re-introduced, as it were, through the back door, by means of a generous application of the escape clause. For it was the declared aim in the Commission proposal for the Rome I Regulation to close the doors on the search for the hypothetical intention of the parties.

The possibility of a partial choice of law is controversial. The question is whether the parties can subject individual parts of the employment relationship to different laws or agree on a choice of law only for parts of the agreement, whilst the objectively applicable provision will apply to the remainder. Example: an employment contract to be performed in Germany contains no choice of law clause, although a share option scheme refers to the law at the place of establishment of the employer or the parent company, similarly the case of partial choice of law for a pensions scheme. Article 3 section 1, third sentence, of the Rome I Regulation clearly states that it is open to international contract law generally to offer the possibility of a choice of law as to part of the contract. That possibility is therefore recognised, to a great extent, also in respect of employment law. Even prior to the Rome I Regulation, the case law recognised

156 Cf. LAG Hessen IPRspr. 2000, 82.
157 BAG No. 6 on Verordnung Nr. 44/2001/EG.
158 Mankowski, FS Spellenberg, 2010, 261, 263 et seq.
the possibility of a choice of law as to part, albeit without substantive reasoning.\textsuperscript{160} In the Giuliano and Lagarde report (see Section 2 paragraph 18), it was stated that the application of overriding mandatory provisions could counter the circumvention of binding provisions.\textsuperscript{161} The logic with which previously freedom of choice of law was contended for, that is to say, that it was a question not of precluding but of selecting specific employee protection (paragraph 5) would militate against that, as it could be a way of appreciably diminishing employee protection through the choice of the least favourable law.\textsuperscript{162} On the other hand, it must of course be recognised that, as a matter of the conflict-of-laws rules, employee protection is implemented through the ‘most favourable’ principle.\textsuperscript{163} A choice of law as to part cannot really adversely affect the employee. The protection of the binding provisions under the notional law applicable to the contract cannot lawfully be removed from the employee by a partial choice of law, owing to Article 8 section 1, second sentence, of the Rome I Regulation.\textsuperscript{164} Against that background, there is no reason not to take seriously the reference in Article 8 section 1, first sentence, of the Rome I Regulation to the law chosen by the parties ‘in accordance with Article 3’ and to construe it as such as applying to the whole of Article 3, including section 1, third sentence.

Only with some reservations we can share the view of the Austrian Supreme Court to the effect that a partial choice of law authorizes the parties to agree different contractual contents, if they so wish. The law in question was not chosen to that extent.\textsuperscript{165} The chosen law with its mandatory contents cannot be opted out of. In so far as those mandatory contents are not chosen, the law objectively applicable to the contract determines which substantive contractual agreements are to be approved.

A consequence of partial choice of law is a split in the law applicable to the contract, also known as a depeçage.\textsuperscript{166} Allegiance cannot be given to a partial choice of law which leads to consequences that cannot be carried through, because they are contradictory.\textsuperscript{167}

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\textsuperscript{159} ErfK-Schlachter, Rom I-VO paragraph 4; Hk-ArbR-Däubler, EGBGB, paragraph 28; Junker, FS Kühne, 2009, p. 735, 745; Staudinger-Magnus, Art. 8 Rom I-VO, paragraph 62; Rauscher- v. Hein, Art. 11 Rom I-VO paragraph 25; Verschraegen, paragraph 482. See also for Switzerland, Patocchi/Geisinger, Article 121 No. 2.

\textsuperscript{160} BAG AP No. 1 on § 81 GVG; BAG AP No. 21 on § 38 ZOP – Internationale Zuständigkeit; also Junker, RIW 2001, 94, 96; also v. Hoffmann, IPRax 1989, 261, 262. Also Austrian case law: OGH DRdA 1993, 21 (= ÖJZ 1992, 835).

\textsuperscript{161} Giuliano/Lagarde, BT-Drucks.10/503, p. 33, 49.

\textsuperscript{162} Gamillscheg, ZfA 1983, 307, 328.


\textsuperscript{164} ErfK-Schlachter, Rom I-VO paragraph 4; Bamberger/Roth-Spickhoff, Art. 8 Rom I-VO paragraph 14; see for instance LAG Hessen IPRspr. 2000, 82.

\textsuperscript{165} OGH Arb 11.286.

\textsuperscript{166} Plender/Wilderspin, paragraph 11-026.
There is nothing to say that the parties may not be permitted merely to exclude a specific law without positively determining the applicable law.\textsuperscript{168}

On subsequent and amended choices of law, the reader is referred to paragraphs 143 et seq.

The agreement as to the choice of law is interpreted under neither the principles of the lex fori nor those of the lex causae, but in accordance with autonomous European principles.\textsuperscript{169}

The choice of law is dynamic. Subsequent amendments to the legislation and the case law have no effect on it, even if the parties, if they had known of such an amendment, would not have made such a choice of law.\textsuperscript{170}

2. Purely Domestic and internal market situations

Article 3 section 3 of the Rome I Regulation restricts the possibility of the choice of law in the event of a purely domestic situation.\textsuperscript{171} That refers to a situation which only has a connection with a single State, irrespective of the fact of the choice of law in itself and of any agreement as to the jurisdiction of a court that may likewise have been made (see Recital 15). It would of course be more correct to describe the situation as a single-State factual situation because it can also be a foreign law which is the only one involved. If, in such a case, another law is chosen, the overriding provisions of the law of the State with which the facts of the case are solely connected nonetheless continue to be applicable. Provisions which are mandatory are those which cannot be departed from by agreement. It is a moot point whether in the case of a domestic situation, the reference to a foreign law constitutes a referral under the conflict-of-laws rules with special inclusion of mandatory provisions or is merely a substantive-law referral.\textsuperscript{172} The difference is that, in the former case, the chosen law is the law governing the contract and is determinant in so far as it differs from the non-mandatory law of the State with which the only connections exist; in the latter case, the law of the State with which the only connections exist constitutes the proper law of the contract and the choice of law in this context signifies a departure by the parties from the non-mandatory law.\textsuperscript{173} The practical significance of this question is much reduced, especially as the same would be achieved by Article 8 (1), second sentence, of the Rome I Regulation. There is, however, a cos-

\textsuperscript{167} Cf. also Schneider, NZA 2010, 1380, 1381.
\textsuperscript{169} Leible/Lehmann, RIW 2008, 528, 532.
\textsuperscript{170} Gamillscheg, IAR, p.102.
\textsuperscript{171} In detail Muir Watt in: Corneloup/Joubert (Eds.), Le règlement communautaire ‘Rome II’ p. 341 et seq.
\textsuperscript{172} See, for instance, Winkler v. Mahrenfels/Block, EAS B 3000, paragraph 67.
\textsuperscript{173} See with further observations, Maultzsch, RabelsZ 75 (2011), 60, 65 et seq.
\textsuperscript{174} See in greater detail Hanau/Steinmeyer/Wank-Wank, Section 31 paragraphs 50 et seq. There is a difference inasmuch as the parties under a substantive law referral may without further ado depart from the mandatory provisions of the chosen law whilst they cannot do so in the case of a conflict-of-laws referral, see Bogdan, NIPR 2009, 407, 409.
metic difference: if there were merely a substantive-law referral, then, in the event of a neutral result of the favourability comparison (the chosen law is neither more nor less favourable than the law of the State with which there are connections), under Article 8 section 1, first sentence, of the Rome I Regulation the chosen law would be determinant (cf. paragraph 61) whilst under Article 3 section 3 of the Rome I Regulation, the chosen law would not come into play. For a court that does not even make for less work. If there are connections, for example, only with the Federal Republic of Germany, in the event of a merely substantive-law referral, a German provision of law would be applicable. Before one can ascertain this, it has to be determined whether the choice of the foreign law would in the end be more favourable to the employee with the result that the foreign law has to be ascertained. The question plays a role in the end, however, because it determines the law which is to determine interpretation and the filling of gaps. In favour of a restricted referral under the conflict-of-laws rules is the fact that in terms of Article 3 section 3 of the Rome I Regulation referral is the choice of law, rather than choice of law being excluded ab initio.\textsuperscript{175} That would have been the obvious option if one had sought merely to permit a substantive-law referral. In the context of non-mandatory law provisions may also be chosen which are provided for under a different legal system.

It remains to clarify what is required by a sufficient foreign connection.\textsuperscript{39} What is important here is to prevent a circumvention of domestically binding provisions by a choice of law. That is why stricter yardsticks are required than in regard to the question of a foreign connection under a PIL examination (on this, see Section 1 paragraph 14).\textsuperscript{176} What is required is that the connection with a foreign State must have a certain relevance from a conflict-of-laws perspective.\textsuperscript{177} That is why, for example, the use of a working implement manufactured abroad will normally not give rise to a sufficient foreign connection. Choice of law and agreement as to the jurisdiction of the court are not sufficient, as is clear from the wording of Article 3 section 3 of the Rome I Regulation (‘all other elements relevant to the situation at the time of the choice’) or under recital 15, second sentence. Already earlier it was controversial whether the conclusion of a contract abroad can constitute a sufficient foreign connection.\textsuperscript{178} The determinant question must always be whether, as a matter of principle, the legal systems of several States can come into consideration for the purposes of application.\textsuperscript{179} In my view, this is already sufficient to render a situation international\textsuperscript{180} provided that the contract is not intended to be performed exclusively within the national territory of the country.\textsuperscript{181} But where the employer has merely prompted

\textsuperscript{175} See also E. Lorenz, RdA 1989, 220, 221; also Birk, RdA 1989, 201, 204; Hergenröder, ZfA 1999, 1, 8; Junker, Internationales Arbeitsrecht im Konzern, p. 250.
\textsuperscript{176} Markovska, RdA 2007, 352, 356.
\textsuperscript{177} Schurig, RabelsZ 54 (1990), 217, 223.
\textsuperscript{178} Cf. with further observations, Palandt-Thorn, Art. 8 Rom I-VO paragraph 3.
\textsuperscript{179} Hönsch, NZA 1988, 113.
\textsuperscript{180} See also Lagarde/Tenenbaum, Rev.crit.DIP 2008, 727, 738.
the employee to go abroad in order validly to agree a choice of law that will not preclude the application of Article 3 section 3 of the Rome I Regulation under the aspect of circumvention of the law. Moreover, it is the case here as well that, owing to the limitation on the choice of law as a result of the favourability principle, employee protection will not be jeopardised. There may also be a sufficient foreign connection where there is a connection with another agreement, which is subject to foreign law.\textsuperscript{182} That could, for example, be the case in the event of an indirect employment relationship or a temporary employment relationship.

For the same reason, a different nationality must also be sufficient in order to give rise to an international situation.\textsuperscript{183} However, the sole possession of foreign shares cannot constitute a foreign connection\textsuperscript{184} because such possession does not affect the issue of which specific legal order the employee’s contractual partner comes under. It will also be possible to presume that there is a sufficient foreign connection where the engagement by the employee in a foreign country is specifically provided for, even if the employee is first employed on home territory.\textsuperscript{185} On the other hand, it is not sufficient if the Internet is used in the course of the work, even where pages are obtained abroad.\textsuperscript{186} These are merely aids which are used in order to perform employment duties on home territory. But also the activity of an employee on home territory for a national employer cannot be played down in regard to a foreign connection, if the performance of the employment duties constitute an element of cross-border cooperation by the employer with foreign undertakings.\textsuperscript{187} Nor will the desire to choose a more developed legal order than the otherwise applicable one be enough to found a sufficient foreign connection.\textsuperscript{188}

Article 3 section 3 of the Rome I Regulation renders applicable all mandatory provisions of the law applicable to the contract with the result that provisions that are not in favour of the employee may also apply.\textsuperscript{189} Since employment law provisions, however, frequently create only unilaterally mandatory law and therefore, from a substantive-law point of view, the ‘most favourable’ principle comes into play\textsuperscript{190} the difference is, in practical terms, rather small. Nonetheless, it is conceivable that bilateral mandatory law could also operate under Article 3

\begin{flushright}
181 See also MünchKomm-Martiny, Art. 8 Rom I-VO paragraph 93.
183 See also MünchKomm-Martiny, Art. 8 Rom I-VO paragraph 93; for another view, see for example v. Hoffmann/Thorn, Section 10 paragraph 30; differentiating (provided it is known to the contracting partner and affects the conclusion or content of the contract), E. Lorenz RIW 1987, 569, 575.
184 Kraushaar, BB 1989, 2121, 2122; for another view, see also Schlachter, NZA 2000, 57, 58.
186 Mankowski, DB 1999, 1854, 1856.
188 Philip, in: North (Ed.), EEC Convention, p. 81, 95.
189 E. Lorenz RdA 1989, 220, 221; see also Birk, RdA 1989, 201, 204.
190 Kittner/Zwanziger/Deinert-Deinert, Section 6 paragraph 9.
\end{flushright}
section 3 of the Rome I Regulation, although it is more unfavourable to the employee. Of course this outcome runs counter to the objective pursued by Article 8 section 1, second sentence, of the Rome I Regulation in accordance with the ‘most favourable’ principle, with the result that it must be presumed that Article 8 section 1, second sentence of the Rome I Regulation constitutes a lex specialis to Article 3 section 3 of the Rome I Regulation.191

Mandatory provisions under Article 3 section 3 of the Rome I Regulation may be those contained in a collective agreement, provided that the collective agreement is applicable to the parties which entails an obligation to be bound by collective bargaining.192

Article 3 section 4 of the Rome I Regulation concerns the so-called internal market situation.193 In that scenario, all other elements of the factual situation (except the choice of law) are situated in one or more Member States. Under Article 1 section 4, second sentence, of the Rome I Regulation the Member States include all Member States, that is to say, also Denmark (on Denmark, see Section 2 paragraph 8). Conversely, there is no internal market situation in regard to connections with an EEA State.194 In an internal market case, even if a choice is made in regard to the law of a non-Member State, the provisions of Union law remain applicable unless they are ones that can be derogated from by agreement.195 The logic is the same as with the purely single-State situation: mandatory Union law loses its value where, though the parties may not deviate from it, a derogation is made possible through the choice of the law of a non-Member State.196 That is, in the final analysis, nothing else but a continuation of the case law established in the Ingmar judgement (see Section 3 paragraph 5). Plainly, this is also intended to counter the abuse of disabling substantive law which is uniform throughout the Union by the choice of a legal order with which no connection exists.197 In the event of law imposed by directive, the transposition law of the forum applies in that connection ‘if appropriate, in the form as transposed by the Member State of the forum court’). The forum does not have to belong to the Union States that are involved in the factual situation.198 The internal market clause is normally superseded by Article 8 section 1 of the Rome I Regulation as a lex specialis 199 under which the mandatory provisions of the

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191 Cf. Schlachter, NZA 2000, 57, 62; also Koch/Magnus/Winkler v. Mohrenfels, Section 9 paragraph 7; Scharig, RabelsZ 54 (1990), 217, 226; for another view, see E. Lorenz, RIW 1987, 569, 574; Heilmann, p. 108 et seq.
192 Left open by Junker, IPRax 1989, 69, 72.
193 In detail see Muir Watt in Corneloup/Joubert (Eds.), Le règlement communautaire ‘Rome II’ p. 341 et seq.
194 Magnus, IPRax 2010, 27, 34.
195 More narrowly (in favour of a restriction to provisions of fundamental importance of the Union legal order), see Clausnitzer/Woopen, BB 2008, 1798, 1799.
197 Cf. Lagarde, Rev.crit.DIP 2006, 331, 337.
198 Mankowski, IHR 2008, 133, 135.
law objectively applicable to the contract cannot be derogated from by the choice of law. Moreover, in this connection, there is no ‘most favourable’ principle, the effect of which is, however, restricted at a substantive-law level (cf. paragraph 38 for the purely single-State factual situation).

There is, however, one configuration in which Article 8 section 1 of the Rome I Regulation would not come into operation, that is to say, in the case of an inadequate transposition of a directive under the law which notionally is objectively applicable to the contract. Then, Article 3 section 4 of the Rome I Regulation would have immediate effect. Without more, the transposing law of the forum would apply insofar as the directive has been properly transposed in the forum. If the directive has not been properly transposed in the forum, the question arises as to whether the transposing law of another Member State would apply or whether the choice of law is then subject to no restrictions. That ought to be precluded, given the regulatory purpose of Article 3 section 4 of the Rome I Regulation. Then, there is something to be said for applying the transposing law of that State with which otherwise the closest connections exist. If there are otherwise no connections with any other Member State, one will have to accept the choice of law. For in that connection, the same must apply as in the case of a comparable case configuration under the law of the forum. Owing to the lack of horizontal direct effect of directives (cf. Section 3 paragraph 15), the citizen cannot have these imposed on him. One might arrive at another conclusion if Article 3 section 4 were to be interpreted as an expression of European public policy. Against that is the point, of course, that this provision concerns only the justification for the applicability provision and does not focus at all on the quality of the law of the non-Member country.

The choice of a Member State’s law is not caught by the internal market clause. As long as it is not a purely one-State situation (paragraph 38), the choice of law is valid, even if a legal difference within Europe has thereby been exploited. Where the law chosen, however, contains an inadequate transposition of a directive, implementation of the transposing law of the forum by way of overriding mandatory provisions could, under certain circumstances, be considered (see Section 3, paragraphs 15 et seq.). That is not precluded by the notion of the fundamental equivalence of the legal orders of the Member States. For it appears more than questionable whether a legal order in which, owing to a Treaty infringement, a directive has not been transposed, is equivalent to a legal order which has complied with its duty of transposition.

The question arises whether, in this manner, a transposing law which under national law goes beyond the minimum requirements of a directive, in scope or content, should apply. It is true that, to the extent to which the national law
goes further than the terms of the directive, it is not mandatory EU law. Nonetheless, it seems that application of that transposing law as well is required.\(^{204}\) That is supported, amongst other things, by the faithful application of statute law (in the form transposed by the Member State of the forum). Also, in practical terms, it will often be difficult to reduce the transposing law of the forum to the minimum content of the directive.\(^{205}\) In addition, that would entail applying a law which in that form does not exist at all. Moreover, excessive transposing law is ‘inspired’ by European law. In the absence of any other points of contact with the chosen law, the parties will not as a rule have any interest worthy of recognition in declining this excessive transposing law. Nor is the application of the excessive transposing law a fetter on the parties’ autonomy by means of legislative action at national level.\(^{206}\) Rather, the parties’ autonomy in internal market cases is at the outset guaranteed only to a limited extent by Article 3 section 4 of the Rome I Regulation.

However, it is doubtful whether the \textit{Ingmar case} (see Section 3 paragraph 16)\(^{207}\) is entirely dealt with by the internal market clause. For this case did not concern a purely internal market situation.\(^{207}\) It is true that one could consider whether the further implementation of directive law by means of the internal market clause would be precluded under the \textit{Ingmar} decision.\(^{208}\) However, it should be stressed that the \textit{Ingmar} decision ultimately concerned a correct interpretation of the directive.\(^{209}\) There is nothing in the Rome I Regulation to suggest that correct interpretations of directives should no longer be possible. Even if there is no purely internal market configuration, implementation of the law contained in the \textit{directive} by means of overriding mandatory provisions under the \textit{Ingmar} case law could continue to be considered. The determination was therefore rightly described as ‘not very helpful’.\(^{210}\) The demand on legal-policy grounds for a solution of the \textit{Ingmar} issue by means of overriding mandatory provisions, instead of in the context of restrictions on the choice of law,\(^{211}\) would, in that connection, have brought greater clarity but was not heeded.

3. ‘Most Favourable’ Principle

A departure from the \textit{mandatory provisions of the law objectively applicable to the contract} is impermissible where this does not benefit the employee. Thus, the choice of law is unrestricted, provided that the law chosen is the one which would also be called upon, under the objective applicability provision, to

\(^{204}\) See also \textit{Bogdan}, NIPR 2009, 407, 409.

\(^{205}\) See \textit{Hoffman}, EWS 2009, 254, 257.

\(^{206}\) But see \textit{Staudinger/Steinrötter}, JA 2011, 241, 244.

\(^{207}\) \textit{D’Avout}, Recueil Dalloz 2008, 2165, 2166, emphasises that this does not constitute a codification of the Ingmar case law.

\(^{208}\) See \textit{Hoffman}, EWS 2009, 254, 258.

\(^{209}\) Thus, reference in \textit{Bogdan}, NIPR 2009, 407, 410.


\(^{211}\) \textit{MPI}, RabelsZ 71 (2007), 225, 252 et seq, 315 et seq.
come into operation (on the objective applicability provision, see paragraphs 65 et seq.). Where, however, the objectively applicable law of the contract is ousted, the choice of law will operate only in respect of non-mandatory law (cf. paragraph 2). Initially, therefore, the objectively applicable law of the contract must be ascertained under Article 8 sections 2-4 in an appropriate case, subject to application of the escape clause\[212\], in order to examine whether it was ousted by the choice of law and, if so, whether this applies to the mandatory provisions of the objectively applicable law. The choice of law clause thus permits only non-mandatory law to be departed from which is why the question has been raised as to whether it is still appropriate to speak of the parties as having autonomy.\[213\]

Conversely, the ‘most favourable’ principle does not, for example, give rise to the applicability of an aggregate of several possible legal systems.\[214\] As was the case earlier in regard to the provisions enacted by individual Member States (cf. paragraphs 71, 73), the ‘most favourable’ principle applies only as a restriction on the choice of law but not when there has been no choice of law.

A further restriction on the choice of law arises out of the application of overriding mandatory provisions, in particular in the case of the temporary posting of workers (Section 10 paragraphs 11 et seq.). Overall, it may be said that the extent of the freedom of choice of law is also determined by the extent of the applicable contract law.\[215\] The fewer matters are covered by the applicable contract law, the less significant is the freedom of choice of law. In that connection, it has been stated that for international employment law special connecting factors rendering certain provisions applicable have played a more extensive role than in the general international law of obligations.\[216\]

On the ‘most favourable’ principle under the conflict-of-laws rules in the case of the application of overriding mandatory provisions, in the event of cross-border postings, reference is made to Section 10 paragraph 63.

a) Mandatory provisions

Mandatory provisions are the (internal) employee-protection provisions of the objectively applicable law, which may not be departed from by legal agreement.\[217\] Henceforth, this is expressly so provided for in Article 8 section 1, second sentence, of the Rome I Regulation. That concerns, therefore ‘internal public policy’ (see Section 5 paragraph 7). It includes both private-law and public-law provisions (cf. Section 10 paragraph 113).\[218\] In that connection, it is imma-

\[212\] Staudinger-Magnus, Art. 8 Rom I-VO paragraph 82.
\[213\] Markovska, RdA 2007, 352, 354.
\[214\] Schlunck, Die Grenzen der Parteiautonomie im internationalen Arbeitsrecht, München 1990 (also Bayreuth, Univ., Diss. 1990), p. 163.
\[216\] Birk, RabelsZ 46 (1982), 384, 394.
terial whether the objectively applicable law is domestic or foreign law. The difference between mandatory provisions for the purposes of Article 3 section 3 of the Rome I Regulation (see on that point, paragraphs 38 et seq.) and such provisions within the meaning of Article 8 section 1 of the Rome I Regulation is to be found in the relevant purpose of the provision. Mandatory provisions under Article 8 (1), second sentence, of the Rome I Regulation are employee-protection provisions and are not all provisions that, for whatever reason, cannot be derogated from. These **protective rules** are characterised by the fact that they seek to protect the employee as the weaker party from the employer.219 General contractual provisions which indeed protect the employee, but specifically not in his capacity as an employee, are said by certain sections of opinion not to be protective rules in that sense.220 That is to be rejected.221 The consequence would be that, for example, a general prescriptive right favourable to the employee could be ‘deselected’. There is no convincing reason for this differentiation. In the final analysis, it would depend on chance whether the legislature is conferring protective measures on other contracting parties, as well as on employees (cf. e.g. in German civil law the unfair terms law is applicable to employees, too, Paragraphs 305 et seq BGB, and therefore no separate rules for restriction of unfair labour contract clauses exist).

Whether a provision is mandatory has to be determined in accordance with the principles of the legal system, of which it forms part.222 Conversely, interpretation of the terms ‘that cannot be derogated from by agreement’ is subject to the principle of **uniform interpretation** (Section 2 paragraphs 17 et seq.).223 In the case of autonomous rules, the issue to be focused on is whether they structurally correspond to State law.224 The **protective provisions contained in a collective agreement**225 also come under the heading of mandatory provisions

218 Erman-Hohloch, Art. 8 Rom I-VO paragraph 10; Staudinger-Magnus, Art. 8 Rom I-VO paragraph 77.
219 MünchKomm-Martiny, Art. 8 Rom I-VO paragraph 34.
220 OGH 12.7.2006 – 9 ObA 103/05 w; Duarte v. Black & Decker [2008] 1 All ER (Comm) 401 (QB); Stone, p. 358; Rummel-Verschraegen, Art. 6 EVÜ paragraph 19.
221 Streithofer, DRdA 2012, 191, 193. Also Staudinger-Magnus, Art. 8 Rom I-VO paragraphs 75 et seq.
222 Hergenröder, ZfA 1999, 1, 25 et seq; Philip, in: North (Ed.), EEC Convention, p. 81, 82; Staudinger-Magnus, Art. 8 Rom I-VO paragraph 70; for another view (under German law), Eser, RIW 1992, 1, 3.
224 Birk, RdA 1989, 201, 206.
225 Governmental explanatory memorandum on the IPRNG, BT-Drucks.10/504, p. 81; Bureau/Muir Watt, paragraph 942; Fernández Rozas/Sánchez Lorenzo, paragraph 464; Gamillscheg, ZfA 1983, 307, 336; Hartley, Rec. 1997, 341, 374; Erman-Hohloch, Art. 8 Rom I-VO paragraph 10; MünchKomm-Martiny, Art. 8 Rom I-VO paragraph 36; Junker, Arbeitnehmereinsatz im Ausland, paragraph 22, IPRax 2007, 469, 471; Kronke, DB 1984, 404, 405; Liukkonen, p. 124; Morse, ICLQ 1992, 1, 14; Däubler-Däubler, TV, Einl. paragraph 593 a; Jacobs/Krause/Oetker-Krause, Section 1 paragraph 132; Wimper, p. 198; cf. also Giuliano/Lagarde, BT-Drucks.10/503, p. 33, 57; Cass.soc., Dr.soc. 2011, 209 (with observations Chaumette); for another view, KR-Weigand IPR, paragraph 24.
which cannot be derogated from by a choice of law clause provided that the collective agreement is applicable in the specific case, which of course requires the collective agreement to be binding on those concerned.\textsuperscript{226} The opposite view expressed by the Austrian Supreme Court is based solely on an erroneous reference to an opinion allegedly prevailing in Germany.\textsuperscript{227} There is no justification for any restriction to universally binding collective agreements.\textsuperscript{228} The same is presumably true of of internal rules of procedure under French law (see Section 12 paragraph 14).

\textsuperscript{226} Staudinger-Magnus, Art. 8 Rom I-VO paragraph 78; Block, p.123; Streithofefer, DRdA 2012, 191, 193.
\textsuperscript{227} OGH IPRax 2007, 460; for a critical view, see Junker, IPRax 1987 469, 470 et seq.
\textsuperscript{228} For another view, see Birk, RdA 1989, 201, 206.
\textsuperscript{229} Cass.soc. Dr.soc. 2003, 339.
\textsuperscript{230} For a critical view, see Birk, RdA 1989, 201, 206.
\textsuperscript{231} Boskovic, Recueil Dalloz 2008, 2175, 2177.
– On an individual comparison, it would be examined in regard to each different issue (e.g. length of the period of notice, duty to pay damages, holiday entitlement, qualifying period for holiday, additional holiday money etc.) whether the chosen law is more or equally favourable in comparison with the law objectively applicable to the contract.\textsuperscript{232} This method avoids the problem that differing concepts of different legal systems are often barely amenable to a favourability comparison (see below in regard to the substantive group comparison).\textsuperscript{233} The method can, however, lead to a situation in which the employee could combine the longer holiday entitlement under the one legal system with a shorter qualifying period under the other legal system which, at most, could be countered by approximation.\textsuperscript{234} The objection here is that this could, as it were, lead to cherry picking\textsuperscript{235} which in the end would result in neither the one law nor the other.\textsuperscript{236} The objection that the employer is not obliged to agree to this by declining to choose law\textsuperscript{237} is to misunderstand the intention of the favourability principle: the Rome I Regulation is in principle favourable to the idea of the choice of law for employment contracts. The idea of the favourability principle in that connection is to counter restrictions on protection, but not to function in such a way as to increase protection.

– This consideration gives rise to the demand for a comparison of the legal systems involved as a whole, even if it should be emphasised that such an overall comparison is in practice difficult to carry out.\textsuperscript{238} Who would wish to say whether German or Austrian employment law is more favourable for the employee? This lack of practicability constitutes, then, the main objection against an overall comparison.\textsuperscript{239}

– According to prevailing opinion, a \textit{substantive category comparison} is required.\textsuperscript{240} The comparison is therefore to be made between groups of provisions which are connected as to their subject matter.\textsuperscript{241} For example, in rela-
tion to the period of notice and the date thereof are to be compared from the perspective of their interconnectedness in the same way as the length of holiday entitlement or qualifying periods, or continued remuneration in the event of illness. This solution is also advocated in France.242

Of course, the detailed application is not without its problems. Thus, for example, it is open to question whether the duration of the period of notice and a mandatory settlement process belong to the same substantive category.243 In my view, that is doubtful. For the category formation must result from a functional view of the desiderata of the employee.244 From a functional point of view the settlement process rather falls within the substantive protection against dismissal with the result that it cannot be included, with the length of the notice period, in the comparison. Yet it is clear that a right to a settlement process is more favourable than a right that requires neither a reason for dismissal nor a process of settlement. Likewise, the requirements to be satisfied by the ground for dismissal, and the legal consequences flowing from an unjustified dismissal, do not belong to one and the same substantive category.245

The outcome of the application of the legal systems concerned must be examined in the individual case.246 Thus, in a specific case, it is to be examined whether a shorter notice period with a specific date is more favourable than a longer notice period. The relevant factor is the date when the decision is made.247 That leads to the perplexing result that, depending on the issue and even dependent on the date on which the issue arises, the chosen law is applicable or the provisions of the law objectively applicable to the contract are rendered specifically applicable (see also paragraph 148). On the other hand, the favourability comparison does not have to stand scrutiny in regard to the whole of the contractual period or of the period during which the choice of law is valid.248

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241 More generously (for entire areas of regulation), see Heilmann, p. 101 et seq.
242 Cass.soc. Dr.soc. 2003, 339; Audit/d’Avout, paragraph 835; see Rodière, Rev.crit.DIP 1990, 700, 709 et seq.; Guedes da Costa, RDT 2007, 571, 572; Callsen, EuZA 2012, 154, 156.
244 Birk, RdA 1989, 201, 206.
245 See Hausmann, JblItalR 4 (1991) 49, 82, who deems it possible for the German law on protection against dismissal to apply in regard to the ground of dismissal whereas the consequences of an unjustified dismissal are conversely to be assessed under Italian law.
246 BAG EzA EGBGB Article 30 No. 11; BAG NZA 2014, 1076; MünchKomm-Martiny, Art. 8 Rom I-VO paragraph 40; Markovska, RdA 2007, 352, 355.
247 Staudinger-Magnus, Art. 8 Rom I-VO paragraph 89.
248 But see Carillo Pozo, REDT 2011, 1023, 1058.
The appraisal of favourability is a legal question requiring an objective assessment. It is immaterial how the employee assesses the issue of favourability, or what he desires. The issue is one that has to be approached ex officio. Of course, that is superfluous if the employee’s legal application can already be upheld under the chosen law.

It is an open question to what extent the procedural desiderata of the employee can have an influence on the assessment of favourability: thus, it was proposed to subordinate the assessment of favourability in the event of a dismissal to the question whether the relevant law granted what the employee was seeking. Where the employee brings an action alleging that the dismissal is invalid, protecting the status quo by reviewing validity is more favourable than granting a right to compensation, whereas, conversely, the compensation solution would be more favourable if the employee is only seeking compensation. That seems in the end to be unconvincing, in particular, when it is borne in mind that the employee would be cumulatively placed under the protection of both systems, which again would entail bringing back the individual comparison which has been rejected. To require the employee to make a choice does not really solve the problem because the possibility of choice already places the employee under the cumulative protection of both legal systems. What is decisive is to determine the objective level of protection that is actually applicable. Article 8 section 1, second sentence, of the Rome I Regulation unambiguously states that the employee cannot be deprived of the protection of the law that, but for the choice of law, would have been applicable to the contract. What the employee seeks by procedural means is to be tailored to that, not the other way around. It will be difficult to assess whether maintenance of the status quo owing to the invalidity of the notice of termination or the settlement solution is more favourable to the employee with the result that one is dealing with an ambivalent provision with the consequence that the law chosen to govern the contract must be determinant (cf. paragraph 62).

249 Staudinger-Magnus, Art. 8 Rom I-VO paragraph 87.
251 Staudinger-Magnus, Art. 8 Rom I-VO paragraph 88.
252 Cf. Staudinger-Magnus, Art. 8 Rom I-VO paragraph 90.
254 Cf. Dicey, Morris & Collins, paragraph 33-071; see also Thüising, BB 2003, 898, 899; this is, however, specifically excluded, also according to Hausmann, JbItalR 4 (1991) 49, 54.
Chapter 3. Connecting factors

c) Legal consequence under the conflict-of-laws rules

The ‘most favourable’ principle does not entail that the law governing the contract is the law rendered objectively applicable which can be derogated from by a choice of law as a result of a concession. On the contrary, the law applicable to the contract is the subjectively chosen law.²⁵⁶ That is henceforth made clear by Article 8 section 1, first sentence, of the Rome I Regulation: the contract is governed by the law chosen in accordance with Article 3 of the Rome I Regulation. The mandatory provisions of the law that would otherwise be (notionally) applicable to the contract apply solely where they are directed to apply by a specific referral.²⁵⁷ In that connection, one may speak of a combination of referrals²⁵⁸, of a mixed law²⁵⁹ or dépeçage.²⁶⁰ Only in regard to the result does the choice of law have merely the effect of a substantive-law referral.²⁶¹ By its nature, however, it is a referral under the conflict-of-laws rules.²⁶² The application of different laws can of course lead to substantive conflicts between the applicable laws²⁶³. In appropriate cases, this will require adjustments.

Whilst more favourable provisions of the law chosen to govern the contract take priority over mandatory provisions of the law that would otherwise have been applicable, the more favourable provisions of the otherwise applicable contract law will prevail over the provisions of the chosen law. A question really arises only in regard to neutral provisions, that is to say provisions that are neither more nor less favourable. The structure of Article 8 of the Rome I Regulation suggests that the tone is set by the provisions of the chosen law: Article 8 section 1, first sentence, of the Rome I Regulation states in clear terms that the law chosen in accordance with Article 3 of the Rome I Regulation will be determinative.²⁶⁴ The subsequent second sentence seeks merely to prevent the employee from being deprived of the protection of the notional law that would have applied. This protection will, however, not be withdrawn from him, where there is an equivalent protective rule under the chosen law.

²⁵⁶ Giuliano/Lagarde, BT-Drucks.10/503, p. 33, 57; Government’s explanatory Memorandum on the IPRNG BT Drucks.10/504 p. 81; MünchKomm-Martiny, Art. 8 Rom I-VO paragraph 33; Oppertshäuser, NZA-RR 2000, 393, 395; Schlachter, NZA 2000, 57, 60.
²⁵⁷ Giuliano/Lagarde, BT-Drucks.10/503, p. 33, 57; Deinert, RdA 2009, 144, 149; Junker, IPR, paragraph 385; see also Guedes da Costa, RDT 2007, 571, 573.
²⁵⁹ Schlachter, NZA 2000, 57, 60.
²⁶⁰ Audit/d’Avout, paragraph 835; Bureau/Muir Watt, paragraph 940.
²⁶¹ MünchKomm-Martiny, Art. 8 Rom I-VO paragraph 33.
²⁶³ Audit/d’Avout, paragraph 835.
²⁶⁴ See also on the old law Gamillscheg, ZfA 1983, 307, 335; Hausmann, JbItalR 4 (1991), 49, 53; Hönsch, NZA 1988, 113, 116. See also Cass.soc. Dr.soc. 2003, 339, 340: the rules of the place of employment cannot displace the chosen law except if they are mandatory and are more favourable to the employee.
Finally, one must also deal with an ambivalent choice of law. In case of doubt, it is the chosen law, and not the law that would otherwise have applied, which is determinative.\textsuperscript{265} However, only a few cases of ambivalent provisions are conceivable. For in this connection, regard must always be had to the result of the application of the law. In that process an assumed ambivalence is often dispelled. Longer periods of notice, for example, are from an abstract perspective ambivalent. Yet in a specific case of a notice of dismissal, their favourability must be assessed depending on whether the notice was given by the employer or the employee. In other words: under Article 8 section 2 of the Rome I Regulation, the employee may not be deprived of the protection afforded by the mandatory provisions of the contract law that otherwise would be applicable. Longer periods of notice under the law otherwise applicable to the contract afford protection to the employee only insofar as the notice period is longer for the employer. Where the notice period is longer for the employee, the notice period does not protect the employee (but only the employer). Longer notice periods under the chosen law will prevail over shorter notice periods applicable under the law that otherwise would be applicable only in regard to notice given by the employer. Conversely, the question as to favourability in regard to settlement, on the one hand, and status quo maintenance or reinstatement, on the other hand, are not issues having to be answered (see paragraph 59).\textsuperscript{266}

Insofar as the chosen law contains provisions that protect the employee and are not reflected by analogous provisions in the law that otherwise would be applicable, then the chosen law will continue to be determinative.\textsuperscript{267} However, regard is not to be had in that connection solely to formal provisions, but to the question whether the contract law otherwise applicable makes any provision for employee protection. This can of course be provided judicially or under customary law.

A problem arises in regard to whether the more favourable provisions are required to be invoked by the employee or whether the employee may freely assess favourability.\textsuperscript{268} The answer to both questions is negative. Where the employee cannot be deprived of protection by the mandatory provisions of the law that would otherwise have been applicable to the contract, that protection is regarded as a given, and is therefore not available to be derogated from. The employee cannot determine what is more favourable because he cannot be deprived of the protection. For the same reason he is not required, either expressly or by implication, to invoke it. However, this is only half of the answer because it is the procedural law of the forum that will in the end determine what evidence the parties have to provide and what it is for the court to establish in its official ca-

\textsuperscript{265} Gamillscheg, ZfA 1983, 307, 335; Junker, IPRax 1989, 69, 71.
\textsuperscript{266} For another view, see Morse, ICLQ 1992, 1, 15 et seq.
\textsuperscript{267} German government’s explanatory Memorandum, BT-Drucks.10/504, p. 81; Hönsch, NZA 1988, 113, 116.
\textsuperscript{268} Cf. in detail Jault-Seseke, Rev.crit.DIP 2005, 253 et seq; Lhuillier, JDI 1999, 766, 770 et seq.
The conflict-of-laws question has already been answered by the Rome I Regulation, with the result that the assertion that the question is to be determined in accordance with the lex fori, does not fully address the issue.

IV. Law objectively applicable to the contract

1. General

Before the advent of statutory provision, commentators were at variance as to whether, in the absence of a choice of law, the applicable law was to be determined in accordance with the presumed intention of the parties (subjective theory) or according to the closest actual connection (objective theory). Initially, the German courts followed the doctrine of the presumed intention of the parties. Yet the Federal Supreme Court already established, early on, that this could not entail the hypothetical subjective views of the parties, but a ‘reasonable weighing of interests on an objective basis’. The Federal Labour Court also followed this doctrine. It was only with the transposition of the Rome Convention by the PIL amending statute (Section 2 paragraph 6) that there was a move in favour of the objective theory. No longer were the individual aspects relevant in ascertaining the presumed intention of the parties. These gave way to certain presumptions which were given concrete expression in separate specific provisions providing for their applicability. As far as international law on the employment contract was concerned, that was in the first place the connection with the place of work (lex loci laboris). The hypothetical choice of law thereby suffered a rebuff. Conversely, in Japan, the presumed intention of the parties continues to be ascertained, even to this day.

Under the system of the Rome I Regulation, as was also the case previously under the system of the Rome Convention, the objective connecting factor plays and continues to play a twofold role. On the one hand, it provides the connecting factor in the absence of a choice of law. On the other hand, it directs special provisions to apply under the ‘most favourable’ principle (paragraphs 47 et seq.). Even where there is a choice of law, the connection to the objectively applicable law is consequently not meaningless. Conversely, the ‘most favourable’ princi-
ple does not come into play if there has been no choice of law. It cannot constitute an **additional connecting factor** (cf. paragraph 48).

Already prior to codification the international law on employment contracts proceeded on the basis that the connection would be with the **place of employment**.\(^{275}\) The suspicion that this had something to do with the endeavour of the courts of the place of employment to domesticate disputes is however speculative.\(^{276}\) For it remains a fact that application of the law at the place of employment is also objectively appropriate to the situation because it is the law to which both employer and employee can best adapt themselves. That also ensures that private and public employment law will run in parallel.\(^{277}\) It is therefore not by random chance that henceforth the connection with the place of employment has internationally had the greatest importance, whilst other connecting factors have, by contrast, receded into the background.\(^{278}\)

By place of employment was meant the **habitual place of work**. As a rule, this was the seat of the undertaking.\(^{279}\) In addition, the seat of the employer or the place where the contract was entered into played only a small role in determining the presumed intentions of the parties,\(^{280}\) whereas a commonality of nationalities as between the parties carried much greater weight.\(^{281}\)

Under Article 8 section 2 of the Rome I Regulation, the objective connection is with the habitual place of employment (paragraphs 83 et seq.), notwithstanding temporary postings (paragraphs 97 et seq.). These provisions are entirely in line with the traditional connection with the place of employment and with the territoriality principle (paragraph 98). Only in the alternative should the connection be made under Article 8 section 3 of the Rome I Regulation with the place of the business through which the employee was engaged (paragraphs 117 et seq.). This connecting factor accords with the traditional connections with the seat of the employer and the place where the contract was entered into. Both connecting factors (place of employment and place of business through which the employee was engaged) are, however, subject to the escape clause in Article 8 section 4 of the Rome I Regulation (paragraphs 124 et seq.). In the context of the escape clause, a commonality of nationality can carry particular weight. Finally, there are specific groups of cases in which the problem arises whether there are specific aspects to be heeded in regard to the objective connecting factor (paragraphs 150 et seq.).

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278 *Gamillscheg*, IAR, p. 142 et seq., 173.


281 *Gamillscheg*, IAR, p. 129 et seq.
From a comparative-law perspective, the connection to the place of employment was widely accepted. In addition, there was commonality of nationality or residence of the parties, establishment of the employer, as well as the place where the contract was entered into, which were additional connecting factors.282 Earlier Austrian case-law at any rate applied mandatory Austrian law to contracts which were intended to produce legal effects in Austria.283 Moreover, Paragraphs 36 and 37 of the Austrian Civil Code regularly resulted in the place where the contract was entered into as being determinant, which was liable to manipulation. Paragraph 44 of the law on private international law of 1978 then provided for the law of the State in which the employee habitually performed his work to be applicable.284 This was intended to remain determinant if the employee was temporarily posted to another State. The ‘most favourable’ principle only came into play where there was a choice of law.285 The employment relationship of persons engaged in development aid was, however, unilaterally directed to be governed by Austrian law, regard being had to the provisions of the law on development aid.286

Under Swiss PIL as well, the lex loci laboris rule applies (Article 121 section 1 of the PIL statute). Even if the employee is engaged in several places of business within a State, the law of that State will apply.287 If, on the other hand, the employee performs his work in several States, in accordance with Article 121 section 2 of the PIL statute, the place of business will be the connecting factor (whereby, under Article 21 section 4 of the PIL statute, a branch establishment will be sufficient). Failing that, the connecting factor will be the residence or habitual residence of the employer. Ultimately, there is in addition also an escape clause. In the end, it makes little difference whether applicability is triggered by closer connections under Article 117 section 1 of the PIL statute or whether this provision is superseded by Article 121 of the PIL statute as a lex specialis and the facts have to be examined under Article 15 section 1 of the PIL statute (general escape clause) to see whether they reveal ‘a much closer connection with another law’.288

The French courts have proceeded on the assumption that the place of employment is determinant.289 The courts adopted the terms of the Rome Convention even before it entered into force and made the connecting factor of the place

282 Dovgert, IJCLLIR 1989, 82, 89 et seq.
283 OGH Arb 8535; cf. in detail, Geppert, DRdA 1970 124, 131 et seq.
286 OGH Arb 11.381.
288 On the same problem, see Birk, FS Heini, 1995, p. 15, 23.
of employment subject to a reservation in regard to closer connections. In the absence of a choice of law, the ‘most favourable’ principle did not come into play either. In the case of permanent employment abroad, the law of the place of work, frequently less favourable in contrast to French law, often came into play. Conversely, in the case of a temporary posting the law of the State from which the posting is made continued to be applicable.

In Belgian international employment law, the place of employment was the determinant connecting factor, even before the Rome Convention came into being.

Spanish PIL also proceeded, in Article 10 section 6 of the Civil Code (Código Civil), on the basis of the place of employment as the connecting factor. However, there is a special connecting factor for employment contracts entered into in Spain between Spanish nationals concerning employment abroad, which is provided for in Article 1 section 4 of the Labour code (on that, see paragraph 133).

In Sweden as well, where there was no choice of law, the place of employment was the connecting factor.

Under English private international law, the proper law of the contract approach also applied to international employment law. It was a question of searching for that law which, having regard to all aspects, was best suited to apply to the contract. Normally, that led to the law of the place of residence or the law of the place of work and, in the case of senior employees, to the law of the undertaking’s seat. In the case of employment of a UK national on a drilling platform outside England, the strongest weight was attached to the nationality of the employer, in view of the fact that the application of English law had been excluded by the contract.

In the USA, the most significant relationship rule predominantly applies (section 188 Restatements (Second)). A special connecting rule is however provided for in section 196 in the case of contracts for the provision of services.

291 Lagarde, Rev. crit. DIP 1986, 505 et seq.
292 Criticised in Charvin/Steichen-Dornier, DO 1991, 197 et seq.
296 Compare McClean/Beever, paragraph 13-002.
297 Deakin/Morris, paragraph 2.45.
That provides for connection to the place at which the services are to be performed.

Likewise, the lex loci laboris plays a predominant role in determining the objectively applicable law under **South African PIL**.\(^3\)

In **Japan** under Article 12 of the statute on the application of the law, the connecting factor is the law with which the contract has its closest connection whereby the closest connection is presumed to be the law of the place of employment.\(^3\)

**Chinese PIL** follows the place of employment connection under Paragraph 43 of the new PIL law.\(^3\) Only if the place of employment is difficult to determine will the main place of business of the employer be taken as the connecting factor. Where the law of the place of engagement is more favourable, it will apply in favour of the temporary employee under Paragraph 44 of the PIL statute.\(^3\)

On the other hand, the PIL statute for **Taiwan** directs under Paragraph 20 section 2 that the place having the closest connection should be the connecting factor and under Paragraph 20 section 3 presumes this to be the seat of the party performing the relevant service, in the case of an employment contract, the place of residence of the employee. In the vast majority of cases, this will be the same as the place-of-employment connecting factor.

2. Place-of-employment connecting factor

The general connecting factor is the place of **employment**. The employment contract is governed by the law of the State in which the employee **habitually carries out his work** under the terms of the contract. In that connection, the actual situation is relevant, rather than the contractual arrangements.\(^3\) For example, where a customer service installer predominantly has to drive to carry out repairs in a neighbouring foreign territory, the place of employment thus ascertained is not called into question by virtue of the fact that the parties had planned that the work would be chiefly carried out in the home country. Irrespective of the fact that Article 8 of the Rome I Regulation enshrines it in its very wording, it is also in accordance with the conception of objective applicability. If one were to allow the matter to be determined by differing agreements by the parties, the place of employment connection would become a matter of subjective applicability dependent on the parties’ intentions, and would be equivalent to the choice of law. Finally, the comparative-law materials on the question whether an employment contract has come into existence suggest that

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\(^{300}\) Mpedi, IJCLLIR 2010, 321, 327.

\(^{301}\) Cf. Sakurada/Schwittek, RabelsZ 76 (2012), 86, 112.


\(^{303}\) Cf. with further observations Pissler, RabelsZ 76 (2012), 1, 33 et seq.

regard should be had to practice rather than to formal contractual agreements (cf. Section 4, paragraphs 15 et seq.).

The habitual place of employment in the case of an employed racing cyclist is, for example, the place where he regularly trains and not the country to whose team he belongs.\textsuperscript{305} Where the applicable law is to be examined prior to commencement of the activity which, for example, may be the case, where the validity of a dismissal prior to commencement of employment is at issue, it depends which was the law applicable to the place where the activity was intended to be carried out.\textsuperscript{306}

The relevant factor in regard to applicability of the place of employment is normally the \textit{seat of the plant} (cf. paragraph 68). Of course, that is only the usual outcome. The Rome I Regulation does not, however, directly provide for the undertaking’s seat, but rather for the place of employment, to be the connecting factor (cf. in more detail, paragraph 95). The assertion that the connecting rule is intended to protect the undertaking’s organisation and thus only secondarily serves the interest of employee protection\textsuperscript{307} therefore proves to be groundless.

The relevant factor is where the employee is \textbf{active}. Conversely, it \textit{cannot} be determinant where the gains from his employment accrue.\textsuperscript{308} Thus, the habitual place of employment of an engineer working in India is India even if he is employed by a German engineering firm by way of tele-working. Likewise, the location of the relevant computer can never be determinant.\textsuperscript{309} Indeed, one can ask the question whether the place of employment as connecting factor is appropriate when new means of communication, such as mobile telephones, Internet, et cetera, are employed on a massive scale.\textsuperscript{310} Yet, this is a question yet to be legislated on; as far as existing legislation is concerned, it is the place of employment that comes into play as the connecting factor. Currently, consideration may only be given to the possibility of applying in proper cases the escape clause in Article 8 section 4 of the Rome I Regulation. Of course, the example of the engineer does not seem to be a suitable case in this connection.

The point of connection is not in reality, however, the place of employment but the \textbf{State of employment}.\textsuperscript{311} It is therefore immaterial if an employee habitually performs his obligation to work in different places in the same State.\textsuperscript{312} That is otherwise, under Article 22 of the Rome I Regulation, only in the event


\textsuperscript{307} According to Carillo Pozo, REDT 2011, 1023.

\textsuperscript{308} Also albeit on the ground that this favours entrepreneurial profits, Carillo Pozo, REDT 2011, 1023, 1036.

\textsuperscript{309} Fenski, FA 2000, 41, 43; Staudinger-Magnus, Art. 8 Rom I-VO paragraph 104.

\textsuperscript{310} Junker, RIW 2001, 94, 101.

\textsuperscript{311} Junker, FS Heldrich, 2005, p. 719, 724, 727.
of the laws of different territorial units applying (see Section 6 paragraph 11). However, the problem arose under the Rome Convention as to the treatment of cases in which employees had **no habitual place of employment** though always working in the same country. That is, for instance, to be encountered in the case of commercial representatives who operate across borders. Under Article 6 section 2 (b) of the Rome Convention, a solution was to connect the employee to the place of business engaging the employee.\(^{313}\) As a rule, that is not a solution favourable to the employee because it chiefly renders applicable the law of the employer’s place of establishment. However, in regard to the international law on jurisdiction, the ECJ decided under the Brussels Convention on jurisdiction and enforcement that the habitual place of employment is to be regarded as the place from which the employment is habitually carried out (see in that connection Section 16 paragraph 7).\(^{314}\) Accordingly, it was suggested that this approach should be applied to cases under the Rome Convention.\(^{315}\) This approach is also paralleled in decisions of the English courts.\(^{316}\) On the question of how to deal with the not infrequent exclusion from the scope of English law of employees who habitually work outside the United Kingdom,\(^{317}\) in the case of flight personnel operating internationally, the Court of Appeal applied the so called ‘**base test**’\(^{318}\).\(^{319}\) The House of Lords expressly referred to that test in Lawson v Serco.\(^{320}\) It should depend on where the employees are, as it were, stationed. Even if the majority of working time is spent outside the United Kingdom, it is work that is habitually carried out in the United Kingdom. In the end it comes down to the question from where the employment operations habitually start. The same approach was taken in the case of so-called ‘**flotels**’ (floating accommodation).\(^{321}\) The same rationale was adopted in the case of employees who are engaged in all countries in which the employer has contracts to fulfil.\(^{322}\) However,
it was also made clear that it is less a question of the place from where the work is actually carried out, but more a question of the place from which the employee is posted under the terms of the contract, which by definition will tend to favour the connecting factor of the place of the business that engaged the employee. In the case of Carver v. Saudi Arabian airlines, Mantell L. J. deemed the ‘base’ of a flight attendant who was trained in Jeddah, but was employed for four years in Bombay and, for a further six years, flew out of London to be ‘nowhere other than in Jeddah’. 323 Conversely, the French courts have been more reluctant to adopt that approach. 324 In principle they have focused more on the central focus of the occupational activities. 325

The issue just addressed has been dealt with by a clarificatory provision in Article 8 section 2, first sentence, of the Rome I Regulation. 326 Whereas the Rome Convention focused on the State in which the employment was habitually carried on, it can henceforth, in the alternative, be the State ‘from which’ the employee habitually carries on his work in performance of his contract. The problem of the cross-border commercial representative is therefore resolved. Accordingly, there is no need to have recourse to the place of business engaging the employee (paragraphs 117 et seq.), although it would correspond to the previously widespread connection to the seat of the employer. 327 Finally, less recourse will be had to the place of business engaging the employee, which is more susceptible to manipulation. 328 The place from which the work is to be carried out will often be an office. 329 The effect of the alternate provision for applicability is illustrated by the following example: a German national applies to a German company for a position as a commercial representative in the Benelux countries and proposes that he should be located in a place in the Netherlands. The agreement is entered into on that basis. The employee works everywhere and not only in the Netherlands. The Bremen Regional Employment Court deemed the habitual place of employment not to be in the Netherlands. If it had done, journeys to Belgium would have been regarded as temporary postings. It found instead that the work was habitually to be carried out in several States, and therefore deemed the place of business engaging the employee to be the relevant connecting factor with the result that it applied German law. 330 Under Article 8 section 2, first sentence, of the Rome I Regulation Netherlands law would have been applicable as

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324 In greater detail, see Callisen, EuZA 2012, 154, 161 et seq.
325 For more detailed references on that and on the divergent view in the case of flight personnel, see Bacuvier, Dr. soc. 2011, 169, 170.
327 Cf. Gamillscheg, IAR, p. 139 et seq., 174.
329 Hansen, EBRL 2008, 767, 758.
330 LAG Bremen AP No. 5 on Article 30 EGBGB n. F.
the *lex loci laboris* since the work was habitually carried on from that State, even if one did not regard the Netherlands as the habitual place of employment with temporary postings without significant effect on the proper law of the contract.

88 Only after the entry into force of the ‘country from which’ provision did the ECJ in an *old case* interpret Article 6 section 2 of the Rome Convention in this way. With reference to the aspect of employee protection, the ECJ emphasised in the *Koelzsch* case that the place from which the employee carries on his work, or the place at which he performs the majority of his work is the place in which he exercises economic and social activity and in which the political and commercial environment influences that activity.\(^{331}\) That may have done justice to the objective of an interpretation in keeping with a coherent system. It may also be said of the case law that it serves better to locate the focal point of the employment relationship than by way of the place of business engaging the employee. It was also of course said on behalf of the ECJ that it had in mind employee protection under the conflict-of-laws rules more than it did in its decisions in *Laval, Viking* and *Rüffert* (cf. on that point, Section 10 paragraphs 62 et seq.).\(^{332}\) The French courts have accepted this ECJ decision in regard to the connecting factor in the case of the contracts of flight personnel.\(^{333}\) The result in any event is to give precedence to the *place of employment factor* above the place of the business engaging the employee factor.\(^{334}\)

89 In order to assess the focal point of the activity, the place *provided for* as the place of employment under the *employment contract* may also be material.\(^{335}\)

90 In light of the developments described above the place of employment as the connecting factor is to be broadly interpreted whilst the factor of the place of the business engaging the employee is to be interpreted narrowly.\(^{336}\) The ECJ already interpreted the Rome Convention as meaning that the place from which the work is carried out is not the only connecting factor (paragraph 88). Likewise, in line with the case law on the international law of jurisdiction,\(^{337}\) it also decided that, *in the absence of a focal point* of the activity, the focus should be on the place *in which the employee carries out the majority of his work*.\(^ {338}\) That is also in line with the case law on the earlier Austrian PIL law under which the connecting factor was the seat of the employer only when, in the case

\(\text{ECJ EuZW 2011, 302} – \text{Koelzsch (=Rev.crit.DIP 2011, 447, with observations from Jault-Seseke); on this see Lacoste-Mary, RDT 2011, 531 et seq.; Lüttringhaus, IPRax 2011, 554 et seq.; Mankowski/Knöfel, EuZA 2011, 521 et seq.; V orlage: Cour d'appel (Luxembourg) EWS 2010, 160.}\)

\(\text{Grass, Dr. soc. 2011, 849 et seq.}\)

\(\text{Cass.soc. 11.4.2012 – 11- 17096 and 11 – 17097; see on this Jault-Seseke, RDT 2012, 388 et seq.}\)

\(\text{Winkler v. Mohrenfels, EUZA 2012, 368, 372.}\)

\(\text{Tribunale di Milano, RDIPP 2006, 759 (on the law of jurisdiction).}\)

\(\text{ECJ EuZW 2011, 302, paragraph 43 – Koelzsch.}\)

\(\text{ECJ EuZW 2002, 221 – Weber.}\)

\(\text{ECJ EuZW 2011, 302, paragraph 45 – Koelzsch.}\)
of several places of employment, none could be accorded preponderant importance.\textsuperscript{339} Where, however, stable places of employment succeed one another, it will in each case be the most recent place that is relevant (cf. also paragraph 99).\textsuperscript{340}

Regard must be had to \textit{all aspects} characterising the employee’s activity. To be considered alongside the place from which the work is carried out, are the place in which he receives instructions, the place in which the work is organised as well as the place in which the working equipment is located. A further consideration is where the employee goes in order to perform his working commitment and where he returns.\textsuperscript{341} That also clarifies that the connection to the place from which the employee habitually carries out his work is not a merely formal factor, but \textbf{qualitatively must form the central point of his activity}. At the same time, by this means possible manipulations, as a result of unilateral designation of the place ‘from which’ the work is carried out will be avoided.\textsuperscript{342} A mere place of return without any other significance would therefore not be sufficient.\textsuperscript{343} For the purposes of the place of work connecting factor, a certain minimum amount of work must be performed at the place from which the work is carried out.\textsuperscript{344}

It is not, however, \textbf{permissible,} overall, to look for the closest connections and to declare the place thus ascertained to be the place of employment. The Federal Labour Court so held in a decision on international jurisdiction (see also Section 16 paragraph 7).\textsuperscript{345} In that connection, it focused on the place with which the employment relationship revealed the closest connections, regard being had to the overall circumstances. That is, however, to level the distinction between the place of work and the place of closest connection.\textsuperscript{346} The fact that the Brussels I Regulation (cf. Section 16 paragraphs 3 et seq.) does not make this distinction is immaterial in light of the requirement to interpret European instruments in the light of their systemic connections (cf. Section 2 paragraph 19).

The habitual place of work must, under the considerations set out above, be examined in two stages:

– Is there a central point of the activity, having regard to all considerations?
– If not, is there a place at which the employee carries out the majority of his work?

If the answer to the both those questions is no, then the connecting factor must continue to be the place of the business engaging the employee.\textsuperscript{347}

\begin{itemize}
\item \textsuperscript{339} OGH DRdA 1990, 206.
\item \textsuperscript{340} Cass.soc. Dr.soc. 2009, 733 (with commentary by Chaumette).
\item \textsuperscript{341} ECJ EuZW 2011, 302, paragraph 49 – Koelzsch.
\item \textsuperscript{342} Lüttringhaus, IPRax 2011, 554, 556.
\item \textsuperscript{343} Mankowski/Knöfel, EuZA 2011, 529.
\item \textsuperscript{344} Lüttringhaus, IPRax 2011, 554, 556.
\item \textsuperscript{345} BAG AP No. 3 on Verordnung Nr. 44/2001/EG.
\item \textsuperscript{346} Therefore, justifiably criticised in Rauscher/Pabst, NJW 2011, 3547, 355.
\end{itemize}
It has to be clarified whether, in connection with the second question in paragraph 93 above, the focus should be on individual places or on countries in regard to the majority of the work. Example: a commercial representative regularly visits customers in Cologne, Aachen, Maastricht, and Liège. As a rule he spends five days per month in Cologne and Aachen, eight in Maastricht and two in Liège. Were one to focus on the specific places, Netherlands law would be applicable. If one focuses however on the country, then German law would apply. Manifestly, the place of employment is to be understood in relation to the connecting factor with the result that the focus is not on the specific places, but on the proportions attributable to the different countries. Article 8 section 2 of the Rome I Regulation focuses on the law of the ‘State’ in which the employee habitually carries on his work (already referred to in paragraph 86).

The place in which the employee in pursuance of his contract habitually carries out his work will be the **seat of the plant**, if the employee is integrated into a plant (cf. paragraph 84). Temporary work abroad is of no significance in that connection. Where an employee is not integrated into a company, the place of work is that place in which the activities are concentrated (cf. paragraphs 87 et seq.). But even where the employee is integrated into the organisation, the decisive factor, in the final analysis, is the place in which the employee is active and not the place where the undertaking, for which the employee is working, is situated. Thus, a **teleworker** who is incorporated within the corporate structures does not have his place of employment at the seat of the plant. What is relevant is to determine the place at which the employee is located during the performance of his work (paragraph 85) and not for instance the place in which the computer is installed or even the place in which the server from which the data is transmitted is located. However, the location of the computer and the place of the activity will, as a general rule, be identical.

The **relevant time** in regard to the connection is to be determined according to the factual situation to be appraised. This decisive factor is where, at the time to which the factual situation relates (for example, a dismissal or a case incurring liability), the habitual place of employment was situated, whether or not it was different previously or may have subsequently changed.

347 Carillo Pozo, REDT 2011, 1023, 1038.
349 Gamillscheg, IAR, p. 128.
350 Gamillscheg, IAR, p. 128.
351 Mankowski, DB 1999, 1854, 1856.
352 Fenski, FA 2000, 42, 43.
353 Mankowski, DB 1999, 1854, 1856.
3. Immateriality of temporary posting

A temporary posting is not enough to give rise to a change in the law applicable (Article 8 section 2, second sentence, of the Rome I Regulation). This provision concerns the ascertainment of the law applicable to the employment contract by way of an objective connecting factor. It is to be strictly distinguished from the special factor by which mandatory employee-protection law is rendered applicable as overriding mandatory provisions under the law on the posting of employees, even if the law governing the posting in the cases of temporary posting here discussed may partially apply: employees who are temporarily posted remain, as a rule, subject to the employment law of their home country, according to Article 8 section 2, second sentence, of the Rome I Regulation. Nonetheless, internationally mandatory employee-protection law can apply to these employment relationships by virtue of the special connection rendering them applicable as internationally mandatory provisions.

In the event of a posting to another European country, the relevant law transposing the directive on the posting of workers (see Section 10 paragraphs 44 et seq.) may be applicable, but not where the posting is to other countries. Accordingly, posting for the purposes of the posting legislation cannot merely be equated with temporary posting under Article 8 section 2 of the Rome I Regulation.

Even prior to the Rome Convention it was recognised that there was an interest to be safeguarded in ensuring stable relationships. Accordingly, the temporary transfer of the place of work should not entail the immediate application of another law. At that time, one spoke of the territorial extension of the law. It is a theory that is still to be found in the law on corporate governance.

Neither at the commencement of the posting nor at its termination will there be a change in the applicable law provided that the temporary posting is not one which adversely affects the connection to the place of employment (see on that point below). It is a statement that specifies a situation without having any self-standing significance because even where no such provision is made, the habitual place of employment would have to be ascertained, irrespective of a temporary posting. Conversely, a posting, which is not temporary, does give rise to a change in the applicable law. Criticism has been levelled at this on legal policy grounds: it is said that the attendant ‘either or principle’ is often not appropriate, in particular where, owing to the temporary posting the law of the previous place of employment continues to apply, but as a result of application of the escape clause, the law of the new place of employment commences to apply.
apply, without connections to the previous law being thereby entirely cut off. For example, it is conceivable that a contract with the parent company in Germany is maintained in force yet the employee is posted abroad for an indefinite period, with the possibility of a further posting in the future to a third country or, equally, of his return. That is supported by the fact that holiday entitlement is determined by the law of the place of employment and also employee liability, but not the grant of employee pensions. Yet these considerations can be countered on the basis of existing legislation. The application of the escape clause (in favour of the law of the home country and in favour of the law of the place of employment) can be limited to parts of the contract and give rise to a splitting (dépeçage) (paragraph 33) of the contract (see paragraph 131).

A problem arises as to the meaning of the adjective ‘temporary’ which can either be understood as a short period of time or as a definite period. This question was already debated before the entry into force of the amending PIL law (Section 2 paragraph 6). The view that the opposite of a temporary posting was one of longer duration, and not a definitive one, did not prevail. The prevailing view was that a posting was temporary if it was not definitive. That was also the view taken in France. However, in the case of a very long posting to France, there was a presumption in favour of a change of the applicable law. On the other hand, a posting for a period of four years, was still viewed as temporary. Ultimately, the connecting factor is linked to subjective (private autonomous) criteria. This consideration of private autonomy is indeed connected in a certain way to party autonomy under conflict-of-law rules, as comprehensively recognised in Articles 3 and 8 section 1 of the Rome I Regulation and, in recital 11, where it is described as ‘one of the cornerstones of the system of conflict-of-law rules’.

The following consideration appears to be more important still: even if a posting is of long duration, but a return to the old place of employment is intended, there is something to be said for arguing that the legal relationship continues to be located at the old place of employment, whereas the place of the le-

363 Likewise however by way of the partial application of the general connecting factor E. Lorenz, RdA 1989, 220, 223.
gal relationship will change if the place of employment alters, with there being no intention of return. The relevant factor must always be whether, on an overall view, the habitual place of employment can be presumed to have shifted.  

Even if the posting is only of short duration, and the employment relationship is afterwards terminated or continued at yet another place of employment, it is no longer located at the earlier place of employment. For that reason, it was always correct to presume in favour of a temporary posting where the parties proceeded on the basis of a return to the previous place of employment. In the original Commission proposal for the Rome I Regulation it was intended that there should be an express provision in Article 6 (2)(a), third sentence. The fact that the corresponding provision no longer appears in the wording of Article 8 of the Rome I Regulation does not mean that henceforth the converse is true; that cannot at any rate be presumed in light of the wording of recital 36 of the Rome I Regulation. The result obtained by interpretation is confirmed in the relevant recital.

The determinant factor is the issue of the employee’s contemplated return. The question does, however, arise as to whether an agreement to return is required or whether the supposition of a return is already sufficient. Ultimately, as was already the case under the Rome Convention, relevant intention must suffice, that is to say an animus retrahendi, on the part of the employer, and an animus revertendi, on the part of the employee. If one bears in mind that it is not impossible for the employer, depending on the terms of the contract, to be able to hold the employee to work abroad under his right to issue instructions, with the result that there does not need to be an agreement, constancy in regard to the law applicable to the contract would be at the mercy of chance. Also at issue here is not the choice of an applicable law, but the legal system in which the employment relationship is located (see Section 1 paragraph 20). Yet that cannot be determined by whether the intention to return was formally agreed or rather formed a tacit part of the parties’ intentions. This interpretation is confirmed by the German wording of recital 36 where it is stated ‘wenn von dem Arbeitnehmer erwartet wird’ (if the employee is expected). That conflicted, for example, with the French version ‘lorsque le tra-

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374 Hansen, EBLR 2008, 767, 768 et seq.  
375 Cf. with further references Deinert, RdA 1996, 339, 341.  
377 Magnus, IPRax 2010, 27, 40; Mankowski, in Ferrari/Leible (Eds.), Rome I Regulation p. 171, 185 et seq.; for Paragraph 44 IPRG OGH DrDA 9888, 345 (= ÖJZ 1986, 760 = ZAS 1987, 50 = JBl.1987, 196); intention to return on the part of both parties is sufficient; cf. also Schwimmann, DrDA 1981, 281, 283.  
378 In this aspect rather too generally, Schneider, NZA 2010, 1380, 1383.  
379 Cf. also Venturi, NLCC 2009, 771, 781.
vailleur est censé reprendre son travail’ (when the employee is expected to resume working).\textsuperscript{380}

102 An intention to return may be specifically inferred from the terms of a posting agreement. If, however, there is no such \textit{agreement}, the intention to return may also be inferred from the \textit{tasks} to be performed in the context of the posting or from the employer’s further scheduling and planning. An intention to return may also be presumed from the contractual situation of the original employment contract, where the employer under his right to issue directions can post the employee, yet the \textbf{normal place of employment} is located at the location of a specific undertaking. It may be inferred that there is no intention to return where the posting is associated with a promotion, for example, where a senior employee is appointed as the chief executive officer of a foreign subsidiary. In any event, there cannot be a temporary posting where the employee is no longer integrated within the undertaking situated in the previous place of employment, but is integrated into \textbf{another company} in another country.\textsuperscript{381} Nor can an intention to return be inferred from a right of revocation contractually agreed in favour of the employer.\textsuperscript{382}

103 In view of the fact that the focus is on an intention to return, and not on an agreement to return, the legal-policy objection that \textit{possibilities of manipulation} are afforded to the employer who enjoys greater powers in this regard, do not carry so much weight.\textsuperscript{383} For this approach has regard to the actual intentions of the parties. It thus does not directly facilitate the choice between the law at the previous place of employment and the law at the new place of employment. Nonetheless, alternatives are difficult to imagine because focusing on a time frame would be yet more inappropriate (see paragraph 100). Nor does focusing on a change in the employee’s residence\textsuperscript{384} appear to be appropriate. Of course, one could consider an objective connecting factor under which the subjective intentions of the parties would be nullified and, after an appreciable period of time, a change in the applicable law would be permitted, irrespective of an intention to return.\textsuperscript{385} This has been partly recognised, for example, in French case law (cf. paragraph 100). However, there are no maximum periods under the Rome I Regulation, nor were there under the Rome Convention, unlike under the Regulation coordinating social law in Article 12 of Regulation (EC) No. 883/2004.\textsuperscript{386} That militates against transposing the 24 month period\textsuperscript{387} provided for in Regulation No. 883/2004, and against the acceptance of a maximum peri-
Nor would a maximum period be appropriate, at least not in regard to assignment-specific postings because project completion cannot always be foreseen, and the focus of the employment relationship in this type of posting will in general always continue to be the pre-existing place of employment. Nor, therefore, will an extension to the originally intended duration of the posting give rise to a change in the applicable law. Where the period of posting is of long duration, in exceptional cases, the application of the escape clause in Article 8 section 4 of the Rome I Regulation (cf. paragraph 124) may be considered. This solution would also be in line with the acceptance by the French courts of a change in the applicable law where a period of employment on national territory exceeds four years (cf. paragraph 100).

Irrespective of the considerations set out above, there is a proposal that a change in the applicable law should be assumed in the event of a period of posting of five years or more. This is based on the consideration that the system of connecting factors is underpinned by the idea of incorporation into a specific employment market and that integration into the labour market of the host State can be assumed to subsist in the event of such a long duration. However, this argument does not seem to be correct since the system of connecting factors looks for the main focus of the contractual relationship and not the relationship of the employee to the employment market (cf. Section 1 paragraph 20), even if both are often compatible one with the other. Of course, that does not preclude having regard to integration into the labour market, but in that case by application of the escape clause.

It has been suggested that only postings having no appreciable effect on the employment relationship should be regarded as immaterial. A more correct view would be that where a posting is found to have such influence the applicable law may be assumed to have changed by application of the escape clause in Article 8 section 4 of the Rome I Regulation.

A definitive posting always leads to a change in the applicable law, even if it is of short duration. If it is of longer duration, under the escape clause the previous law may still always apply.

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387 Cf. Winkler v. Mohrenfels/Block, EAS B 3000, paragraph 103; cf. in that connection also Lacoste-Mary, p. 25; for another view, see v.Hoffmann/Thorn, Section 10 paragraph 81.
388 For another view, see Heilmann, p. 143 et seq.; Kraushaar, AiB 1989, 53, 55; as here on the earlier Austrian law, Rebhahn, Festschrift Strasser, 1983, p. 59, 81 et seq.
389 E. Lorenz, RdA 1989, 220, 223; Biegen, p. 47 et seq.; cf. also in this respect Rummel-Verschraegen, Article 6 EVÜ, paragraph 27.
390 Nunes Fernandes Gil Wolf, p. 113 et seq.
391 Junker, Internationales Arbeitsrecht im Konzern p. 183; also FS Bauer, 2010, p. 503, 510; Deinert, RdA 2009, 144, 146; Winkler v. Mohrenfels/Block, EAS B 3000, paragraph 104.
392 v. Hoek, p. 444 et seq.
393 Jault-Seseke, Rev.crit.DIP 2005, 253, 265.
394 v. Bar, IPR 2, Section 4 paragraph 529.
Where the parties initially had, in contemplation a temporary posting which, in the course of time, becomes a definitive posting, a change in the applicable law will occur at the time when the intention of the parties changes. The Austrian Supreme Court also would only presume in favour of a posting, for the purposes of the Austrian law on private international law, if the person concerned had previously been employed nationally. In regard to the original Commission draft proposal, which was linked to the idea of return (cf. paragraph 100), the view was taken that one should not adhere too closely to the wording. As a result of the corresponding passage having been removed from the recital (36) this view of the matter is not precluded by the wording of the regulation. Nor, moreover, is there by definition any reason to take issue with that. Article 8 section 2, second sentence, of the Rome I Regulation is only a clarification under which the habitual place of employment does not change in the event of a temporary posting (cf. paragraph 99). It may therefore be stated, on the basis of the same consideration and with an eye to constancy in regard to the applicable contract law, that the place of employment within contemplation is the habitual place of work, even if at the beginning, the employment is carried out at another place of employment.

Conversely, the previous place of employment will remain determinant under analogous considerations where the employment relationship is intended to end with a posting although then there is no intention to return. For, in this case as well, the employment relationship had its central focus at the habitual place of employment.

A temporary posting is possible, in particular in the context of the cross-border hire of employees (temporary agency work). In regard to the employment relationship of the hired worker with the person hiring him out, the following

396 Cf. Déprez, Dr.soc. 1995, 323, 327.
397 Schlacher, in Leible (Ed.), Das Grünbuch zum internationalen Vertragsrecht 2004, p. 155, 158.
400 Mauer/Sadtler, DB 2007, 1586, 1588; Mankowski, IPRax 2006, 101, 107; for another view, see Franzen, AR-Blattere SD 920 paragraph 57; for a different view, see Mauer/Sadtler, RIW 2007, 92, 97.
401 For another view, see Winkler v. Mohrenfels/Block, EAS B 3000, paragraph 106.
402 See also Magnus, IPRax 2010, 27, 40.
403 Cf. García Martín Alférez, EuLF 2008 I-61, I-76; Mankowski, in Ferrari/Leible (Eds.), Rome I Regulation p. 171, 188 et seq.
404 Wurmnest, EuZA 2009, 481, 493; Nord, RDT 2012, 383, 385; Mankowski, in Ferrari/Leible (Eds.), Rome I Regulation, p. 171, 189.
will apply: where the hiring-out to the foreign borrower is permanent, there is a habitual place of employment abroad with the result that the local law will be the law applicable to the contract under Article 8 section 2 of the Rome I Regulation. Where employees are hired out to a changing pattern of borrowers abroad, the applicable law will depend upon the central focus of the activity (paragraphs 87 et seq.). At least there is no change in the applicable law in favour of the country in which the hired workers are set to work. Where an employee only occasionally works under a hire arrangement abroad, that will be a temporary posting, which cannot operate to bring about a change in the applicable law. Where it is a genuine cross-border hired employment that will normally be a temporary posting in the absence of any further specific features. If a self-standing local employment contract is entered into with the borrower for the period of availability of the hired worker, it is to be dealt with autonomously in the sense that the lex loci laboris will be applicable. Conversely, the agreement between hirer and borrower is not to be dealt with as a matter of employment law, but rather under the general law of contract which, pursuant to Article 4 of the Rome I Regulation, directs the law of the hirer’s place of establishment to be the law applicable to the contract of service. The fact that the employee made available may in appropriate cases be set to work abroad is without significance. In contrast, the relationship between the hired employee and the user is to be classified under employment-law principles (see Section 4 paragraph 34). Of course, the habitual place of employment is not to be equated, for the purposes of this partial employment relationship, with the habitual place of employment under the hire relationship (see paragraph 110). A temporary posting from one perspective can be the habitual place of performance of the work from the other. As a rule in that connection, however, the national law applicable to the hiring of employees will come into play as overriding mandatory law (see Section 12 paragraph 109).

A specific case is represented by intra-group postings. The contract law applicable to employees who are posted to another group undertaking, frequently described as ‘expats’, will remain unchanged, if a return to the previous undertaking is intended (whether by prior agreement subject to specific conditions

405 Rummel-Verschraegen, Art. 6 EVÜ paragraph 15; Bayreuther, DB 2011, 706, 708.
407 Cass.soc. Dr.soc. 2011, 336 (with observations by Lhernould).
409 Mankowski, DB 1999, 1854, 1858.
411 In further detail, see Winkler v. Mohrenfels/Block, EAS B 3000, paragraph 120; cf. Staudinger- Magnus, Art. 8 Rom I-VO paragraph 171; Czernich/Heiss-Rudisch, Article 6, paragraph 15.
413 See on this Nunes Fernandes Gil Wolf, p. 27 et seq.
or by the employer’s right of revocation).\textsuperscript{414} That is not altered by the fact that the authority to give instructions temporarily passes to another group undertaking.\textsuperscript{415} Only if exceptionally a definitive posting is provided for, will there be a change of applicable law (see paragraph 99). In both cases, it may be a genuine case of hired employment in the form of an intra-group loan (see paragraph 110). There can be no presumption that, in the absence of a provision for return, there is no employment relationship with the result that the applicability provisions in relation to employment contracts do not apply.\textsuperscript{416} For even in that event, a dormant employment relationship may subsist even though that makes little sense, as a rule, and therefore in practice will hardly ever be agreed.

Where an employment contract becomes dormant and an employment contract concerning a posting is entered into with the same employer for a period of employment abroad, the same connecting factor must be presumed to operate with the result that a normal temporary posting subsists with the contract being governed by the habitual place of employment.\textsuperscript{417} In that connection, both contracts are to be viewed as a unit. For the agreement concerning the temporary posting to be governed by a different law, there must have been a choice of law in regard to part.\textsuperscript{418}

It is also possible for a pre-existing employment relationship to be terminated (often with reinstatement options), and for a new employment relationship to be entered into with a new group company. That may often result from matters relating to foreign residence and work permits.\textsuperscript{419} On the question as to which law that is to be examined under, reference is made to Section 7 paragraph 12.\textsuperscript{420} This local employment relationship is likewise governed by the law of the place of employment with the result that, as a rule, there will be a new applicable law (for the new employment relationship).\textsuperscript{421} However, the original employment relationship with the previous employer will determine any existing right of revocation on the part of the previous employer and the revival of the pre-existing basic employment relationship.\textsuperscript{422} Conversely, irrespective of the conclusion of a new employment relationship with the superseding group company, the initial basic employment relationship remains on foot with the previous employer, but the local employment relationship will nonetheless be dealt with autonomously,\textsuperscript{423} which in general will mean in accordance with the place
of employment rule that the local law will apply.\(^{424}\) Of course, in that connection, a choice of law will take precedence. In respect of the initial basic employment relationship to be dealt with separately it should be made clear that it continues to be classified as an employment relationship, irrespective of suspended obligations under the main contract.\(^{425}\) That will remain the case, as a rule, in the event of a temporary posting, at least so long as there is an intention to return.\(^{426}\) In general, the basic employment relationship will be complemented by agreements in regard to posting.\(^{427}\) The constancy of the connecting factor is not, however, called into question by the establishment of the local employment relationship which, if the initial basic employment relationship is ongoing, will also apply to postings outside the group.\(^{428}\) This is made explicit by the second sentence of recital 36. It is true that in the *Pugliese* case the ECJ took a different view of this in the context of the law of international jurisdiction.\(^{429}\) In that regard the interest of the employer under the basic employment relationship in the work to be performed with the other group employer justified the place of employment under the local employment relationship as being regarded as the place of employment of the basic employment relationship as well. Yet this consideration cannot be transposed to the Rome I Regulation. It is true that, in the course of interpretation, heed must be paid to the systemic connections with the Brussels I Regulation (see Section 2 paragraph 19). However, that does not require a uniformly schematic interpretation, but rather a consideration of the underlying legislative purposes which in fact point to a differing construction.\(^{430}\) The Brussels I Regulation in recital 13 also provides for protection of the employee as the weaker party, as does recital 23 of the Rome I Regulation. However, providing for an additional court to have jurisdiction at the place of performance of the employment (in addition to the jurisdiction conferred on the courts of the place of establishment of the employer) will ease the employee’s access to justice, whereas a change in the law applicable to the contract will by no means necessarily lead to the applicability of better employee protection. Even if the law at the place of employment is more favourable from the employee’s point of view, that may be offset to his disadvantage by virtue of the fact that he loses the certainty of the law with which he is familiar and which he perhaps can more readily ascertain. Overall, from a conflict-of-laws perspective and in regard to the question as to the central focus of the employment relationship, it appears to be entirely justified not to presume a change in the law applicable to the basic underlying employment relationship. Recital 36, second sentence, supports this


\(^{427}\) Cf. for instance, Pohl, NZA 1998, 735, 738, 739 et seq.

\(^{428}\) Cf. Venturi, NLCC 2009, 771, 781 et seq.

\(^{429}\) ECJ OJ 2003 C 135/3 – Pugliese.

\(^{430}\) Deinert, RdA 2009, 144, 146.
view. Even if the basic employment relationship immediately begins with the conclusion of a local employment contract, that does not preclude the existence of a temporary posting with the consequence that the relevant connecting factor for the basic employment relationship is the post-return place of employment.\textsuperscript{431} In that connection, the same applies as in the normal course when an employment relationship begins with a posting (see paragraph 108). Conversely, it may also be the case that, if the escape clause is applied, local employment contracts and the basic employment contract will be dealt with under the same connecting factors (see also paragraph 136).\textsuperscript{432}

Of course, it is conceivable that other considerations militate in favour of a change in the applicable law in regard to the basic employment relationship.\textsuperscript{433} That will particularly be the case where the question of return is left entirely open. Moreover, in the context of the escape clause under Article 8 section 4 of the Rome I Regulation, other considerations may play a role in regard to a change in the applicable law.\textsuperscript{434}

In the case of other configurations of the basic employment relationship apart from a group posting, for example a posting to another undertaking in the context of a joint venture, the considerations set out above will apply by analogy.\textsuperscript{435}

4. Subsidiary connecting factor of the place of business through which the employee is engaged

The connecting factor of the place of business through which the employee was engaged applies only as subsidiary factor.\textsuperscript{436} Whilst under Article 6 of the Rome Convention the connecting factors of the place of employment and the place of business through which the employee was engaged were joined together by the word ‘or’ and therefore it was not free from doubt whether the latter connecting factor was an ancillary or an fall-back factor, the issue has henceforth been clarified in Article 8 section 3 of the Rome I Regulation. The so-called \textit{lex filiae} will apply only if the law to be applied cannot be determined in accordance with section 2. In the meantime, in an old case the ECJ clarified the matter in regard to the Rome Convention. Since the place of employment criterion must be given a broad interpretation, the place of business criterion will only apply on a narrow interpretation ‘where the court dealing with the case is not in a position to determine the country in which the work is habitually carried out’.\textsuperscript{437}

Since the place of employment factor also applies where the work is regularly carried out from a specific place of employment, the scope of the place of busi-

\textsuperscript{431} For another view, see \textit{Junker}, FS Kropholler, 2008, p. 481, 495.
\textsuperscript{432} \textit{Nunes Fernandes Gil Wolf}, p. 62 et seq.
\textsuperscript{433} Cf. \textit{Knöfel}, RdA 2006, 269, 276.
\textsuperscript{434} \textit{Knöfel}, RdA 2006, 269, 276.
\textsuperscript{435} \textit{Wurmnest}, EuZA 2009, 481, 494 et seq.
\textsuperscript{436} \textit{Block}, p. 142 et seq.
\textsuperscript{437} ECJ EuZW 2011, 302, paragraph 43 – Koelzsch.
ness factor is considerably reduced.\textsuperscript{438} It does not apply when an employment contract is to be performed in several countries. Conversely, the place of business connecting factor is to be applied where the work is to be carried out in no State, as in the case of a drilling platform on the high seas (see paragraphs 171, 172).\textsuperscript{439} This case is expressly mentioned in the \textit{Giuliano} and \textit{Lagarde} report as one in which the place of business connecting factor is to be applied.\textsuperscript{440} The same applies in the case of work carried out in space.\textsuperscript{441} But that applies only for work normally carried out in space (future developments are awaited!) whilst, in the case of merely occasional work in space, the focus will be on the habitual place of employment on earth and temporary postings to space will be immaterial.\textsuperscript{442} In sum, it may be said that the place of business criterion will apply to work in areas not subject to State jurisdiction provided that the work is not carried out from a specific place, which otherwise would result in the place of employment factor being applicable (see on that paragraph 86).\textsuperscript{443}

A particular problem is presented by the classification of the flight staff of \textbf{airline companies}. In \textbf{France} the view initially taken was manifestly that what was required here was a place of business connecting factor with additional emphasis on the State of registration.\textsuperscript{444} Since the Rome I Regulation, the base is taken to be the relevant factor in this connection as well (cf. Paragraph 153).\textsuperscript{445} The Cour de Cassation now also follows the case law of the ECJ in the \textit{Koelzsch} case (paragraph 88).\textsuperscript{446}

The question arises as to the interpretation of the \textbf{place of business through which the employee was engaged}. It has rightly been objected that it ought not to depend on the randomness of the place where the employment contract was entered into.\textsuperscript{447} Otherwise, the employer would be able indirectly to make a choice of law by determining the place of conclusion of the contract.\textsuperscript{448} Since that would be occurring in the guise of an objective connecting factor, such indirect choice of law would not even be subject to the limitations to which the

\begin{thebibliography}{99}
\bibitem{438} Boskovic, Recueil Dalloz, 2008, 2175, 2176; Kenfack, JDI 2009, 3, 36; Plender/Wilderspin, paragraph 11-042.
\bibitem{439} Däubler, RIW 1987, 252.
\bibitem{440} Giuliano/Lagarde, BT-Drucks.10/503, p. 33, 58.
\bibitem{441} Ebeneroth/Fischer/Sorek, ZVglRWiss 88 (1989), 124, 140; for another view (connection to the register), see Block, p. 507 et seq.
\bibitem{442} Cf. Block, p. 524.
\bibitem{443} Block, p. 159 et seq.
\bibitem{444} Cass.mixte, Rev.crit.DIP 1986, 501 et seq. (with observations by Lagarde); Cass.mixte, Dr.soc. 1986, 410; cf. with further references, Jault-Seke, RDT 2008, 620, 624; also Gaudemet-Tallon, Dr.soc. 1986, 406, 408 et seq.; for a critical view see A. Lyon-Caen with observations on Cass.mixte, JDI 1986, 699, 710 et seq.
\bibitem{445} Boskovic, Recueil Dalloz 2008, 2175, 2176.
\bibitem{446} Cass.soc., 11.4.2012 – 11-17096.
\bibitem{447} Gamillscheg, ZFA 1983, 307, 334; Blefgen, p. 80 et seq.; for another view, see Hess. LAG IPRax 2001, 461, 465; Schlachter, NZA 2000, 57, 60; Rauscher-v. Hein, Art. 8 Rom I-VO paragraph 63; Czernich/Heiss-Rudisch, Article 6, paragraph 38; Heilmann, p. 58 et seq.; Taschner, p. 122 et seq.
\bibitem{448} Junker, FS BAG, 2004, p.1197, 1204; Wurmnest, EuZA 2009, 481, 491.
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choice of law would be subject owing to the ‘most favourable’ principle. There is therefore much to be said for seeking the focus of the employment relationship where the employee is integrated into the organisation, in particular, where the employee is looked after.\textsuperscript{449} This solution has also been favoured in France\textsuperscript{450} and has likewise been discussed in Spanish academic writings.\textsuperscript{451} It has also been followed by the Austrian Supreme Court.\textsuperscript{452} The Federal Employment Court has not hitherto clarified the question. However, where a crewing agent abroad was engaged, it focused, in the absence of a local place of business of the shipping company, not for example on the seat of the shipping company, but on the place where the contract was entered into, without, however, evidently being aware of the problem here under discussion.\textsuperscript{453} The correct view is that the focus should not be on the place where the contract was entered into.

In an old case on the Rome Convention, the ECJ, however, held that the place of business through which the employee was engaged is not that with which the employee is connected by his actual employment but is the place of business which engaged the employee.\textsuperscript{454} The court substantiated that by reasoning that, in the first instance, the place of employment has to be ascertained, as broadly interpreted in the case law of the ECJ (see paragraphs 83 et seq.). Then the subsidiary connecting factor could not be the actual employment.\textsuperscript{455} What is relevant is solely in which place of business the employee was engaged in terms of the conclusion of the employment contract. The same applies to the Rome I Regulation owing to the fact that it has the same connecting factors. On the other hand, the connection is not with the place of the conclusion of the contract, but the place of the business with which the contract was entered into (cf. also paragraph 123).

The case law deserves criticism. It is true that, in light of the broad interpretation of the connection to the place of employment, there will only be few cases in which the paragraph 2 connecting factor does not meet the objective.\textsuperscript{456} Nonetheless, in view of the dangers of manipulation alluded to, the connecting

\textsuperscript{449} Bitter, IPRax 2008, 96, 100; Gerauer, BB 1999, 2083, 2084; Krausbaer, BB 1989, 2121, 2123; Mankowski, DB 1999, 1854, 1855; Martiny, ZEuP 2010, 747, 772; Venturi, NLCC 2009, 771, 783; Staudinger-Magnus, Art. 8 Rom I-VO paragraph 124; Rummel-Verschraegen, Art. 6 EVÜ paragraph 29; Biełgen, p. 75 et seq.; Ganzert, Das internationale Arbeitsverhältnis im deutschen und französischen Kollisionsrecht, Frankfurt am Main 1992 (Regensburg, Univ., Diss. 1992), p. 90; see also Hergenröder, ZFA 1999, 1, 19 (actual commencement of work); similar to Carillo Pozo, REDT 2011, 1023, 1046 et seq.; for another view, see Hess. LAG 25.8.2008 – 17 Sa 570/08. For use of the escape clause in this case, see Junker, IPR, paragraph 382.

\textsuperscript{450} Lhuillier, JDI 1999, 766, 769.

\textsuperscript{451} Garcimartín Alférez, EuLF 2008 I-61, I-76.

\textsuperscript{452} OGH ZfRV 1994, 207.

\textsuperscript{453} BAG AP No. 32 on Internationales Privatrecht – Arbeitsrecht.

\textsuperscript{454} ECJ EuZW 2012, 61 – Voogsgseer; see on this Jault-Seseke, RDT 2012, 115 et seq.; Lüttringhaus/Schmidt-Westphal, EuZW 2012, 139 et seq.; Winkler v. Mohrenfels, EuZA 2012, 368 et seq.

\textsuperscript{455} In this sense see Rauscher-v. Hein, Art. 8 Rom I-VO paragraph 63.

\textsuperscript{456} Cf. ErfK-Schlachter, Rom I-VO, paragraph 14.
factor of the place of business must be understood in its objective meaning. At least in regard to the German language version that is entirely reasonable because the concept of recruitment amounts to more than simply the conclusion of an employment contract (cf. for example, Paragraph 99 of the law on the constitution of companies). Unlike in the case of the connecting factor of the place of employment, the place of business criterion – and this is passed over by the ECJ – does not turn on where the employee works from, or where he predominantly works, but only on whether the employee works for the place of business through which he was engaged. What determines the organisational integration is the place from which the performance of the work is organised and coordinated. The place of business must then be deemed to be the organisation into which the employee is first integrated on conclusion of the contract. It is significant that it has already been said that the ECJ in its decision by no means ‘unduly restricted the room for manoeuvre on the employer side’ – that is specifically not the point in the case of the objective connecting factor, unlike in regard to the choice of law.

The ECJ of course recognises that the matter is liable to manipulation and therefore permits two exceptions:

- First the escape clause should allow for corrections. To this, it was of course correctly objected that this concerns the objective connecting factor and does not pursue the aim of correcting the outcome in the case of manipulations.

- If, in fact, another subsidiary has acted ‘on behalf of and for the account of another company’, the other company must be regarded as the place of business engaging the employee. By its very nature, that is an abusive circumvention of the law. There could, for example, be such a case where a head office issues the instruction to engage a person to a subsidiary in a country with a lower standard of protection, it being entirely a matter of indifference from where the work is organised. This could conceivably occur in shipping where a subsidiary company of a shipping company acts as an intermediate crewing firm which in reality no longer performs tasks as an agent.

Nor is it only the actual administrative seat of a company that is deemed to be a place of business, but ultimately any operational unit. This is already required by the principle of uniform interpretation in regard to other language ver-

457 For a corresponding parallel see Däubler, RIW 1987, 249, 251.
459 Deinert, RdA 2009, 144, 147.
460 Lüttringhaus/Schmidt-Westphal, EuZW 2012, 139, 141.
461 ECJ EuZW 2012, 61, paragraph 51 – Voogsgeerd.
462 Lüttringhaus/Schmidt-Westphal, EuZW 2012, 139, 141.
463 ECJ EuZW 2012, 61, paragraphs 49 et seq. – Voogsgeerd.
464 Cf. the case described in Jault-Seseke, Rev.crit.DIP 2005, 253, 267.
466 Blefgen, p. 68 et seq.
Thus, under French law mention is made of an établissement which may be translated as place of business. Of course it does not turn on whether the unit in question satisfies all the requirements of an undertaking for the purposes of the general law of employment. What is, however, required is an organisational unit into which the employee is integrated. However, in no event may the conclusion of the contract abroad by an employer’s agent suffice. Contrary to the case law (on jurisdiction) of the Italian Court of Cassation, a yacht on which the employee is engaged as captain cannot be deemed to be a place of business.

From the perspective of the case law, the connecting factor of the place of business is immutable because the process of engagement in terms of the conclusion of an employment contract happens only once. Only if the view here propounded is followed under which matters are determined by the organisational integration of the employee, can there be a possibility of a subsequent change in the applicable law, if there is a subsequent change in regard to integration. However, that cannot be brought about by using the human resources department responsible for the employee as a connecting factor but by application of the escape clause in Article 8 section 4 of the Rome I Regulation. For otherwise the employer would be able to determine the law applicable to the contract by appropriate allocation of human-resources responsibility for the employee. On this point the view here expressed coincides with the view taken by the ECJ: if, in the subsequent course of the employment relationship, there are no further connections with the place of business through which the employee was engaged, it will be possible, by means of the escape clause, to apply the law of the place where the employee is organisationally integrated. However, that will always only concern cases in which a habitual place of employment cannot be ascertained.

The fact that the focus is on the place of business through which the employee is engaged indicates that the attribution must be to that operating unit which has at its disposal the corresponding competence in terms of personnel for the purpose of engagement, which is why, conversely, it is not necessary to focus on the legal personality of the employer or on its headquarters.

468 On this see, for instance, with further references Kittner/Zwanziger/Deinert-Deinert, Section 4 paragraphs 34 et seq.
469 Schneider, NZA 2010, 1380, 1382.
470 Lagarde, Rev.crit.DIP 1991, 287, 318; Staudinger-Magnus, Art. 8 Rom I-VO paragraph 122.
471 Corte Cass. RDIPP 2010, 93.
472 In this sense Franzen, AR-Blattei SD 920 paragraph 74; on the facts also Blefgen, p. 90 et seq.
473 MünchKomm-Martiny, Art. 8 Rom I-VO paragraph 65; Staudinger-Magnus, Art. 8 Rom I-VO paragraph 176.
474 Cf. Franzen, IPRax 2003, 239, 241; Calliess- Franzen, Art. 8 Rom I-VO, paragraph 37.
place of business must, however, have a certain permanence, since a transitory place for the conclusion of the contract will not satisfy the requirements of the system of connecting factors.\footnote{ECJ EuZW 2012, 61, paragraph 55 – Voogsg eerd; \textit{Winkler v. Mohrenfels}, EUZA 2012, 368, 379; see already \textit{Dicey, Morris \& Collins}, paragraph 33-077; Staudinger-Magnus, Art. 8 Rom I-VO paragraph 122.}

5. Escape clause

Article 8 sections 2 and 3 of the Rome I Regulation contain fundamental connecting factors which complement and exclude one another. There is no third way – \textit{tertium non datur}.\footnote{Staudinger-Magnus, Art. 8 Rom I-VO paragraph 96; also on the old law, see \textit{Franzen}, observations on BAG EzA, Article 30 EGBGB No. 3; \textit{Mankowski}, IPRax 1996, 405, 406; \textit{Schlachter}, NZA 2000, 57, 59; \textit{Rummel-Verschraegen}, Art. 6 EVÜ paragraph 30.} Article 8 section 4 of the Rome I Regulation, by way of exception, makes provision for applicability where there appears to be a closer connection. That is not a catch-all clause under a third connecting factor\footnote{See \textit{Hönsch}, NZA 1988, 113, 114.} for cases not coming under either section 2 or section 3 but an escape clause allowing for an outcome that differs from the fundamental connecting factors.\footnote{\textit{Block}, p.139 et seq.; \textit{Junker}, RIW 2001, 94, 99 et seq.; also FS Heldrich, 2005, p. 719, 720; \textit{Schlachter}, NZA 2000, 57, 60.} The intention of the escape clause is to ensure justice in terms of private international law by allowing the person applying the law to depart from the normal connecting rule when, in a specific case, the balance of interests is not adequately reflected by the assessment of interests under the Rome I Regulation. Thus, its purpose is to achieve justice in private international law by ensuring a just determination of the applicable law, but not in terms of substantive law, for example, by facilitating the search for the law most favourable to the employee.\footnote{See \textit{Hirse}, Die Ausweichklausel im Internationalen Privatrecht, Tübingen 2006 (also Rostock, Univ., Diss. 2005), p. 246, 401 et seq.; for a critical view on such a starting point see also \textit{Liukkonen}, p. 119.} The price to be paid is of course a diminution in legal certainty.\footnote{\textit{Symeonides}, in \textit{Symeonides (Ed.) Private International Law at the End of the 20th Century}, p. 3, 31 et seq.}

Application of the escape clause is, of course, not at the discretion of the person applying the law but, in the case of closer connections, is required by operation of law.\footnote{\textit{Czernich/Heiss-Rudisch}, Article 6, paragraph 39.} Article 4 section 1 and section 2 of the Rome I Regulation contain objective connecting rules for contracts not subject to the specific connecting rules in Articles 5 et seq. (which also include Article 8 of the Rome I Regulation concerning individual employment contracts). However, under Article 4 section 3 of the Rome I Regulation an escape clause comes into play. Under that provision the law of another country is to apply where it is clear from all the circumstances of the case that the contract is manifestly more closely connected with that other country. An analogous escape clause is contained in Article 8 section 4 of the
Rome I Regulation. That provision, however, lacks the word ‘manifestly’. The significance of this textual difference is unclear. It may be viewed as an editorial oversight. However, it may also be seen as affording the possibility of greater judicial discretion in decision-making. Thus, Jault-Seseke advocates the view that not only Article 8 section 1, second sentence, of the Rome I Regulation, but also recital 23, makes provision in terms of the conflict-of-laws rules for the protection of the employee as the weaker party. In that way, it is said, the courts are authorised to exercise restraint in the application of the escape clause if the clause would run counter to employee protection. To this, it may be objected that the Rome I Regulation systematically makes provision for the protection of the weaker party principally by restricting the choice of law. If, conversely, protection under the conflict rules of the weaker party had been intended at the stage of determining the applicable law, a connecting factor would have been laid down under which the most favourable law of the legal systems concerned would have been applicable. The escape clause therefore does not have the objective of ensuring employee protection (see paragraph 141). The question that remains, however, is what importance is to be attached to the absence of the word ‘manifestly’. In that connection, it may be said that it was intended to afford the courts greater flexibility. Nonetheless, there must be a certain clarity in favour of the departure from the normal connecting factor under Article 8 section 2 and section 3 of the Rome I Regulation (see paragraph 130) in order to prevent the floodgates from being opened to the repatriation of jurisdiction.

This approach receives support from the fact that in French academic writings the search for the proper law of the contract by means of the escape clause is regarded as conflicting with the system of connecting rules and that therefore a narrow interpretation of the escape clause is advocated. In fact, it must be noted that a wide-ranging search for close connections would tend to bring back the hypothetical choice of law (see paragraphs. 32, 128) excluded by the system of rules for establishing connecting factors laid down in Article 8 of the Rome I Regulation.

The escape clause may not be used to look for a hypothetical choice of law (paragraph 32). Nor, a fortiori, may the escape clause be misused for the purposes of repatriation. In the absence of a clear choice of law, the objective connecting factor will apply. It is therefore questionable when inferences are made as to a closer connection from matters which would lend support to a hypothetical choice of law. Conversely, aspects that previously gave rise to an assumption...
in favour of a tacit choice of law, but today are no longer sufficient (see paragraph 24) because they lack the requisite clarity, may play a role as elements in the examination of a closer connection. That is true, for example, of a reference to a collective agreement, to the language of the contract or to the place where the contract was entered into. Conversely, it is very questionable if, for the purposes of the comparison of favourability, once the choice of law has been made, the focus is placed on the reasons which dictated the choice of law made, in order to ascertain the law otherwise objectively applicable to the contract in the context of the escape clause.489 In that way the courts are removing from the employee the protection of the law objectively applicable to the contract, which the ‘most favourable’ principle specifically seeks to uphold.

The problem with the escape clause is that its application is always at the expense of legal certainty. On the other hand, the escape clause serves the ends of justice in an individual case under private international law. It was not least for this reason that the deletion of the escape clause – provided for in the draft proposal on general contract law490 (but not in the provision concerning individual employment law) – was not in the end carried through.

On the other hand, this must not mean that in a wide-ranging search for the closest connections the normal connecting rules under Article 8 sections 2 and 3 of the Rome I Regulation are simply set aside. It is true that the Federal Labour Court already on the surface appears to have done so yet, in actual fact, has given an indication of the fundamental connecting factor on which it specifically based itself.491 A direct focus on the aspects in favour of a closer connection would be wrong492 from the perspective of the scheme of the law because the normal connecting rules would then not be required at all.493 That would place excessive pressure on legal certainty.494 In terms of the concept underlying the scheme of connecting factors, the normal connecting rules must be applied and the other circumstances must clearly outweigh the place of work or the place of the business engaging the employee, matters to which great weight was given by the legislature (see paragraph 126).495 This was inferred by the Federal Labour Court from the absence of a sequence of specific circumstances and from the fact that the closer connection must be substantiated by a series of specific circumstances.496 However, before this assessment is made, the primary

489 As was the case, for instance, in LAG Baden-Württemberg, BB 2003, 900, 903 et seq.
491 BAG AP No. 30 on Internationales Privatrecht – Arbeitsrecht.
493 490 ECJ ECLI:EU:C:2013:551 – Schlecker.
495 Kropholler, IPR, p. 472.
Connecting factors must be applied. In this connection, one should not count all the criteria that could be of importance, instead the criteria should be weighed.\textsuperscript{498}

131 It cannot be precluded that different closer connections exist in respect of different parts of the contract or that closer connections exist only in the case of individual parts of the contract.\textsuperscript{499} Thus, it may be envisaged that that where the place of employment is abroad in the case of a German employee of a German employer, the proper law of the contract may be a foreign law and yet the law applicable to the pension provision will be German law on the basis of of long-standing closer connections.\textsuperscript{500} Here also one can be faced with a situation of \textit{dépeçage} (see paragraph 33).

132 Finally, the escape clause serves to attenuate an excessive rigidity in the normal connecting rules. Thus, by definition, all aspects which came into consideration as connecting factors, even before the Rome Convention falls to be considered today in the event of application of the escape clause.\textsuperscript{501} In these terms regard may also be had to the case law and academic writings of earlier times. Circumstances justifying a tacit choice of law cannot, however, be considered.\textsuperscript{502} For these permit an inference as to subjective aspects, but not as to the objective criteria. It is, of course, not possible to provide an exhaustive list of all circumstances which may conceivably substantiate a closer connection.\textsuperscript{503} In view of the requisite clarity with which the circumstances justifying use of the escape clause must outweigh the normal criteria, individual considerations cannot suffice.\textsuperscript{504}

133 An important circumstance which may give rise to the application of the escape clause is a commonality of nationality on the part of the contracting parties.\textsuperscript{505} That will also apply where, following a legal succession, the employer has another nationality.\textsuperscript{506} It may be doubted whether a common nationality is
enough on its own to call into question the connection to another place of employment.\footnote{Plender/Wilderspin, paragraph 11-056.} Yet it is an important consideration in the application of the escape clause. The ECJ has identified as important connecting factors in this context the country where the employee has to pay \textit{taxes} and where he is covered by \textit{Social Security systems}, furthermore the \textit{parameters of relevance for the wages} and working conditions.\footnote{ECJ ECLI:EU:C:2013:551 – Schlecker.} This seems to be compatible with the case law of the Federal Labour Court according to which factors that can be influenced by contractual agreements (“contract immanent factors”) are of less importance because the contract parties could otherwise directly influence the objective connecting factors.\footnote{BAG EzA EGBGB Article 30 No. 11; BAG NZA 2016, 473, no. 30.}

In the case of legal persons who recruit nationals of the same State as part of the local workforce, this will normally give rise to the application of the common domestic law.\footnote{Eser, RIW 1992, 1, 2.} Thus, \textit{Article 1 section 4 of the Spanish law on workers} (ET) provides for Spanish employment law to be applicable in the case of an employment contract between a Spanish employee engaged in Spain and a Spanish employer, even if the work is performed abroad.\footnote{Cf. TCT REDI 1989, 334.} If the provision is not to contravene the Rome I Regulation, it will be merely construed as a specific application of the escape clause.\footnote{See Montoya Melgar, Derecho del trabajo, Madrid 2010, p. 236; cf. on the problem, Callsen, EuZA 2012, 154, 164.} Of course, in Spain, the predominant view is that this provision has no longer been applicable since the adoption of the Rome I Regulation.\footnote{Carillo Pozo, REDT 2011, 1023, 1028, footnote 7; cf. Fernández Rozas/Sánchez Lorenzo, paragraph 464.} This view of the matter is supported by the fact that the provision even previously was construed as an autonomous special connecting factor.\footnote{Cf. Galiana Moreno, Actualidad Laboral 1987, 2169 et seq.; cf. also TSJ Galicia 18.3.2008 – 318/2008 according to which the condition was repealed by the Rome Convention.} The purpose attributed to it was to guarantee to Spanish employees at least the same rights as in the case of employment within the national jurisdiction.\footnote{TS, 17.3.1995 – 2454/1994.}

Nationality carries special weight if it is a mandatory requirement for carrying on the activity.\footnote{BAG AP No. 31 on Internationales Privatrecht – Arbeitsrecht.} Similar weight, as in the case of commonality of nationality, should be attached to the conclusion of an employment contract in the State in which both parties have their residence, notwithstanding the intention that the work be performed abroad.\footnote{Rabel, Conflict of Laws III, p. 185.} In other cases as well, the \textit{seat of the employer} is a matter to be taken into account.\footnote{517}
Less significance is attached to the following circumstances which must, however, be examined in the context of the overall examination of all circumstances, owing to their indicative value:

- Language of the contract, but bearing in mind that the contracting parties have to use a specific language with the result that the language is not necessarily significant in terms of ascertaining the central focus of the employment relationship. That is true, in particular, where a world language such as English is used as a lingua franca or indeed is the mother tongue of both parties which, irrespective of the fact that the parties have different nationalities, may often be the case where one of the world languages is used;

- Currency of the remuneration;

- Place of payment in which connection only little importance will be attached to the payment processing from a staff administration point of view;

- The place where the contract was entered into, or the place where the letter of engagement was drawn up;

- Residence of the employee, its significance will, however, diminish in face of a different commonality of nationalities between the parties. The

518 BAG AP No. 30 on Internationales Privatrecht – Arbeitsrecht; BAG AP No. 31 on Internationales Privatrecht – Arbeitsrecht; Cass.soc. Dr.soc. 2005, 1181; Cass.soc. Dr.soc. 2012, 412; Franzen, observations on BAG EzA article 30 EGBGB No. 3; Staudinger-Magnus, Article 8 Rome I Regulation, paragraph 136.
521 BAG AP No. 30 on Internationales Privatrecht – Arbeitsrecht; BAG AP No. 31 on Internationales Privatrecht – Arbeitsrecht; Cass.soc. Dr.soc. 2005, 1181; Cass.soc. Dr.soc. 2012, 412; Franzen, observations on BAG EzA Article 30 EGBGB No. 3; Mankowski, IPRax 1996, 405, 407; Staudinger-Magnus, Art. 8 Rom I-VO paragraph 136.
522 Ca Paris Recueil Dalloz, 1998, 281; CA Versailles, Dr.soc. 2009, 1263; Franzen, observations on BAG EzA Article 30 EGBGB No. 3; Mankowski, IPRax 1996, 405, 407; cf. TS JDI 1989, 876.
Federal Labour Court has also held that residence in the case of a flight attendant is only of slight importance. In another connection, the Federal Labour Court has held that the residence of the employee is to be regarded as of ‘primary importance’, even alongside the nationality of the parties and the seat of the employer.

– More significance should however be attached to the employee’s nationality, where the contract is entered into in the same State.
– Recourse to the proper law of a previous contract.

However, it seems doubtful whether a distinction can validly be made between primary criteria of appraisal (paragraph 133) and secondary criteria of appraisal (this paragraph) on the basis that secondary criteria can only serve to reinforce primary criteria and cannot in themselves be determinant. Such a statement of legal principle would run counter to the rules requiring individual appraisal of each criterion and appraisal on a case-by-case basis.

The place from which the right to give directions is exercised can constitute a factor to be taken into account. However, in general, its significance recedes in contrast to the place of activity. The same is true of the place from which the employment relationship is administered from a human resources point of view, and of the place to which reports are to be submitted.

Where in a group there is no residual basic employment contract, but at the prompting of the group parent company, employment contracts are entered into with subsidiary companies in various States and those contracts disclose a single place of employment, application of the escape clause may be considered. In such case, where there was (presumably) no residual basic employment contract, nonetheless a right in some form to give directions was exercised by the group parent company in regard to the conclusion of employment contracts with subsidiary companies, the French Court of Cassation in the case of these contracts found that closer connections subsisted with French law. One may readily make a similar finding even where there is a residual basic employment contract and this will result in the same treatment being accorded to the residual basic

529 BAG AP No. 10 on Article 30 EGBGB n. F.
530 BAG AP No. 261 on § 1 TVG Tarifverträge: Bau.
532 Mankowski, IPRax 1996, 405, 407.
533 See also Mankowski, IPRax 1994, 88, 93 et seq.; Franzen, observations on BAG EzA Article 30 EGBGB No. 3; also BAG AP No. 261 on § 1 TVG Tarifverträge: Bau.
534 Mankowski, IPRax 1994, 88, 93, deems it impermissible to create a subsystem with connecting rules.
535 BAG AP No. 10 on Article 30 EGBGB n. F.; CA Versailles, Dr.soc. 2009, 1263; Kappelhoff, ArbRB 2009, 342, 344; Mankowski, IPRax 1996, 405, 407.
536 Mankowski, DB 1999, 1854, 1856.
537 CA Versailles, Dr.soc. 2009, 1263.
539 Cass.soc. Dr.soc. 2011, 412 (with observations by Laborde).
employment contract and to employment contracts at the place of employment (see also paragraph 114).

137 The flag of a ship has no significance for the escape clause (see below paragraphs 156, 169).\textsuperscript{540} Conversely, the regular route of a ship may be a consideration in determining the closer connection. The same is true of a homeland port (see paragraph 170).

138 A jurisdiction clause should also have no significance.\textsuperscript{541} It says nothing about where the central focus of the legal relationship is located, but can only provide evidential clues as to which law the parties may have tacitly agreed (see paragraph 26).

139 A weighting of the criteria according to employment-market significance is not required.\textsuperscript{542} It is true that the connecting factor will have consequences on competition on the labour market but is not intended to regulate it. Coordination with collective employment law and employment protection law may indeed be desirable but is not the objective of the connecting rule and, in the result, with specific regard to the escape clause, cannot be guaranteed.

140 In the case of civil servants, the fact of the State’s involvement is not a consideration militating in favour of a closer connection with the law of that State. The State, when it operates in the private law arena cannot claim more favourable treatment than is accorded a private employer.\textsuperscript{543} Accordingly, the Federal Labour Court did not apply the escape clause in favour of the United States in the case of a German embassy employee where the contract was entered into in Germany and remuneration was paid in Deutschmarks.\textsuperscript{544} That leads on to the question as to the possible significance of the employee having the nationality of specifically, that country. This configuration is to be treated in precisely the same way as commonality of nationality under a private employment relationship.\textsuperscript{545} That must also apply where the employee is engaged as a member of the local workforce. The objective of equal treatment of all local workers\textsuperscript{546} transcends the individual employment relationship and has nothing to say about its central focus. Rather, it is the case here as well that, for example, a German employee who is in engaged by the German State to work abroad will expect, with a certain entitlement, that German law will apply. That applies \textit{a fortiori} where the contract was entered into within the national territory (paragraph 133). Whether that law will, in fact, in the end, prevail by dint of a closer connection over the \textit{lex loci laboris} will then depend on an overall assessment of all the circumstances.\textsuperscript{547}

\textsuperscript{540} For another view, see \textit{Venturi}, NLCC 2009, 771, 782 et seq.

\textsuperscript{541} For another view, see \textit{Staudinger-Magnus}, Art. 8 Rom I-VO paragraph 137.

\textsuperscript{542} For another view, see \textit{Mankowski}, IPRax 1996, 405, 407 et seq.

\textsuperscript{543} \textit{Junker}, RdA 1990, 212, 214; cf. also \textit{Mankowski}, IPRax 2001, 123, 125.

\textsuperscript{544} BAG AP No. 1 on § 18 GVG.

\textsuperscript{545} See also \textit{Mankowski}, IPRax 2001, 123, 127.

\textsuperscript{546} \textit{Junker}, RdA 1990, 212, 241.
The level of protection afforded by a legal system is without significance to the escape clause.\textsuperscript{548} This cannot enable any connections between the contract and a specific law. As a matter of principle, the level of employee protection cannot be improved by way of the escape clause (see paragraph 126).\textsuperscript{549} Protection of the employee under the conflict-of-laws rules as the weaker contracting party operates by virtue of the ‘most favourable’ principle (paragraphs 47 et seq.), special connecting factors (Section 10), and by way of the public-policy reservation (Section 5).

Application of the escape clause will specifically be taken into consideration in the case of senior employees, in particular branch managing directors abroad in whose case the (permanent) posting under Article 8 section 2 of the Rome I Regulation would result in a change in the applicable law.\textsuperscript{550}

6. Change of applicable law

The subjective connection through a choice of law is mutable. The parties can again exercise their autonomy in order henceforth to choose another law (Article 3 section 2, first sentence, of the Rome I Regulation). The law governing the contract changes. The parties may choose whether to give retroactive effect to the choice of law (\textit{ex tunc} validity) or only prospectively (\textit{ex nunc} validity).\textsuperscript{551} Where the parties have not expressly provided for this, it will be determined by way of interpretation. Under the general international law of contract, in case of doubt, the choice of law will be valid \textit{ex tunc}.\textsuperscript{552} However, a note of caution should be sounded.\textsuperscript{553} The retroactive subsuming of a purchase agreement under a different law\textsuperscript{554} is quite different from a retroactive choice of law in relation to an employment contract as a permanent obligatory relationship. That can, for example, have serious consequences in regard to qualifying periods for company pensions or other vested rights. Accordingly, the Federal Labour Court has described \textit{ex nunc} validity of a change in the proper law as being in accordance with the general principles of private international law, without however providing further evidence in support of its ruling. The law

\begin{footnotesize}
\begin{enumerate}
\item For a similar logic in the German law on the external service (GAD) cf. \textit{Deinert, Internationales Arbeitsrecht}, Section 9 paragraph 188.
\item \textit{v. Bar}, IPR 2, Section 4 paragraph 530; \textit{Plender/Wilderspin}, paragraph 11-057; \textit{Staudinger-Magnus}, Art. 8 Rom I-VO paragraph 138.
\item \textit{Déprez}, RJS 1998, 251, 259; \textit{Clerici}, FS Pocar, 2009, p. 215, 218 et seq., 224 et seq.; \textit{Moreau}, observations on CA Paris, Rev.crit.DIP 1997, 55, 63 et seq., but also \textit{Stone}, p. 358, according to whom a European law is intended to apply under certain circumstances to a person employed within the EU for work abroad.
\item \textit{Gamillscheg}, ZfA 1983, 307, 342.
\item \textit{Heilmann}, p. 54.
\item For another view, see \textit{Hönsch}, NZA 1988, 113, 115, who in general terms in international employment law proceeds on the basis that a subsequent or amending choice of law will have retroactive effect. Like here \textit{Heilmann}, p. 54 et seq.
\item Cf. for instance, BGH NJW 1991, 1292, 1293.
\end{enumerate}
\end{footnotesize}
previously applicable to the contract remains applicable to the laws, legal situations and legal conditions prevailing until the change in the law whilst future effects are determined by the newly applicable law. Conversely, in the case of a choice of law in legal proceedings, it will be safer to assume that this choice of law is intended also to cover problems arising out of the earlier legal relationship.

Likewise, Article 3 section 2, first sentence, of the Rome I Regulation permits a subsequent choice of law. It can give effect to a change in the law governing the contract where previously, under the objective connecting factor, another law was indicated other than the choice of law thenceforth applicable, and the choice of law is not intended to have ex tunc validity (see paragraph 143). If, however, the choice of law is intended to produce effects ex tunc, the objective connecting factor will lapse unless it is revived by application of the ‘most favourable’ principle (paragraph 47).

The amended or subsequent choice of law does not affect the formal validity of the contract or the rights of third parties (Article 3 section 2, second sentence, of the Rome I Regulation).

A change in the law objectively applicable to the contract was previously regarded as problematic. A change in the place of employment – not merely provisional but definitive (see paragraph 97) – gives rise to the applicability of another law. That may also come about as a result of a change in the place of employment owing to the cross-border transfer of an undertaking. That is nowadays acknowledged and is in itself not a problem. One speaks of a change in the applicable law. This change is not retroactive, but operates ex nunc. The problem of the change in the law applicable to the contract was, however, specifically discussed in relation to the problem of recognition of periods of service under a foreign law applicable to the contract. However, that is, in truth, not a problem of the change in the law applicable to the contract but a problem of the substantive law henceforth applicable following the change in the law applicable to the contract, that is to say, the question of the significance of a foreign factual situation (Section 1 paragraph 16). On the problem of the change in the law applicable to the contract in the case of the transfer of an undertaking, see Section 13 paragraph 11.

In a certain sense, there is an artificial change of applicable law, where the parties have chosen the law, but the law objectively applicable to the contract changes, for example, as a result of a change in the place of employment. That

555  BAG NZA 2012, 148, 150.
556  MünchKomm-Martiny, Art. 8 Rom I-VO paragraph 80.
557  Staudinger-Magnus, Art. 8 Rom I-VO paragraph 107; Morse, ICLQ 1992, 1, 17 et seq.; cf. Cass.soc. Dr.soc. 1998, 185 (with observations by Moreau); Schmidt-Hermesdorf, RIW 1988, 938, 940.
560  Gamillscheg, IAR, p. 183.
may give rise to mandatory provisions of the law objectively applicable to the contract applying or not. The solidity of the connecting factor is thereby compromised.\textsuperscript{561} The applicability of provisions of the place of employment, occurring on a change of the law objectively applicable to the contract, or indeed termination thereof, will, unless other provision is made in regard to the applicable law, give rise to the applicability of another law, but not to novation.\textsuperscript{562}

An \textbf{artificial change in the law applicable to the contract} will also occur where the appraisal of favourability changes over time. Where, for example, a legal system provides for a period of notice of two months for employment contracts, whereas under another legal system the normal period of notice is only one month and is extended by one month for every five years of service, the employer, if he wishes to give notice in the first five years, will be dealing with a law which subsequently will have been ousted by the more favourable law (see also paragraph 57 above).

Conversely, there is no change in the law applicable to the contract on commencement and termination of a temporary \textbf{posting} whereas a posting, which is not temporary, will entail a change in the law applicable to the contract (see paragraph 99).

\section{V. Specific case configurations}

\subsection{1. Variable employment abroad}

\textbf{Lorry drivers} in international long-distance transport may, like \textbf{commercial representatives}, be engaged internationally without there being a country with a habitual place of employment. Nonetheless, often the \textit{lex loci laboris} will apply because the employee is habitually carrying out his work \textbf{from a specific place}. Yet it is conceivable, specifically in the case of lorry drivers, that there is no such place. If it is not possible to ascertain from other aspects a central focus of the activity and if there is no country in which the work is predominantly performed (see paragraphs 87 et seq.), the \textbf{ancillary connecting factor of the place of business} through which the employee was engaged, will apply.

Also in the case of \textbf{travel representatives}, it is conceivable that there is a central focus of their activity, which enables the place of employment to operate as the connecting factor. Otherwise, here too, it will be necessary to apply the ancillary connecting factor of the place of business through which the employee was engaged.

\subsection{2. Rail and air transport}

In the course of \textbf{employment in the transport sector}, the problem may arise that there is no State ‘in which or, failing that, from which the employee habitually carries out his work in performance of the contract’, discounting domestic

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\begin{enumerate}
\item \textsuperscript{561} Deinert, RdA 2009, 144, 149.
\item \textsuperscript{562} Cass.soc. JDI 1999, 759.
\end{enumerate}

\url{https://doi.org/10.5771/9783845278605}


\textsuperscript{149} Das Erstellen und Weitergeben von Kopien dieses PDFs ist nicht zulässig.

\textsuperscript{150} \textsuperscript{151} \textsuperscript{152}
inland journeys. However, there will often be a place from which the employee begins the journey and to which he returns. This will then be the central focus of his activity and, consequently, will be deemed to be the place of work for the purposes of Article 8 section 2 of the Rome I Regulation. Along the same lines, in regard to international air travel, normally the law of the State in which the base is located from which the operations start will be applicable. The proposal for a regulation considered this addition (‘or, failing that, from which’, see paragraph 87) to the place of employment connecting factor to be crucial, specifically for this case configuration. The views hitherto expressed on this point, which favoured the factor of the place of business through which the employee is engaged (thus, the German courts) or the place of registration (thus, the Italian courts in regard to the international law on jurisdiction) can no longer be maintained today. Nor can connection with the place of registration be asserted under the escape clause. That is the case, in particular because aircrews are frequently engaged in different aircraft. Also the notion that one may freely attach weight to all indications in support of the closest contact is ultimately not sustainable. It overlooks the priority connection under the lex loci laboris rule, and could only be justified under the escape clause. But the escape clause presupposes not just a close connection but a closer connection with a specific law, which will not necessarily become apparent on every weighing of all circumstances. If there is no base from which operations are initiated, it will be necessary to apply the con-

563 BAG AP No. 31 on Internationales Privatrecht – Arbeitsrecht; Wurmnest, EuZA 2009, 481, 495.
564 Kenfack, JDI 2009, 3, 36; Knöfel, RdA 2006, 269, 274; A. Lyon-Caen, observations on Cass.mixte JDI 1986, 699, 710 et seq.; Staudinger-Magnus, Art. 8 Rom I-VO paragraph 100; Magnus, IPRax 2010, 27, 41; Staudinger-Magnus, Art.8 Rom I-VO paragraph 165; Mankowski, IPRax 2006, 101, 108; also in Ferrari/Leible (Eds.) p. 171, 179 et seq.; Hk-Arb-Rädler, EGBGB, paragraph 20; Deinert, RdA 2009, 144, 147; Dicey, Morris & Collins, 2nd supplement, paragraph 33-R058-33-079; Dicey, Morris & Collins, 3rd supplement, paragraph 33-R058-33-079; for a critical view see Wurmnest, EuZA 2009, 481, 496.
565 COM (2005) 650 final; cf. also Lagarde, Rev.crit.DIP 2006, 331, 343; Morvan, Dr.soc. 2007, 191, 195; criticised further in Mankowski, IPRax 2006, 101, 107; generally criticised from a legal policy perspective in MPI, RabelsZ 71 (2007), 225, 286 et seq.
566 BAG AP No. 10 on Article 30 EGBGB n. F.; LAG Frankfurt am Main, IPRax 2001 461, 464 et seq.; Ganzert, Das international Arbeitsverhältnis im deutschen und französischen Kolli-
567 Corte Cass. RDIPP, 2011, 162.
568 Franzen, IPRax 2003, 239, 240; Junker, RIW 2006, 401, 407; also FS BAG, 2004, p. 1197, 1207; also FS Heldrich, 2005, p. 719, 731; Biegen, p. 133 et seq.; cf. also for the period be-
fine PIL law Birk, RabelsZ 46 (1982), 384, 393.
569 Lüttringhaus, IPRax 2011, 554, 558; for another view in relation to place of business though which the employee is engaged as the connecting factor, see Wurmnest, EuZA 2009, 481, 498 et seq.; for register as connecting factor, see Block, p. 444 et seq.
569 BAG AP No. 10 on Article 30 EGBGB n. F.; BAG AP No. 8 on Article 27 EGBGB n. F.
570 Wurmnest, EuZA 2009, 481, 495.
571 See Thüsing, NZA 2003, 1303, 1306.
necting factor of the place of business through which the employee is engaged.\textsuperscript{573}

Connection to a base was not generally recognised in France, either (see paragraph 119). Finally, the French legislature adopted this approach for a specific sector by directing in Article R. 330 – 2 - 1 of the Aviation Code that Article L 342 – 2 of the Employment Code (henceforth Article L 1262 – 3 concerning the law on posting) should apply to air travel undertakings having a base in France.\textsuperscript{574} However, it was not free from doubt whether that was compatible with the Rome Convention and, subsequently, also the Rome I Regulation.\textsuperscript{575} But the Council of State approved the provision and found it specifically to be in conformity with European law.\textsuperscript{576} Reservations are still raised in regard to its compatibility with freedom to provide services (Article 56 TFEU).\textsuperscript{577} Henceforth, the Court of Cassation (see paragraph 119) at any rate follows the case law of the ECJ in the \textit{Koelsch} case (see paragraph 88).

3. Work at sea

The connecting factor for the seafarer’s employment contract is in general subject to controversy.

\textit{a) System of connecting factors}

In regard to the seafarer’s employment contract, previously in Germany, the law of the flag was acknowledged to be determinant.\textsuperscript{578} This was construed as a sub-category of the \textit{lex loci laboris}\textsuperscript{579} and inferred from the scope of Paragraph 1 of the Seafarers’ Law as a unilateral connecting factor. Thus it was made clear that for employment contracts on ships flying the federal flag German law would apply. Under the pressure of prevailing opinion, however, the factor was made universal with the result that the law applicable to the contract was to be determined in accordance with the relevant flag (which could also be foreign).\textsuperscript{580} Conversely, no conflict rule is to be inferred from ILO Convention 22 on Seamen’s Articles of Agreement (see Section 2 paragraph 11).

\textsuperscript{573} Erman-Hohloch, Art. 8 Rom I-VO paragraph 19.
\textsuperscript{574} For further details, see Guedes da Costa, RDT 2007, 571, 575 et seq.; Morvan, Dr.soc. 2007, 191 et seq.
\textsuperscript{575} Morvan, Dr.soc. 2007, 191, 194.
\textsuperscript{576} Conseil d’Etat, RJS 2007, 960.
\textsuperscript{577} Audit/d’Avout, paragraph 834.
\textsuperscript{579} Gamillscheg, IAR, p. 136.
\textsuperscript{580} Cf. Gamillscheg, IAR, p. 136; Ebenroth/Fischer/Sorek, ZVglRWiss 88 (1989), 124, 138.
After the entry into force of the new PIL law (Section 2 paragraph 6), the Federal Labour Court left open the question whether the new law continued to permit the flag to be the connecting factor (that could not in itself be justified, see paragraph 162)). It certainly proceeded on the basis that Paragraph 1 of the Seafarers’ law had at any rate lost its regulatory content in terms of the conflict-of-laws rules as a result of the new PIL law.\(^{581}\) It would not be compatible with the requirements of a uniform interpretation under Article 36 of the EGBGB a. F. (old version) if Article 30 section 2 EGBGB a. F. thereof had applied with the restriction that Paragraph 1 of the Seafarers’ law continued to be applicable.\(^{582}\) Article 36 EGBGB a. F. would, thereby, as it were, become the vehicle by which conflict-of-laws rules incompatible with the Rome Convention would be set aside.\(^{583}\) The Federal Labour Court therefore rightly rejected the view that the European system of connecting factors also contains universal connecting rules for seafarers’ employment contracts which, however, must yield to a unilateral connection to German law in the case where the German flag is flown.\(^{584}\) It follows therefrom that under the international law concerning employment at sea a choice of law has at any rate\(^{585}\) become possible.\(^{586}\) The logical consequence is that the renewal of the legislation in Paragraph 1 of the proposed seafarers’ law\(^{587}\) has no conflict-of-laws content. With the requirement that the German flag must be flown by the ship and the exceptions provided for in that connection that is a self-denying ordinance in terms of substantive law. Like for instance in France (see paragraph 158) and in Norway\(^{588}\) there is, in addition, a special provision for the so-called Second ship register whose significance is not free from doubt.\(^{589}\) Taking a view represented in academic writings and in line with the explanatory report on the legislation,\(^{590}\) the Federal Constitutional Court and the Federal Labour Court both inferred from the provision in Para-

\(^{581}\) Thus it is not a question of whether paragraph 21 section 4, first sentence, of the Law of the Flag Act (FlRG) precludes the application of paragraph 1 of the Seefarers’ Law (SeemG) (as per Geffken, Internationales Seeschiffartsregister, p. 17 et seq.).

\(^{582}\) BAG AP No. 30 on Internationales Privatrecht – Arbeitsrecht; also Kegel/Schurig, p. 685; see also Basedow, BerDGesVölkR 31 (1990), p. 75, 82.

\(^{583}\) Magnus, IPRax, 1991, 382, 383.

\(^{584}\) See also Ebenroth/Fischer/Sorek, ZVglRWiss 88 (1989), 124, 143.

\(^{585}\) Until then the choice of law in the case of ships flying the German flag had been deemed to be precluded by paragraph 1 of the Seefarers’ Law. Cf. Leffler, Das Heuerverhältnis auf ausgeflaggten deutschen Schiffen, Berlin 1978 (also Kiel, Univ., Diss. 1976/77), p. 86; Eßlinger, Die Anknüpfung des Heuervertrages unter Berücksichtigung von Fragen des internationalen kollektiven Arbeitsrechts, München 1991 (also München, Univ., Diss. 1991), p. 40 et seq.; for another view, see Drobnig/Puttfarken, p. 13 et seq.; Werbke, Die neue Rechtslage nach Einführung des internationalen Seeschiffahrtsregisters,1989, p. 12 et seq.


\(^{587}\) BT-Drucks.17/10959.

\(^{588}\) See with further references Deinert, Internationales Arbeitsrecht, Section 9 paragraph 174.

\(^{589}\) Deinert, Internationales Arbeitsrecht, Section 9 paragraph 173 et seq.

\(^{590}\) BT-Drucks.11/2161, p. 6.
graph 21 section 4 of the statute of the law on the flag that the escape clause was authoritative as regards the employment of seamen employed on ships entered in the second register.\textsuperscript{591}

The general connecting factor under under \textbf{Article 121 of the Swiss PIL law} essentially applies to all kinds of employment relationships, including the employment of seamen. Article 15 section 1 of the PIL, which is tailored to individual cases, does not lend itself to developing a general system of special connecting rules for certain kinds of employment relationships under the escape clause.\textsuperscript{592} However, Article 68 section 1 of the law on maritime shipping provides that the provisions concerning the seafarers’ employment contract are to be applied to the employment relationships of all mariners on ships flying the Swiss flag, irrespective of their nationality. Irrespective of the fact that the PIL law is a more recent law that potentially also catches seafarers’ employment contracts, Article 68 of the law on maritime shipping must be presumed to continue to apply, with the result that seafarers’ employment contracts on ships flying the Swiss flag are subject to Swiss law under a unilateral connecting factor.\textsuperscript{593} This will become a universal conflict rule; however, in the case of flags of convenience, the law of the place of residence or the law of the nationality of the beneficial owner of the vessel will apply.\textsuperscript{594}

\textbf{In France} the view is widely taken that the seafarers’ employment contract is to be connected to the place of the business through which the employee is engaged.\textsuperscript{595} A choice of law in favour of French law where a vessel is sailing under a foreign flag has also been recognised.\textsuperscript{596} There is also an international register in France. After an earlier decree was quashed,\textsuperscript{597} it was introduced in 1996 by law 96 – 151. New provisions were introduced by law 2005 – 412 of 3 May 2005.\textsuperscript{598} It was approved from the point of view of constitutional law by the Constitutional Council and declared compatible with the Rome Convention.\textsuperscript{600} It contains special advantages in favour of ships registered in that register. The key provision of the part concerning employment law is Article 12 under which for seamen who do not reside in France the contract is subject to the choice of law.

\begin{itemize}
  \item \textsuperscript{592} Birk, FS Heini, 1995, p. 15, 23.
  \item \textsuperscript{593} Cf. Patocchi/Geisinger, Article 13 No. 4.1; criticised in Birk, FS Heini, 1995, p. 15, 24 et seq.
  \item \textsuperscript{594} Patocchi/Geisinger, Article 13 No. 4.2.
  \item \textsuperscript{595} Jault-Seseke, RDT 2008, 620, 624; Boskovic, Recueil Dalloz, 2008, 2175, 2176.
  \item \textsuperscript{596} Cass.soc. Recueil Dalloz, 1994, 5 (= Dr.soc. 1994, 48).
  \item \textsuperscript{597} Conseil d’État, Dr.soc. 1995, 1006.
  \item \textsuperscript{598} OJ 4.5.2005 p. 7697.
  \item \textsuperscript{599} On the second register of terres australes et antartiques françaises, see Conseil d’État Dr.soc. 1995, 1006.
  \item \textsuperscript{600} Cons.Const. 28.4.2005 – 2005-514 DC.
\end{itemize}
There is also a public policy provision by reference to ILO conventions which are binding on France as well as substantive employment law provisions which fall short of those in the employment code. The practical effect of this law is, however, extremely doubtful. For the Constitutional Council has expressly stated that, under the Rome Convention, the employee may not be deprived, as a result of a choice of law, of the protection of the law that would otherwise be objectively applicable to the contract. Finally, Article 12 makes no additional provision to what is already provided for under the Rome Convention and, henceforth, by Article 8 of the Rome I Regulation. Against that background, the provision of the enactment appears to be entirely superfluous. The relevant provisions are now to be found in Article L.5611 – 1 et seq. of the Transport Code.

159 Spanish case law equates the flag with the place of employment, but has applied the escape clause in the case of commonality of nationality to permit domestic law to apply in the absence of a relationship with the flag State or in the event of a subsequent outflagging.

160 In its case law the US Supreme Court proceeds on the basis that the USA claims territorial rights to vessels voluntarily entering their sovereign waters and permits exceptions only in regard to internal affairs provided these are not punishable offences having an effect on US territory. Nonetheless, the court considers it unreasonable for an undertaking to be subject to manifold territorial rights with the result that it will always prefer the flag as the constant connecting factor.

161 There are few employment-law connecting factors which can rely on such a broad consensus in the world. Nonetheless, it seems inappropriate, for example, for German mariners under a German ship-owner on a ship flying the Panamanian flag to be subject to the law of the State of Panama. In view of the high rate of outflagging, the flag says little about the country of origin of the vessel. For example, of around 3,600 German vessels fewer than 500 operate under the German flag. It cannot be objected that in such cases German law is commonly chosen. Even if that is true, that does not alter the fact that an answer must also be found for the case where a choice of law is not made. Nor can it

601 Lagarde, Rev.crit.DIP 2005, 529, 531.
602 Lagarde, Rev.crit.DIP 2005, 529, 531.
607 Lauritzen v. Larsen, 345 US 571.
611 For another view, see Birk, RabelsZ 46 (1982), 384, 393.
always be found by using the argument of circumvention of the law since the outflagging of ships can often be for reasons other than those relating to matters of employment law. That is reason enough to ask whether the flag as connecting factor is really appropriate nowadays. It is worthy of note that, even more than 50 years ago, Gamillscheg could discern only one single advantage of the flag as the connecting factor, that is to say the extremely widespread nature of that rule, and thus the risk of jeopardising the uniformity of decisions by departing from it. Yet, can it be correct to persist with a solution acknowledged to be wrong, only because the error is widespread? At least in the case of flags of convenience, consideration was already given at an earlier stage to a different connecting factor, such as for example the nationality of the ship-owner. Today, this would be a classical case for application of the escape clause. However, a connection to another legal system will by no means be a given in all cases involving flags of convenience.

Finally, even under the under the Rome Convention, the flag as connecting factor was not sustainable. The first point to be made is that the Rome Convention refrained from making special provision for shipping on the high seas with the result that the general rules on connecting factors came into play. It was true that the flag as a connecting factor continues to be present under that system, manifesting itself as an expression of the connection to the place of employment, the connection to the place of the business, or as a result of the application of the escape clause. The possibility of an express clarificatory provision was unfortunately also missed by the Rome I Regulation. In the result, the flag as connecting factor cannot remain. It has been superseded by the scheme established under the Rome I Regulation. Nor can the flag as the

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612 This is referred to by Gamillscheg, IAR, p. 136 et seq; also in AcP 155 (1956), 49, 61; cf. Leffler, Das Heuerverhältnis auf ausgeflaggten deutschen Schiffen, Berlin 1978 (also Kiel, Univ., Diss. 1976/77), p. 106 et seq.
613 Gamillscheg, IAR, p. 137, footnote 97.
615 Cf. for instance, Fernández Rozas/Sánchez Lorenzo, paragraph 465; Blefgen, p. 121 et seq.
616 Cf. Block, p. 324 et seq.
617 Giuliano/Lagarde, BT-Drucks.10/503, p. 33, 58.
619 Ebenroth/Fischer/Sorek, ZVGlRwiss 88 (1989), 124, 140 et seq.
621 Proposal de lege ferenda in MPI, RabelsZ 71 (2007), 225, 294 et seq.
622 Possibly in this sense but finally leaving the question open BAG NZA 2016, 473.
connecting factor be maintained, under the principle of uniform interpretation, on the basis of the argument that, prior to the Rome Convention, the connecting factor used was predominantly the flag.\footnote{But see Mankowski, RabelsZ 59 (1995), 148, 153.} For uniformity of interpretation also presupposes the possibility of interpretation. A result that is not warranted by the rule cannot be supported by divergent practice, as will be shown. Therefore, other comparative law references, for example to the USA, cannot point to a contrary result. Thus, the notion is to be forthwith rejected that the failure to make specific provision for a connecting factor for the seafarers’ employment contract owing to the widespread use of the flag as the connecting factor, means that the flag as connecting factor must follow from the system of connecting factors under the Rome Convention.\footnote{See Drobnig, BerDGesVölKRG 31 (1990), p.31, 60 et seq.; Mankowski, Seerechtliche Vertragsverhältnisse im Internationalen Privatrecht, Tübingen 1995 (also Hamburg, Univ., Diss. 1993/94), p. 485 et seq.; see also Däubler, Das zweite Schiffsregister, Baden-Baden 1988, p. 22 with footnote 35 a: ‘Sollten die See-Arbeitsrechte aller EG Mitgliedstaaten völkerrechtswidrig sein?’.
}

Ultimately, there will, as a rule, be no central focus of the activity or a place where the work is principally carried out. In international shipping work is carried out in State-free zones.\footnote{Puttfarken, See-Arbeitsrecht: Neues im IPR, Hamburg 1988, p. 10; Ebenroth/Fischer/Sorek, ZVglRwiss 88 (1989), 124, 138; for another view, see Geffken, AiB 1988, 129, 131.} For the flag does not make the vessel part of the territorial area of the State, which would enable that State to be called into play as the lex loci laboris.\footnote{See also BAG AP No. 1 on Article 18 EuGVVO; Junker, FS BAG, 2004, p.1197, 1208; also FS Heldrich, 2005, p. 719, 728 et seq.; E. Lorenz, RDA 1989, 220, 224; Wurmnest, EUZA 2009, 481, 497 et seq.; Rauscher-v.Hein, Art. 8 Rom I-VO paragraph 43; similarly Lagoni, JZ 1995, 499, 502; Mankowski, Seerechtliche Vertragsverhältnisse im Internationalen Privatrecht Tübingen 1995 (also Hamburg, Univ., Diss. 1993/94), p. 470 et seq.; Staudinger-Magnus, Art. 8 Rom I-VO paragraph 149; Block, p. 239 et seq., 258 et seq.; for a concurring view, see Winkler v. Mohrenfels, EUZA 2012, 368, 373.
} Nor can it be objected that a vessel has, as it were, the nationality of the flag State which would justify treating the seaman as working in that State.\footnote{For another view, see Winkler v. Mohrenfels/Block, EAS B 3000 paragraph 132; Block, p. 239 et seq.} For that is precisely what he is not doing. The fact that the flag State has exclusive jurisdiction under Article 92 section 1 of the UN Convention on the Law of the Sea does not alter that fact.\footnote{Cons.Const. v. 28.4.2005 – 2005–514 DC.
} Accordingly, the French Constitutional Court, in its decision on the constitutionality of the French international shipping register, ruled that a ship under the French flag is not a part of French territory and therefore the seamen on such a vessel were not subject to all laws applicable in France.\footnote{Lagarde, Rev.crit.DIP 2005, 529, 531.
} This was construed as a rejection of the flag as a connecting factor with the consequence that the place of business through which the employee was engaged was the determinative connecting factor.\footnote{Lagarde, Rev.crit.DIP 2005, 529, 531.
} Nor may it be objected that connection to the flag and to the place of employment are underpinned by the same considerations which, in the latter case, is predominantly
concerned with continuity and stability and integration into the world of employment of a specific State. The place of business as the connecting factor is also focused on continuity and stability and employment on the territory of a State generates more connectedness with that State than employment outside the State on a working installation under the jurisdiction of that State.

Where, exceptionally, there is a place from which the seaman carries out his work or there is a place which constitutes the central focus of his activity, that place will be the connecting factor. The *lex loci laboris* will be applicable. There may be such cases, for example, in the case of the cross-border employment of pilot boats. In a case concerning the question whether an undertaking was located outside the United Kingdom, the Employment Appeal Tribunal decided that in the case of the crew of a floating hotel, what was decisive was the base. This consideration may be transposed to the connecting factor of the place of employment. But in the majority of cases in international shipping, there will be no such place of employment capable of being determined. Logically, the English courts treat employment as entirely outside the United Kingdom, where vessels under the United Kingdom flag cruise the Caribbean and South America. In these configurations, the place of the business through which the employee was engaged will be the ancillary connecting factor. Against that, it could have been objected under the Rome Convention that, under the express provision in Article 6 section 2 (b) thereof, the place of the business through which the employee is engaged could be considered as a connecting factor ‘if the employee does not habitually carry out his work in any one country’. This objection no longer carries conviction since the place of the business as the connecting factor under Article 8 section 3 of the Rome I Regulation will always fall to be considered if the law to be applied cannot be determined under Article 8 section 2 of the Rome I Regulation. Any attempt to use the flag as a connecting factor under the escape clause, instead of the place of the busi-

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632 Koch/Magnus/Winkler v. Mohrenfels, Section 9 paragraph 14; Staudinger-Magnus, Art. 8 Rom I-VO paragraph 148; cf. Audit/d’Avout, paragraph 834; Francq, JDI 2009, 41, 65 et seq.; Ubertazzi, p. 94 et seq.
636 See the objection by Puttfarken, RIW 1995, 617, 623.
ness, will fail owing to the fact that the escape clause does not create a self-standing connecting factor, but can only come into play as a corrective to front-line connecting factors (see paragraph 124).  

Provision in this regard was already made in the original Commission proposal. Since there is, however, no evidence of any intention on the part of the European legislature to make contrary provision, it is immaterial that this provision was in the end, not expressly enacted. Unlike, for example, in the case of commercial representatives or pilots, there will usually be no place at which the central focus of the activity is located, enabling the place of employment to be considered as the connecting factor.

Nor can it be objected against the place of the business connecting factor that, for example, a German ship-owning company could arrange the recruitment through a foreign undertaking in order to bring about less favourable terms and conditions of employment. For, on a proper construction of the place of the business as the connecting factor, it is not sufficient to have regard only to the place where the contract was entered into. Also, if one follows the case law of the ECJ, this form of circumvention of the law has to be countered (see paragraph 120).

Nor can the flag as connecting factor be justified either with the assistance of the decision of the ECJ in the Weber case (cf. paragraph 172). In that case, the ECJ assigned work on a drilling platform over the continental shelf adjacent to the territorial area, as a matter of the international law on jurisdiction, to the adjacent State by dint of the place of employment as the connecting factor. That is indeed preferable from the point of view of giving primacy to the place of employment as the principal connecting factor (see paragraphs 87 et seq.) but, from the perspective of localisation of the contractual relationship, it does not answer the need in regard to shipping on the high seas. Attribution under international law to a State cannot be generalised by inference from the case-law mentioned since the place of employment on a platform is still capable of being localised, whereas that is specifically not the case in regard to a ship plying its trade on the high seas.

The connection to the place of the business through which the employee is engaged is also the only one appropriate under the system of connecting factors established by Article 8 of the Rome I Regulation. That is based on the notion that it is fundamentally appropriate for the law applicable to the employee to be the lex loci laboris. Where that law cannot be ascertained, the focus should be placed on the legal setting of the employer or of his place of business. In regard to this, see also Block, p. 253, 255.

640 But see Junker, FS Heldrich, 2005, p. 719, 728 et seq.
641 See also Block, p. 253, 255.
to the connecting factor of the flag, that is, ultimately, in keeping with all endeavours of earlier times, in the event of outflagging to countries with flags of convenience, to have recourse to the seat of the ship-owner or the place of the business. The supposition that using the place of the business through which the employee is engaged as the connecting factor is inappropriate owing to the widespread use of crewing firms from States having little employment law ignores the separate nature of the various legal persons involved and also overlooks the possibility of combating a circumvention of the law (cf. paragraph 120). In so far as there is, in this case, no circumvention of the law, it will nonetheless be a case of temporary employment. That may then have the consequence that the place of the business as the connecting factor will, essentially, be disadvantageous to the employee.

This view of the matter is also not incompatible ab initio with the solution adopted by Swiss law (cf. paragraph 157), although this at least appears to provide for a unilateral connection to the Swiss flag. Nor is the Swiss legal situation so evident and may also be interpreted the other way around, in the sense that Article 68 of the law on shipping is superseded by the subsequent provision in Article 121 of the PIL law.

A ship’s flag says nothing about the economic area to which the vessel ultimately belongs. Therefore, from the point of view of employment law, it is left entirely to chance which flag the seafarer is working under. The flag can therefore play no role in the search for the central focus of the employment contract. It is true that the Federal Labour Court accepted that the flag can play a role in the context of the escape clause, of course, only as a connecting factor possibly to be taken into consideration under Article 30 section 2 EGBGB a. F. (old version) that is to say, as the place of employment. Since, however, the initial premise is incorrect (cf. paragraph 162) the flag cannot have any significance in regard to the escape clause.

However, the home port of a vessel will be of significance in the context of the application of the escape clause, as will a regular route.

b) Specific matters

Analogous considerations also apply to other activities on the high seas, such as, for example, work carried out on a drilling rig (cf. Paragraph 118), but not...
over a continental shelf adjacent to sovereign territory (paragraph 172)\textsuperscript{650}, or otherwise carried out in a State-free zone, such as the Arctic or outer space.\textsuperscript{651} Where there is a place from which the activity in the State-free zone without adjacent continental shelf is carried out, that place will constitute the connecting factor (see paragraph 163 for shipping).\textsuperscript{652}

172 In the case of shipping and also any other activity, such as employment on a drilling rig \textit{within the sovereign waters} of a country, the place of employment must be the connecting factor, notwithstanding the abovementioned considerations (paragraph 163).\textsuperscript{653} On the Rome Convention the ECJ ruled that employment carried on over the continental shelf adjacent to the contracting State had to be deemed to be employment carried out in the sovereign territory of that State (see in that connection Section 16 paragraph 7).\textsuperscript{654} It is true that, under the Rome Convention, it was a question of determining the scope of applicability. However, the acceptance under international law of a close connection specifically to that Member State is also transposable to the determination of the place of employment under Article 8 section 2 of the Rome I Regulation.\textsuperscript{655} For that reason, in such cases the place of the business through which the employee was engaged is not sustainable as a connecting factor.\textsuperscript{656}

173 In regard to shipping in the \textit{sovereign waters of several countries}, as in the case of mobile drilling rigs within and outside sovereign waters,\textsuperscript{657} it is primarily the place of employment that is to be examined as a connecting factor. Here again, it is a question of determining the central focus of the activity and, if need be, of having regard to the place where the majority of working time is spent (cf. paragraphs 87 et seq.). Thus, a seaman employed on sailing cruises in the southern part of the Baltic, and active partly in Germany, partly in Denmark, partly in Sweden and partly in Poland, irrespective of the flag, will have the central focus of his activity in the country of the home port to which his ship belongs, at least if that port is used with sufficient regularity and the ship, for example, also overwinters there. In cross-border ferry traffic there may be no central focus of activity. Nor ought the majority of the working time in such a configuration be relevant where a longer route has to be covered in one State than in another. In such case, one will proceed on the basis that there is no habitual place of employment

\textsuperscript{650} Block, p. 348 et seq.
\textsuperscript{651} Cf. \textit{v. Hoffman/Thorn}, Section 10 paragraph 81 a.
\textsuperscript{652} Cf. Staudinger-Magnus, Art. 8 Rom I-VO paragraph 97; also \textit{Junker}, FS Kühne, 2009, p. 735, 744; for another view, see \textit{Block}, p. 362 et seq., 411 et seq. who, in the case of offshore installations on the high seas as well as in the case of employment in the Antarctic, would like the connection to be with the State of installation or the operating State.
\textsuperscript{653} BAG AP No. 32 on Internationales Privatrecht – Arbeitsrecht; \textit{Hauschka/Henssler}, NZA 1988, 597, 599; Staudinger-Magnus, Art. 8 Rom I-VO paragraph 17.
\textsuperscript{654} ECJ EuZW 2002, 20 – Weber.
\textsuperscript{655} Also Staudinger-Magnus, Art. 8 Rom I-VO paragraph 147.
\textsuperscript{656} Nor the connection to the nationality of the employer, as happened in Sayers \textit{v. International Drilling Co.} [1971] 1 W.L.R. 1176.
\textsuperscript{657} Cf. (employment held not to be in the United Kingdom) Claisse \textit{v. Keydril and others} [1978] ICR 812 (EAT).
and have recourse to the connecting factor of the place of the business through
which the person concerned was engaged. In a case concerning employment in
cross-border ferry traffic, the Federal Labour Court – wrongly (see paragraph
130) - left the question open and focused on the escape clause.\(^\text{658}\)

As regards \textit{variable operations in different territorial areas} on an irregular
basis, for example, the operation of a dredger, the focus again will have to be
placed on the majority of working time. It will be otherwise only if, on the most
recent change of place of employment, the parties agreed that that in future
would be the regular place of employment of the employee.\(^\text{659}\) In such a case, in
an appropriate case, a change in the law applicable to the contract would occur.

The intervention of a \textbf{crewing firm} does not alter the position, on the view
here put forward. If no place of employment can be taken into consideration as
the connecting factor, the place of the business of the crewing firm through
which the person is engaged will be the connecting factor. For it is the employer.
In the case of circumvention of the law, attention may be focused on the ship-
owning company (cf. paragraph 120). A distinction must also be made: if the
work of the crewing firm is limited to the mustering of staff and the power to
give instructions remains with the ship-owning company then, by definition, that
is a hiring-out of workers, with all the consequences that that entails. The Fed-
eral Labour Court has, moreover, deemed it to be contrary to social law to give
notice to a seaman only with the objective of transferring the formal position of
employer to a crewing firm but with the organisation of work and ability to give
instructions remaining unchanged.\(^\text{660}\)

The intervention of a \textbf{hiring agency} cannot, contrary to case law (cf. para-
graph 120), result in the place where the contract was entered into through the
intermediary of the hiring agency being determinative. Rather, it is the case that,
in the absence of a place of employment as connecting factor, the focus must be
on the employer’s place of business through which the employee was engaged.

4. Embassy employees

In addition to problems of \textit{immunity in relation to legal proceedings}\(^\text{661}\),
there are certain specific features of international employment law relating to
diplomatic and consular representations.

In the case of persons temporarily posted to an embassy abroad, their em-
ployment relationships will continue to be governed by the law of the \textbf{habitual
place of employment}.

In the case of \textbf{local employees} employed in the country concerned local law
will apply to them in accordance with the place of employment rule.\(^\text{662}\) For ex-

\(^\text{658}\) BAG AP No. 30 on Internationales Privatrecht – Arbeitsrecht.
\(^\text{660}\) BAG AP No. 80 on Paragraph 1 KSchG – Betriebsbedingte Kündigung.

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traterritoriality does not alter the fact that the place of employment is located in the territory of the host country.\textsuperscript{663} If the law of the posting country foresees rights from domestic law only for posted employees of the same nationality like the German law on the external service (GAD) does, this can bring out a \textit{differentiation according to nationality}. To the extent to which Union citizens are affected by this, that will be \textbf{unlawful under Union law}. Under the ECJ’s case law that will also apply to employment in a non-Member State, provided that there is a \textbf{sufficient connection with the Union}. On analogous considerations \textbf{discrimination against local employees on the ground of gender or age} are unlawful, where there is a sufficient connection with the Union. The immediately applicable\textsuperscript{664} prohibition on discrimination on the ground of gender is enshrined, as a matter of primary law, in Article 157 TFEU and the prohibition of age-related discrimination is also a primary law principle under the case law of the ECJ.\textsuperscript{665} Conversely, other prohibitions on discrimination are subject to the requirement of transposition at national level with the result that they apply only if the applicable law has enacted such prohibitions on discrimination.

\begin{thebibliography}{99}
\bibitem{LAG K\öln LAGE, Article 30 EGBGB No. 1; Junker, Rda 1998, 42, 46.}
\bibitem{ECJ [1976] ECR 455 – Defrenne II.}
\bibitem{ECJ AP No. 1 on Directive 2000/78/EC – Mangold with observations by Wiedemann.}
\end{thebibliography}
Special connecting rules differ, for certain matters, from the general connecting rule (e.g. Article 8 of the Rome I Regulation). The problem posed by special connecting rules is that they are distinct from the system of universal connecting rules. They are as a rule unilateral connecting rules. That is particularly true of overriding mandatory provisions (paragraphs 11 et seq.). Of course, there are also universal special connecting rules, in particular that of the mandatory protective law under the law that would objectively be applicable to the contract (in the absence of a choice of law), as determined by Article 8 section 1, second sentence, of the Rome I Regulation.

The reasons for special connecting rules are many and varied. Thus, the special connecting rules under the ‘most favourable’ principle, in the context of the choice of law, owes its existence to the protection under conflict-of-laws rules of the weaker party (cf. Section 9 paragraphs 5 et seq.). On the other hand, the spe-
cial connecting rule in regard to overriding mandatory provisions (below, paragraphs 11 et seq.) assists the enacting State in the pursuit of public interests.

3 Special connecting rules may also be pursuing a **classificatory purpose**. Thus, Article 1 section 1 of the Rome I Regulation applies to civil and commercial matters, but not to matters of administrative law. In borderline cases, the consideration may arise as to whether a civil-law issue is merely ancillary to a set of problems falling outside the scope of the Rome I Regulation and, if so, whether connecting factors have to be found additional to the provisions applicable to those problems. An example of that is afforded by the problem of the provisions applicable to immunities from liability in the case of accidents at work (see Section 12 paragraphs 130 et seq.). In Chapter 4, we shall deal with the question as to the areas in which special connecting factors can come into play.

4 The example of immunities from liability points to the problem specific to employment law of the interplay with **public law**. Whilst there were earlier appreciable difficulties in dealing with the public-law aspects of employment law, today there is consensus that public-law provisions of employment law also fall under the private international law connecting rule in Article 8 of the Rome I Regulation, at least where they are not merely requirements imposed on the employer (see paragraph 110). Further details of the manner in which public-law aspects of employment law are dealt with will be given at the end of this section (paragraphs 113 et seq.).

5 Closely connected to the question of the public-law classification of the rules of employment law is the problem of the **pursuit of public interests**. Thus, **Rabel** has already pointed out that public policy provisions ultimately always come into play if the employment is to be carried out in the forum, but in the end are equated with public law provisions and separated off from provisions of the forum, with the intention of protecting the interests of the employee.3 Along these lines, the idea gained currency that in the employment relationship two referrals are determinant: first, the universal connecting factors under private international law and, secondly, the applicability of the law of the place of employment as a result of the unilateral referral to one’s own public law.4 Ultimately, however, another system has gained the upper hand as a result of the Rome Convention and, subsequently, the Rome I Regulation. It is not the formal classification that is decisive in the event of a demarcation question, but the interest underpinning a rule. If a public interest requires the application of a rule, even if it is not part of the law applicable to the contract, it will be brought into play by way of a unilateral connecting rule. This is the idea of **positive public policy** (cf. Section 5 paragraph 5), that is to say public policy laws, police laws, overriding mandatory provisions, so called because they disrupt by supervening in the system and,

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3 **Rabel**, Conflict of Laws, III p. 192 et seq.
4 **Gamillscheg**, RabelsZ 23 (1958) 819, 826; the same principle is seen in **Gamillscheg**, ZfA 1983, 307, 345 et seq.
The notion of the unilateral connecting factor is, however, better expressed in the concept of directly applicable laws which, of course, is based on the idea of a direction for the rule to be applied contained in the substantive provision itself, and not on its being dependent on a referring rule. However, whether the current system of a special connecting factor rendering overriding mandatory provisions applicable is based on the idea that those provisions are called upon to apply by operation of a conflict-of-laws rule and not in and of themselves, as it were, independently of PIL, has not yet been fully resolved (see further on this, at paragraph 31).

The doctrine of the special connecting rule, attributable to Wengler, under which all mandatory provisions are to be separated off and made subject to a self-standing special connecting factor where there was a sufficiently close connection to the contract. Although this doctrine favours the international uniformity of decisions, it cannot, however, provide any argument as to why justice under private international law requires such a connecting rule.

This unilateral special connecting rule is illustrated, for example, by Article 121-1, subparagraph 2, of the French Labour code, old version, concerning the requirement that an employment contract be drawn up in the French language (now governed by Article L-121 – 3 of the Labour code), which was regarded as a directly applicable law. In Germany, a directly applicable law – irrespective of its public or private law classification – is, for instance, Paragraph 3 of the law on continued payment of remuneration (EFZG- Entgeltfortzahlungsge- setz), determined by the Federal Labour Court under a special connecting rule. Overall, it should be stated that overriding mandatory provisions are by no means only provisions of public law.

As regards individual employment law there are self-standing connecting rules for the issues of capacity under Article 13 of the Rome 1 Regulation (see Section 7), and formal validity under Article 11 of the Rome I Regulation (see Section 8). These matters are excluded from the law applicable to the contract. In the context of the subjective connecting rule under Article 8 section 1 of the Rome I Regulation, there is a special connecting rule for mandatory provisions in the case of transactions within a single State (see Section 9, paragraphs 37 et seq.).
Chapter 3. Connecting factors

seq.) and, in regard to matters occurring within the internal market (see Section 9, paragraphs 41 et seq.), under Article 3 sections 3 and 4 of the Rome I Regulation; this applies also to the mandatory employee protection rules of the law that would be applicable but for the choice of law, provided they are more favourable than the protective rules of the chosen law (see Section 9, paragraph 46), under Article 8 section 1, second sentence, of the Rome I Regulation. Rules applicable to workers’ involvement in the undertakings and to works constitutions under a collective agreement are governed by the laws of the place where the plant is established, irrespective of the law applicable to the employment relationship\textsuperscript{15} The provisions of the law applicable to the contract, whether the connecting factor be subjective or objective, must, under Article 9 section 2 of the Rome I Regulation, give way to the overriding mandatory provisions of the forum (paragraphs 11 et seq.). In that connection, the overriding mandatory provisions may be mandated by European law in the context of the law contained in the directive on the posting of workers (paragraphs 44 et seq.) or be determined autonomously (paragraphs 19 et seq.). To a certain extent there may also be a special connecting factor in regard to the overriding mandatory provisions of non-Member States under Article 9 section 3 of the Rome I Regulation (paragraphs 81 et seq.).

9 The sequence of the stages in the examination is:

2. Self-standing connecting factors in regard to formal validity and capacity (Sections 7 and 8).
3. Special connecting factors in regard to specific issues (see, in detail, Chapter 4).
4. Subjective connecting factor (Section 9 paragraphs 13 et seq.).
   (a) Special connecting rule in respect of mandatory law in the case of a single-State transaction (see Section 9 paragraphs 37 et seq.);
   (b) Special connecting rule in respect of mandatory law in the case of Internal market transactions (see Section 9 paragraphs 42 et seq.);
   (c) Special connecting rule for overriding mandatory employee protection laws under the law otherwise objectively applicable to the contract under the ‘most favourable’ principle (see Section 9 paragraphs 48 et seq.);
5. Objective connecting rule (Section 9 paragraphs 65 et seq.)
6. Overriding mandatory provisions of the forum (paragraphs 19 et seq.)
7. Overriding mandatory provisions of third countries (paragraphs 81 et seq.).

\textsuperscript{15} Deinert, Internationales Arbeitsrecht, Section 15 paragraph 56.
10 Special connecting rules

Figure 4. System of special connecting rules, including as to ancillary issues, under international employment law under the Rome I Regulation

| Formal requirements, Article 11 Rome I Regulation |
| Capacity, Article 13 Rome I Regulation |

| Law applicable to the contract |
| Subjective connecting factor (choice of law) (Article 8 section 1 first sentence Rome I Regulation) |
| Objective connecting factor Article 8 sections 1 – 4 Rome I Regulation |

| Mandatory law in the case of national and internal market situations, Article 3 sections 3 and 4 Rome I Regulation |
| Mandatory law of the law objectively applicable to the contract, Article 8 sections 1 second sentence Rome I Regulation |

| Overriding mandatory provisions of the forum, Article 9 section 2 Rome I Regulation |
| In regard to the law on the posting of workers (Directive 96/71/EC and transposing legislation) Article 9 section 2 Rome I Regulation with recital 34 |
| Third-country overriding mandatory provisions, Article 9 section 3 Rome I Regulation |

II. Overriding mandatory rules

1. Introduction

Public policy allows only foreign law to be averted. Yet a situation inconsistent with public policy rules can specifically arise from the fact that there is no provision to be applied. It is only a small step from averting an application of
law that is entirely incompatible with our notions of equity to the application of rules which, according to our legal notions, must nonetheless be compulsorily applicable. These positive public policy rules (Section 5 paragraph 5) are implemented today by means of the special connecting rule in respect of overriding mandatory rules.\textsuperscript{16}

The special connecting rule for overriding mandatory provisions was provided for in Article 7 of the Rome Convention. Accordingly, the former German Article 34 EGBGB made provision in terms of the international law of contract for a special connecting factor in respect of ‘provisions of German law which compulsorily govern the factual situation, irrespective of the law applicable to the contract’. That is a unilateral connecting rule: it determines the conditions under which \textit{lex fori} applies but does not, as in the case of a universal connecting rule, determine which of several potentially applicable provisions of different legal systems may be called upon to apply. This unilateral connecting rule is henceforth provided for in Article 9 of the Rome I Regulation. There is an analogous provision in regard to non-contractual obligations in Article 16 of the Rome II Regulation. However, these provisions are only manifestations of a general principle with the result that overriding mandatory rules can also apply outside the scope of application of the Rome I Regulation or the Rome II Regulation.

The special connecting rule for overriding mandatory provisions is not without problems in regard to the international uniformity of decisions. Since it is a unilateral connection, there is no guarantee that a court in another State would come to the same decision; rather, the contrary is the case. Article 9 section 2 of the Rome I Regulation provides for a special connecting rule in respect of the overriding mandatory provisions of the forum. Another court will therefore not apply these overriding mandatory rules and, consequently, will normally come to a different result. It will be otherwise only if such other court also applies foreign overriding mandatory rules.\textsuperscript{17} It is true that, as a matter of principle, this is provided for in Article 9 section 3 of the Rome I Regulation (paragraphs 81 et seq.).\textsuperscript{18} However, this provision concerns only the possibility of applying foreign overriding mandatory rules, but without there being a corresponding unrestricted obligation to do so.\textsuperscript{19} In addition, it covers only overriding mandatory rules in regard to performance and not all overriding mandatory rules and, what is more, only the overriding mandatory rules of the \textit{lex loci solutionis} (law of the place of performance) and not of all States. Nonetheless, it favours the international uni-


\textsuperscript{17} Cf. v. \textit{Hoffmann}, IPRax 1989, 261, 264.

\textsuperscript{18} On the relevant intention, see COM (2005) final, p. 7.

\textsuperscript{19} Already referred to by \textit{Coester}, ZVglRWiss 82 (1983) 1, 18, under the Rome Convention, who regarded the provision for reservations in Article 22 section 1(a) of the Rome Convention as compromising the international uniformity of decisions (loc. cit., p. 19); this danger no longer exists under the Rome I Regulation.
formity of decisions by somewhat reducing the adverse effects on it brought about by the general permissibility of special connecting factors for the overriding mandatory rules of the forum.

The prevailing view in Germany defined international mandatory provisions as provisions whose aim was not only to bring about contractual fairness in the sense of the protection of the weaker party to the contract, but also to pursue matters of State and economic policy going beyond this.\(^\text{20}\) As was already emphasised in the Government’s explanatory memorandum on the reform of the PIL law\(^\text{21}\) that includes provisions which pursue particular value judgements of a socio-political nature.\(^\text{22}\) More recent decisions of the Federal Labour Court emphasise that it is not a matter of the protection of the individual interests of the employee but of the general interests of the public as a whole.\(^\text{23}\) Along those lines the general protection against dismissal under the relevant statute (KSchG-Kündigungsschutzgesetz) was said to be not in the nature of an overriding mandatory provision because it served primarily to balance the interests of the employee in maintaining the status quo and freedom of contract for the employer.\(^\text{24}\)

Irrespective of the demarcation established by legal practice, the Rome I Regulation endeavours to make clearer provision.\(^\text{25}\) In recital 37, it is stressed that the concept of ‘overriding mandatory provisions’ should be distinguished from the expression ‘provisions which cannot be derogated from by agreement’, and should be construed more restrictively. Provisions which cannot be derogated from by agreement are henceforth those mentioned in Article 3 sections 3 and 4 and in Article 8 section 1, second sentence, of the Rome I Regulation. What is referred to in that connection are the mandatory provisions at domestic level that have to do with public policy and security. Conversely, it is Article 9 section 1 of the Rome I Regulation that defines the overriding mandatory provisions. They are provisions regarded as crucial for safeguarding public interests to such an extent that they demand to be applied, irrespective of the law otherwise applicable to the contract (see in further detail paragraph 19).\(^\text{26}\) In light of the public interests pursued, the demarcation between mandatory law at domestic level and overriding mandatory provisions will in many cases correspond with the demarcation line between public and private employment law.\(^\text{27}\) However, both in

\(^{20}\) BAG AP No. 2 on § 1 a AEEntG; BGH NJW 2006, 762, 763 et seq.; Franzen, AR-Blattei SD 920, paragraph 141; cf. BAG AP No. 32 on Internationales Privatrecht – Arbeitsrecht; similarly Liukkonen, p.130 et seq.

\(^{21}\) BT-Drucks. 10/504, p.83.

\(^{22}\) BAG AP No. 30 on Internationales Privatrecht – Arbeitsrecht.

\(^{23}\) BAG AP No. 2 on § 1 a AEEntG; BAG AP No. 10 on Art. 30 EGBGB (n.F.); BAG AP No. 261 on § 1 TVG, Tarifverträge: Bau.

\(^{24}\) BAG AP No. 30 on Internationales Privatrecht- Arbeitsrecht.


\(^{26}\) For an overview of mandatory law under the Rome I Regulation, see d’Avout, Recueil Dalloz 2008, 2165 et seq.
no way overlap (see on this paragraph 5)\textsuperscript{28}, for private-law rules can also be overriding mandatory provisions (see paragraph 7).

The differentiation between provisions that cannot be derogated from and \textbf{overriding mandatory provisions} is also upheld in other language versions. Thus, in the German version, a distinction is made between ‘Bestimmungen, von denen nicht durch Vereinbarung abgewichen werden kann’ and ‘Eingriffsnormen’. In the French version, a distinction is made between ‘dispositions auxquelles il ne peut être dérogé par accord’ and ‘lois de police’.

Overriding mandatory provisions are \textit{prejudicial to the international uniformity of decisions} not only as regards the disparate assessments of the question whether a rule can be applied (see paragraph 13). There is the additional factor that each State itself determines which rules it regards as overriding mandatory rules. This task cannot be taken away from it. A uniform determination of the criteria for determining whether provisions are overriding mandatory provisions does not therefore solve the problem.\textsuperscript{29} For each Member State is free, within the limits of Union law, to pursue its own policy in creating overriding mandatory law. From a comparative-law perspective, there is a growing tendency, which is not confined to employment law, to recognise overriding mandatory provisions.\textsuperscript{30}

The \textbf{further exposition} below will present the principles applicable to the special connecting rule for the overriding mandatory provisions of the forum (see paragraphs 19 et seq.). There will then be an explanation of the provisions governing the posting of workers to national territory (paragraphs 44 et seq.). It will then be shown how overriding mandatory provisions adopted by other legal systems are dealt with (paragraphs 80 et seq.). Finally, there will be a brief discussion of situations in which overriding mandatory provisions may come into conflict (paragraphs 108 et seq.).

\textbf{2. Special connecting rule for overriding mandatory provisions of the forum}

\textit{a) Overriding mandatory rules}

Under Article 9 section 1 of the Rome I Regulation \textbf{overriding mandatory provisions} are provisions the respect for which is regarded as crucial by a country for safeguarding its public interests, such as its political, social or economic organisation, to such an extent that they are applicable to any situation falling within their scope, irrespective of the law otherwise applicable to the contract. In

\begin{itemize}
  \item \textsuperscript{27} See Güllemann, p. 94.
  \item \textsuperscript{29} For another view, see Kuipers/Migliorini, Eur. Rev. Priv. Law 2011, 187 et seq.
  \item \textsuperscript{30} Symeonidis, in: Symeonidis (Ed.), Private International Law at the End of the 20th Century, p. 3, 16 et seq.
\end{itemize}
that regard, the distinction between public and private law is not determinant (cf. paragraph 15).

The legal definition goes back to the definition of police laws which the ECJ already used in the Arblade case\(^{31}\) (paragraph 61) and later also in the Commission v Luxembourg case\(^{32}\) (paragraph 65).\(^{33}\) The ECJ used the definition, which may be traced back to French roots, in regard to the classification of Belgian rules as police and security legislation. It is of course older and goes back\(^{34}\) to Francescakis.\(^{35}\) Also, the doctrine of immediately applicable laws ultimately focuses on the significance of the provision to the State apparatus.\(^{36}\) The progress of the introduction of this legal definition is to be accounted for by the fact that it statutorily imposes a certain restrictive construction,\(^{37}\) thus preventing the undermining of the universal connecting rules.\(^{38}\) Thus, ultimately all the rules governing the protection of the weaker party to the contract are precluded from being implemented compulsorily as overriding mandatory rules.

The Member States must be restrained in the use they make of the possibility of implementing overriding mandatory provisions (paragraph 28). In particular, there may be limits to the creation of overriding mandatory law in terms of the European fundamental freedoms (paragraphs 27, 61). On the other hand, implementation of specific employment-law provisions is provided for in the European posting directive (paragraphs 29, 44). On the other hand, the posting directive, by fully harmonising this area, circumscribes the pay-off between fundamental freedoms and employee protection, with the result that employment-law provisions going beyond that framework constitute overriding mandatory law requiring justification (paragraphs 61 et seq.). The implementation of overriding mandatory provisions will always require a sufficient connection with the national jurisdiction (paragraph 36). The extent to which the overriding mandatory provisions of a foreign law must be taken into account will be examined in paragraphs 80 et seq.

Finally, the question has to be examined as to how employment law of a public-law nature is integrated into this system (paragraphs 181 et seq.).

Not every internal mandatory provision will be an overriding mandatory provision.\(^{39}\) Nor, therefore, is every provision for the protection of the weaker party an overriding mandatory provision. On the other hand, it cannot be precluded that such provisions serving to protect the employee as the weaker party

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\(^{31}\) ECJ AP No. 1 on Article 59 EG Treaty – Arblade (1999 ECR I-8453).
\(^{32}\) ECJ NZA 2008, 865, paragraph 29 – Commission v Luxembourg.
\(^{34}\) See Francescakis, Rev. crit. DIP 1966, 1 et seq.
\(^{35}\) Bonomi, Yearbook of Private International Law 10 (2008), 285, 287; Bureau/Muir Watt, paragraph 552; Francq, JDI 2009, 41, 55; for a critical view, see Biagioni, NLCC 2009, 788, 789; De Cesari, FS Pocar, 2009, p. 257 at p. 263.
\(^{36}\) Calsen, p. 24 et seq.
\(^{38}\) Garcimartín Alferez, EuLF 2008 I-61, I-76.
\(^{39}\) Carter, ICLQ 1993, 1, 2.
to the contract at the same time pursue wider public interests. Overriding mandatory rules and rules for the protection of the weaker party are, accordingly, not mutually exclusive rule groups. A tendency, in this connection observable in Germany in international consumer law (see Section 3, paragraph 17), has therefore neither encountered unanimous acceptance, nor has it significantly resonated abroad or in German international employment law – here the problem, of course, did not present itself with the same degree of intensity. Furthermore, the posting directive is actuated by other considerations, too. The Giuliano/Lagarde report is also based on a different understanding; it is therein stated, in connection with Article 7 section 2 of the Rome Convention (now Article 9 section 2 of the Rome I Regulation), that overriding mandatory rules ‘may above all appear in areas to do with the law on consumer protection’. In the final analysis, the government’s explanatory memorandum on the proposal for a law reforming the PIL was based on the same understanding, inasmuch as it was therein stated that provisions of tenancy-protection law could constitute overriding mandatory provisions. The contrary view has in the meantime been described as ‘hardly capable of achieving a majority in Europe’. That has to be taken seriously. The assumption that the rule is a manifestation of a purely German notion is absolutely not sustainable. Against this background, accordingly, employee protection provisions, where they pursue a wider public purpose, can perfectly well be overriding mandatory rules. Provisions motivated on grounds of social policy may also be considered to be overriding mandatory rules (see paragraph 14). The objection raised by Italian academic commentators to the effect that such provisions are only mandatory for one side and, for that reason, could not constitute overriding mandatory rules, cannot carry convic-


41 For another view, see e.g. vv. Hoffmann, IPRax 1989, 261, 264.

42 Expressly rejected by Bonomi, Yearbook of Private International Law 10 (2008), 285, 293 et seq.; likewise, FS Pocar, 2008, p. 107, 118; see also Hartley, Rec. 1997, 341, 373; Ancel, Rev. crit. DIP 2009, 732, 737 et seq.; see also exposition by Knöfel, JBL 1999, 239, 256, who himself takes a dismissive view (ibid. p. 256 et seq.); see for an overall view the comparative-law accounts by C Müller, p. 31 et seq., 49 et seq.; Stoll, p. 194 et seq.

43 See, for instance, C.Müller, p. 94 et seq.; Stoll, p. 194 et seq.

44 Unlike in the case of consumer law, employee protection under conflict-of-laws rules is not restricted only to matters provided for in legal provisions, Junker, IPR, paragraph 409.

45 See v. Hoffmann/Thorn, Section 10, paragraph 96. It may remain open whether the approach here discussed has been superseded (as suggested by v. Hoffmann/Thorn, ibid.) or rather whether the other view of the matter was upheld.

46 Giuliano/Lagarde, BT-Drucks. 10/53, p. 33 at p. 60.

47 RegBegr.,BT-Drucks. 10/503, p. 83 et seq.

48 Freitag, IPRax 2009, 109, 112.

49 Thus, however, MünchKomm-Sonnenberger, Einl. IPR paragraph 44.

50 Cf. Markovska, Rda 2007, 352, 357 et seq.; Streithöfer, DRdA 2012, 191, 194; for Austria, see Schwimann, WBI 1994, 217, 222; for England, see Stone, p. 342 et seq., 359; with reservations, Ancel, Rev. crit. DIP 2009, 736. See also to that effect the Austrian case-law prior to the Rome Convention, OGH Arb 11.048.
The premise that overriding mandatory rules must be of a bilateral mandatory nature has no solid foundation; nor is the public interest underpinning the rule called into question by the unilaterally mandatory nature. Against that background, the legal-policy criticism sometimes expressed to the effect that rules that protect private interests fall outside the definition of overriding mandatory provisions is misplaced. However, the further question remains to be clarified as to whether the overriding mandatory rule absolutely precludes the rule from being subsumed under the law applicable to the employment contract (on that point, see paragraph 31).

The public interest is not merely a reflex or knee-jerk reaction, but a primary consideration in terms of protection. The public interest that is pursued by a provision must be the predominant purpose of the rule. An indication that the rule is an overriding mandatory one is where an authority is provided in order to ensure its implementation. Yet that does not, on the other hand, allow a provision to be deprived of being regarded as an overriding mandatory provision solely on the basis of the consideration that it is left to the employee alone to implement it. That would represent a reversion to the outdated differentiation between public and private law. It would also be to mistake the tendency of the modern legislature to press private-law subjects increasingly into service for the purpose of implementing public objectives. A further important indication of an overriding mandatory provision may be seen in the punishability of an offence under the provision. The Court of Cassation, moreover, used the imminent threat of an infringement of elementary human rights in a case of modern slavery as a pretext for applying French rules without, to be sure, at the same time declaring these to be overriding mandatory provisions. That case concerned, inter alia, a ‘ridiculous’ rate of remuneration, with the result that one could say that the implementation of a minimum wage as an overriding mandatory provision is called for.

Even if its public-law nature is neither a necessary nor a sufficient precondi-
tion for assuming that it is an overriding mandatory rule (paragraph 5), the public-law formulation may be an indication that the rule is pursuing an overriding mandatory interest (cf. paragraph 15). Likewise, the meshing of a private law

51 Cf. Pocar, Rec. 1984, 339 et seq.
52 Thus, for example, Ubertazzi, p. 122 et seq.
53 Pfeiffer, EuZW 2008, 622, 628; see also on the old law BAG NZA 2008, 761, 767 et seq.
54 Markovska, RdA 2007, 352, 358; Schlachter, NZA 2000, 57, 62.
55 Hess.LAGIPrax 2001, 461, 468; Junker, Arbeitnehmereinsatz im Ausland, paragraph 46; likewise BAG 2004, 1197 at 1213 with further references; Borgmann, p. 119; cf. With further references Hk-ArbR-Däubler, EGBGB, paragraph 43; Gamillscheg, ZFA 1983, 307, 345 et seq.
56 Thus, however, Hess.LAGIPrax 2001, 461, 468; Gamillscheg, ZFA 1983, 307, 346.
57 v. Bar/Mankowski, Section 4 paragraph 95; Maultzsch, RabelsZ 75 (2011), 60, 83.
60 Cf. also discussion in Pataut/Hammje, Rev.crit. DIP 2006, 858 et seq.
rule with public law is a corresponding indicator. In that connection, an example is Paragraph 14 section 1 of the law on the protection of the mother (MuSchG-Mutterschutzgesetz – cf. Section 12, paragraph 114). In parallel to that, but going yet further, one can even assume a rule to be an overriding mandatory rule if it is one compulsorily provided for in the case of employment within the territory. If one regards it as an overriding mandatory provision on that basis, it will then apply irrespective of the proper law of the contract.

24 It is not evidence against the existence of an overriding mandatory rule where a provision is only binding on one side. An overriding mandatory provision may seek only to be implemented against the law applicable to the contract, which fails to meet its standards.

25 The new legal definition raises awareness of the need for uniform interpretation (Section 2, paragraphs 17 et seq.). That requirement already subsisted under the Rome Convention. However, it comes more strongly into the conscious realm if it is not about the interpretation of a concept but about the application of a definition. Therefore, the question arises whether the previous construction of the expression ‘overriding mandatory provisions’ can also be sustained under the new definition in Article 9 section 1 of the Rome I Regulation. If one bears in mind that, specifically in Germany, the doctrine concerning demarcation has been considerably elaborated without comparable endeavours being known about in other countries, there is something to be said for taking over the pre-existing demarcation formula (see Paragraph 14), which is also consistent with the definition in Article 9 section 1 of the Rome I Regulation. That has already been proposed in other countries. Perhaps a tendency is discernible in the new definition to restrict, at least to some extent, the implementation of mere individual protection rules as overriding mandatory provisions. Against that background, previous practice will continue to be determinant, that is to say, that a rule will be deemed to be an overriding mandatory provision if it is not content with merely striking a fair balance of interests but, beyond that, pursues public interests. Of course, that is not to be equated with rules which are motivated by public interests, as is the case under employment law with protective rules which may often have regard to interests relating to employment-mar-

63 Thus, however, Junker, Internationales Arbeitsrecht im Konzern, p. 290; Franzen, ZESAR 2011, 101, 106.
64 Cf. Luikkonen, p. 137 et seq.
68 On that, see d’Avout, Recueil Dalloz 2008, 2165 at 2167.
ket policy. Frequently, the public interest will be articulated in the rule and that rule will be deemed to be an overriding mandatory provision. Yet, specifically where the legislature allows exceptions to the general protective regime under employment law in order to revitalise the employment market, it will not be possible to describe the residual protection in terms of overriding mandatory provisions, just as that will not be possible in the case of a provision which to an extent relaxes employee protection. That may be illustrated, for example, by the German law on fixed-term contracts where, under the law on part-time and fixed-term employment, Paragraph 14 section 2 thereof on unwarranted fixed-term contracts (TzBfG), cannot be construed as overriding mandatory law (see Section 13, paragraph 66).

A provision may itself stipulate that it is to apply, irrespective of the law that is otherwise applicable. There is such provision, for example, in Section 204 of the Employment Rights Act 199669 in English law. However, Paragraphs 2 and 8 of the German law on temporary posting are general statutory provisions (Arbeitnehmer-Entsendegesetz- AEntG) which direct that other German legal provisions should be regarded as having the nature of overriding mandatory provisions. In determining what is overriding mandatory law, uniform interpretation reaches its limits. For it is a matter for the relevant State to determine what are public interests and whether they should be protected by internationally binding rules. The Rome I Regulation gives no directions in that connection. Uniform interpretation can only clarify what may be deemed to be an overriding mandatory provision.70 Conversely, the enactment of overriding mandatory provisions is a matter for the Member State with the result that the assessment as to whether a national legal provision corresponds to the criteria characterising an overriding mandatory provision remains a matter to be determined according to the yardsticks of the enacting State.71

Nor does the Rome I Regulation appear to preclude even an excessive use of overriding mandatory provisions.72 A limit may be reached if overriding mandatory provisions threaten to infringe fundamental freedoms.73 We will return to this issue at a later stage (paragraphs 61 et seq. and 71). Ironically, however, the fundamental freedoms apply only to intra-European trade and do not preclude

69 On the nature of (the predecessor provision) as an overriding mandatory provision, see Gamillscheg, RIW/AWD 1979, 225, 233.
71 Heilmann, p. 109; Junker, IPRax 1989, 69, 75; Philip, in: North (Ed.), EEC Convention, p. 81, 82; see also, for a critical view from the standpoint of legal policy, Dickinson, JPIL 2007, 53, 67 et seq.
72 Deinert, RdA 2009, 144 at 150 et seq.; see also on the Rome Convention with legal policy reservations against the excessive enactment of overriding mandatory provisions, Lagarde, Rev.crit. DIP 1991, 287, 325.
73 Callsen, p. 97 et seq.; v. Bar/Mankowski, Section 4 paragraph 94; Guedes de Costa, RDT 2007, 571 at 574; Leible/Lehmann, RIW 2008, 528 at 542; Ubertazzi, p. 125.
excessive use as against non-Member States; in regard to other limits, see para-

Recital 37 provides for the application of overriding mandatory provisions on public interest grounds ‘In exceptional circumstances’. That indicates that caution is called for in classifying provisions as overriding mandatory provisions. Not the least reason for that is that otherwise the general connecting factors would, to a large extent, be rendered redundant. Moreover, it is also a way of promoting the international uniformity of decisions. For the implementation of the overriding mandatory provisions of the forum is not entirely analogous with the special connecting rule for these overriding mandatory provisions on the part of a foreign court; this is because the overriding mandatory provisions of third countries (for that is what we are dealing with when German overriding mandatory provisions are applied by a foreign court) may be rendered applicable under a special connecting rule only to a limited extent (see paragraph 91). The exceptional circumstances which are flagged up in Recital 37 come clearly to the fore in the new definition in Article 9 section 1 of the Rome I Regulation which uses a formulation from the reasoning underpinning the ECJ’s decision in the Arblade case. In that case, the ECJ acknowledged that the overriding mandatory law of the Member States can entail a justified restriction on the fundamental freedoms. In that connection, for Member States to depart from the system of connecting rules in the European regulation by enacting overriding mandatory provisions requires justification.

The fact that the posting directive (paragraphs 44 et seq.) effects a full harmonisation, according to the case law of the ECJ (cf. paragraphs 63 et seq.), does not prevent Member States from going further in their enactment of law. Primarily, that will apply to overriding mandatory law which is based on considerations other than that of employee protection. Yet, also in the sphere of employee-protection objectives, further overriding mandatory provisions may fall to be considered (see paragraph 68).

In assessing whether a public interest can endow a provision with the nature of an overriding mandatory one, it may also be considered whether that rule serves a value which is internationally recognised. For example, it may be that other States have legal provisions of the same kind, or that the provision corresponds to international obligations, such as may arise, for example, from ILO conventions. Of particular importance in the present context is the possibility

74 Cf. Lagarde/Tenenbaum, Rev.crit.DIP 2008, 727, 748.
75 Hess. LAG IPrax 2001, 461, 467.
76 H eilmann, p. 114.
77 ECJ AP No. 1 on Art. 59 EG Treaty – Arblade.
79 Deinert, Rda 2009, 144, 150.
80 That is also emphasised by Magnus, IPRax 1991, 382, 385; cf. also Di Marco, Revue du Marche Commun 1981, 319, 323. In the Giuliano/Lagarde, BT-Drucks. 10/53, p. 33, 59, it is pointed out that in the drawing up of the Rome Convention consideration was given to requiring justification of provisions under internationally recognised criteria.
that the objective of a fundamental EU directive may transform a provision into an overriding mandatory one (see, in more detail, Section 3, paragraph 15 et seq.).

The relationship between overriding mandatory provisions and the law applicable to the contract is a highly controversial problem, specifically in Germany. It turns on the question whether overriding mandatory provisions can at the same time be assigned to the law applicable to the employment contract. This has been widely contended for, often after detailed discussion.

Moreover, this has been the unanimous view adopted abroad. Thus in Kahler v Midland Bank Ltd the House of Lords upheld a refusal to deliver up securities on the ground that under Czech foreign exchange law the requisite authorisation was lacking and Czech law was applicable to the contract in question. The Austrian Supreme Court also makes no distinction in that connection (see paragraph 72). The contrary view, which was earlier held, namely that the public-law aspects of employment law were not governed by the law applicable to the contract, but constitute overriding mandatory law, owed much to the narrow understanding of the PIL law as a law referring to private law (see paragraph 113) and, in that connection, has little to say of interest to the Rome I Regulation.

Conversely, a substantial part of German academic doctrine advocates a strict separation between overriding mandatory provisions and the law applicable to the contract and regards overriding mandatory provisions as being applicable only under a mandatory special connecting rule. The logical consequence of overriding mandatory provisions being subject to a mandatory special connect-
ing rule is that they cannot be called upon to apply along with the law applicable to the contract, and, consequently, are not accessible to a connecting factor under Article 8 section 1 of the Rome I Regulation (cf. figure 5). This view of the matter is connected with the idea that overriding mandatory provisions are not in the nature of individual protective provisions (see, on this issue, paragraph 21). The Federal Supreme Court has also adopted the theory of the special connecting rule without, however, discernibly reflecting on the issue. In earlier case law it also followed that theory, albeit based on the distinction – today more questionable – between public and private law.

The Swiss Federal Court also seems to follow this view of the matter in deeming the general system of referral to be precluded in the case of overriding mandatory provisions.

The first mentioned solution corresponds to the theory of the applicable law and the second to the doctrine of the special connecting rule (on these theories, see paragraph 84 below, as well as paragraph 6 above). Article 12 section 1 of the Rome I Regulation which gives concrete effect to the scope of the applicable law has nothing to say on this matter. The request by the Max-Planck-Institute for Foreign and International Private Law for an express clarification in Article 8 of the draft, which formed the basis of what is now Article 9, was not acted upon.

In order to give one example, German case law regards Paragraph 3 of the law on the continued payment of remuneration (EFZG) as an overriding mandatory provision. If that provision were precluded from being construed as an element of the law applicable to the contract, that would have no effect in the case of employment within the national jurisdiction with German law as the law applicable to the contract. It is true that Paragraph 3 of the EFZG would not apply as a provision of the law applicable to the contract, but would do so as an overriding mandatory provision. It would be otherwise, however, in the case of employment abroad with German law as the law applicable to the contract, such as in the case of a permanent posting, and where either a choice of law had been

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87 See, for instance, Kropholler, s. 52 IX 3, p. 500 et seq.; 
88 BGH NJW 2003, 2030, 2031 in which, after clarification that German law was the law applicable to the contract, it is discussed whether a German provision could apply as an overriding mandatory provision.
89 BGH NJW 1960, 1101, 1102.
90 BGE 136 III 23, 25.
91 Cf., for instance, with further references, Schubert, RIW 1987, 729, 732 et seq.
93 MPI, RablS 71 (2007), 225, 314, 316 et seq.
94 Contrary to E Lorenz, RIW 1987, 569, 583, it is by no means a sham alternative.
made or there were closer connections to German law. In that case, Paragraph 3 EFZG would apply neither as a provision of the law proper to the contract nor as an overriding mandatory provision (owing to the lack of sufficient connection to the national territory) and the employee would, in a given case, be left without payment of continued remuneration in the event of illness, for instance, where the law of the place of employment had no analogous overriding mandatory provision available.

Figure 5: Relationship of overriding mandatory provisions to law applicable to the contract

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<th>Special connecting rule solution</th>
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<td>Overriding mandatory provisions</td>
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The irrationality of this result militates in favour of the view that it should be possible for a provision to form both part of the proper law of the contract and to be an overriding mandatory provision. For, otherwise, the particular interest of the State in implementation might lead to the result that it is of no avail, precisely because it is an overriding mandatory provision. That can, however, not have been intended owing to the pursuit of the aim of protecting the weaker party from a conflict-of-laws perspective under the Rome I Regulation (cf. Recital 23). Rather, it must be acknowledged that the protective aims are not alternatives, but in part are subject to synchronisation.\(^95\) Also, a strict separation between overriding mandatory provisions and provisions of the proper law of the contract would entail great practical problems of application because, in the

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case of a contract governed by foreign law, it would always have to be ascertained whether the provision in question was regarded, from the perspective of the foreign State, as an overriding mandatory provision, although the Rome I Regulation in Article 9 section 3 adopts a reserved approach in regard to dealing with foreign overriding mandatory provisions. Finally, with the possible exception of the interest in maintaining an equilibrium in regard to conflict rules without, however, any objective justification, there is absolutely no reason for a separation between provisions of the proper law of the contract and overriding mandatory provisions. The only problem that could arise is that of a cumulation in terms of rules and provisions (cf. Section 16 paragraph 15). That, however, can be solved (cf. paragraphs 123, 125). Finally, Article 7 of the Rome Convention seemed to suggest that the overriding mandatory rules of the applicable law are called upon to apply with it since it was there clearly stated that, in addition to the proper law of the contract, the overriding mandatory provisions of a closely connected other legal system could also be called upon to apply. This is also borne out by the Giuliano/Lagarde report which mentions a close connection between the contract and a State other than the State whose law is to be applied. There can be no reliance on the assertion that only special connecting rules of the forum and of other States are provided for (Article 8 sections 2 and 3 of the Rome I Regulation), which would imply that the overriding mandatory provisions of the lex causae are deemed to be those of other States. If they were called upon to apply with the lex causae, no provision would need to be made for them, with the result that other States would be only third countries (see in that connection also paragraphs 80, 81).

Against that background, it is clear that the debate that was practically conducted only in Germany has had no resonance at European level. Apart from the abovementioned views of the matter prevalent abroad, the directive on the posting of workers also seems to dispense with a strict separation between lex causae and overriding mandatory law, inasmuch as matters which in themselves come under the law governing the contract are elevated to the status of mandatory law (cf. paragraph 52). Moreover, the Rome I Regulation follows the applicable-law theory. Presumably, the German discussion was misled by the Government’s explanatory report on the PIL law which alludes to the theory of special connecting rules. Thus, alongside the special connecting rule,

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96 The subsuming of overriding mandatory provisions of public-law within the law applicable to the contract does not give rise to insuperable frictions for in that connection it is a matter only that part of the provisions that relate to the contract not their sovereign implementation, E Lorenz, RIW 1987, 569, 583.
98 Giuliano/Lagarde, BT-Drucks. 10/503, p. 33, 59, Kropholler, S. 52 X 3 b, p. 508 proceeds on the basis of the law governing obligations being applicable but regards this as not being settled in the text of the Convention; but, for another view, see Junker, Internationales Arbeitsrecht im Konzern, p. 305.
99 Cf. v. Hoek, p. 545.
100 W-H Roth, FS Kühne, 2009, p. 859, 873.
overriding mandatory provisions may also be called into play by the applicable law governing obligations.

On the face of it, the term ‘overriding mandatory provision’ militates in favour of restricting the application of Article 9 of the Rome I Regulation to rules of law (on the issue of classifying collective agreements as overriding mandatory provisions, see also under paragraph 33 et seq.). Unwritten law, such as judge-made law, would be excluded from that. Also the definition, by focusing on ‘Eingriffsnormen’, points in that direction. Conversely, the English language version of overriding mandatory rules is not so clear. Moreover, there is nothing to be discerned in favour of restricting the special connecting factor to legal rules. Law is rather, as a general rule, a combination of enacted legislation and unwritten law. To restrict oneself here to legal rules would entail an incompleteness which would in no way do justice to ideas of fairness under conflict-of-laws rules. If moreover, one bears in mind that there are legal systems which are widely influenced by case law, it would not be in keeping with the requirement of uniform interpretation (Section 2 paragraph 17) to leave this out of account. This is also supported by the historical context. In the French version of the Rome Convention, the word *loi* in the draft was subsequently replaced by the word *droit* in order also to be able to take account of the Common Law. It is true that this choice of wording is no longer to be found in the French version of the Rome I Regulation. However, that is due to the fact that a linguistic demarcation was sought between overriding mandatory provisions and internally mandatory law and, therefore, the technical term of *lois de police* was introduced (paragraph 15 et seq.). There is nothing to support the assertion that there was an intention to alter the hitherto existing legal situation.

**b) Collective agreements as overriding mandatory provisions?**

In respect of the question whether collective agreements can be overriding mandatory provisions, it is important to distinguish the separate issues that are involved.

If a collective agreement can be an overriding mandatory rule has to be answered by every legal order on its own.

The Federal Labour Court initially proceeded on the basis that collective agreements, according to German law could only govern employment relation-

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101 There it is stated that consumer protection and employee protection provisions cannot be applied as overriding mandatory provisions if, in the event of a choice of law, they were to come into play as mandatory provisions under Art. 29, 30 EGBGB (former version) on the ground that those articles constitute lex specialis, German government’s explanatory Memorandum, BT-Drucks. 10/54, p. 83 et seq. On the other hand, those would come into play as overriding mandatory provisions under the law objectively applicable, ibid. p. 83.

102 Thus, also, ultimately, Heilmann, p. 139; Stoll, p. 160 et seq.

103 Giuliano/Lagarde, BT-Drucks. 10/53, p. 33, 59.

104 For Austria the prevailing view is in the negative, see Mayr in: Resch (Ed.), Arbeitnehmerentsendung, p. 33, 41; Rebhahn, DRdA 1999, 173, 175; likewise in France, cf. with further references Robin, Dr. soc. 1994, 127, 132 in Spain, Carillo Pozo, REDT 2011, 1023, 1066.
ships where German law was the law applicable to the contract and therefore rejected the notion that collective agreements could be in the nature of overriding mandatory provisions; rather they required to be expressly made applicable, as was provided for in certain cases, for example, by Paragraph 1 of the law on the posting of workers (AEntG). The court subsequently acknowledged that this solution could not be correct because the collective agreement has a rule-making character. This has been confirmed inasmuch as the law on the posting of workers later introduced the possibility of making a collective agreement binding by way of a legal regulation in which it is stated that it is also equated to other legal provisions from the point of view of private international law. Of course, that is not enough to make it an overriding mandatory provision. Rather, it has to be examined whether a collective agreement also can have the character of an overriding mandatory provision.

In the case of collective agreements under German law, which are not universally binding, the answer to that question must be in the negative. Such agreements are binding only on the organised parties. Conversely, one could argue in the case of a universally binding declaration because this depends by definition of a public interest. In that case the internationally binding effect follows from the combination of the provision of the collective agreement and the declaration as to the universally binding nature of the agreement. Of course, in an individual case, it remains to be examined whether the relevant provision of the collective agreement is to be construed in such a way that, in light of the public interest, it is intended to have internationally binding effect. But Paragraph 8 of the law on the posting of workers governs the internationally binding effect of universally binding collective agreements within the scope of the law on the posting of workers. One may therefore wonder whether the legislature, by making express provision for a restricted sector in the predecessor 1996 legislation on the posting of workers, by dint of contrary reasoning, intended a divergent interpretation for universally binding collective agreements outside the law on the posting of workers. The Federal Labour Court left this question open. In the final analysis, it must be answered in the negative. As is
apparent from the explanatory memorandum on the original version of the law, the legislature intended merely to provide clarification for certain areas. The sectorial restriction was owing to a specific requirement for action. But then it is going too far to infer a provision from the eloquent silence of the law.

c) Special connecting rule

The special connecting rule for overriding mandatory provisions requires a sufficient connection at national level. For the less far-reaching the effects at domestic level, the less interest there is in implementing the State’s national, economic and socio-political objectives against the individual parties to the agreement. For this reason, for example, only in the case of employment at national level will the approval of the integration office be required, under Paragraph 85 of the German Social Code IX, in the case of the dismissal of a severely handicapped person (see Section 13, paragraph 47).

The special connecting rule in the case of overriding mandatory provisions occurs not only by way of derogation from the law applicable to the contract, but also where there has been a choice of law. The overriding mandatory provisions then have priority over both the chosen law and over provisions which are governed by a special connecting rule under Article 8 section 1, second sentence, of the Rome I Regulation. The special connecting rule in respect of overriding mandatory provisions will increase in significance, to the extent to which under the choice of law laws may be chosen which have no specific connection to the contract. For often, in the case of an objective connecting factor, the lex fori and the lex causae will overlap.

The special connecting rule under Article 9 section 2 of the Rome I Regulation, unlike in the case of Article 8 section 1, second sentence, of the Rome I Regulation, contains no exception in regard to the ‘most favourable’ principle. However, overriding mandatory provisions with social policy motives will result only in minimum protection of employees and therefore will not preclude the application of more favourable provisions under the law applicable to the employment contract (see in that connection paragraph 21).

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114 BR-Drucks. 523/95, p. 4.
115 Deinert, RdA 1996, 339, 348 et seq.
116 German government’s explanatory Memorandum, BR-Drucks. 523/95, p. 1.
117 Deinert, RdA 1996, 144, 151.
118 BAG AP No. 10 on Art. 30 EGBGB n.F.; Stoll, p. 66 et seq; Hanau/Steinmeyer/Wank-Wank, S. 31, paragraph 141; Kropholler, S. 52 IX 1, p. 498; Magnus, IPRax 2010, 27, 41; Thüsing, NZA 2003, 1303, 1308; for another view Wimmer, p. 179, according to whom the overriding mandatory provision itself decides whether it needs a national connection or not.
120 Heilmann, p. 120; Kropholler, S. 52 VI 2, p. 488; Chong, J PIL 2006, 27.
122 Cf. Dicey, Morris & Collins, paragraph 33-073.
Chapter 3. Connecting factors

Thus, for example, the Swedish courts regarded implementation of Swedish overriding mandatory provisions, even before the entry into force of the Rome Convention, as necessary only if they were more favourable to the employee than provisions of the law applicable to the contract. An analogous tendency is also reported from Japan.

Where, however, the objective of the domestic overriding mandatory provision is not met by a foreign provision – even one more favourable – the overriding mandatory provision of the forum will apply. Likewise, the overriding mandatory provisions of the forum will come into play and apply as against provisions under the law governing the contract insofar as they serve public interests other than those relating to social policy.

The special connecting factor does not remove the need for an examination of the substantive-law conditions for the application of the overriding mandatory provision (see also paragraph 106 in regard to the overriding mandatory provisions of non-Member States). In so far as the latter, for instance, presuppose employment at national level or a national undertaking, it will not apply in the case of employment abroad, even if otherwise there is a sufficient national connection.

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\text{\textit{d) Overriding mandatory provisions under domestic law}}
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Since the special connection in regard to overriding mandatory provisions is a unilateral connection (paragraph 12) the examination must in each case be on the basis of the rule. Therefore, it is not a matter of examining which overriding mandatory provision is applicable. The matter must be approached from the other end, that is to say, it must be examined whether a specific provision requires to be applied as an overriding mandatory provision. That may be answered in general terms for the relevant provision. In what follows, we will show which provisions of German law can be extended as overriding mandatory provisions to employment relationships governed by foreign laws of contract in the German forum. It is certainly also of interest to see which overriding mandatory provisions of other States, in the case of employment in those states, come into play for employees working in other countries on foreign statute. That of course requires comprehensive research into foreign laws, which in the context of this account cannot be provided.

\begin{itemize}
\item \textbf{123} Cf. \textit{Calsen}, p. 92; C. Müller, p. 1221; Hanau/Steinmeyer/Wank-Wank, Section 31 paragraph 151; \textit{E. Lorenz}, RJW 1987, 569, 580; \textit{Schlachter}, NZA 2000, 57, 61; for an analogous application of Article 8 section 1, second sentence, Bamberger/Roth-Speckhoff, Art. 8 Rom I-VO paragraph 15; see also \textit{Heilmann}, p. 119, however, contradictory statements at pp. 120 et seq.; for another view Wiedenfels, IPRax 2003, 317, 318.
\item \textbf{124} AD No 110/2001; \textit{Luikkonen}, p. 158.
\item \textbf{125} Cf. \textit{Nishitani}, p. 95 et seq.
\item \textbf{126} \textit{Heilmann}, p. 119; \textit{Schlachter}, NZA 2000, 57, 61; MünchArbR-Oetker, S. 11, paragraph 51; to that effect, see also \textit{Morse}, ICQL 1992, 1, 16 et seq.
\item \textbf{127} \textit{Heilmann}, p. 120.
\item \textbf{128} \textit{Heilmann}, p. 116.
\end{itemize}
Although in itself tailored to cases of posting, Paragraph 2 of the German law on the posting of workers contains a catalogue of provisions which are also **internationally binding in regard to matters going beyond posting configurations**.\(^{129}\) It is the list from the ‘hard core’ as indicated in the posting directive. The matters listed in Paragraph 2 of the law on the posting of workers includes:

- Maximum periods of work (in that connection, see Section 12 paragraph 68);
- Minimum rest periods (in that connection, see Section 12 paragraph 68);
- Minimum paid annual leave (in that connection, see Section 12 paragraphs 99 et seq.);
- Minimum rates of remuneration, including rates of overtime pay (paragraphs 71 et seq.; Section 12 paragraphs 29 et seq.);
- Conditions governing the temporary hiring out of their employees in particular through temporary employment agencies (paragraph 71, and Section 12 paragraphs 109 et seq.);
- Safety, health protection and hygiene in the work-place (Section 12 paragraphs 68 et seq.);
- Protective measures for pregnant workers, women who have recently given birth, children and young persons (Section 12 paragraphs 112, 114 et seq.);
- Equal treatment of men and women and antidiscrimination law (Section 12 paragraphs 87 et seq.).

The list contained in paragraph 2 of the law on the posting of workers is **not final**. Nor does the directive on the posting of workers preclude other overriding mandatory provisions of employment law (see paragraph 61). The **German overriding mandatory provisions** include for example

- The duty to offer employment to severely handicapped persons under Paragraph 71 of the Social Code IX (see, on that, Section 12 paragraph 117);
- Continued payment of remuneration under Paragraph 3 of the law on the continuation of payment of remuneration (see, in that connection, Section 12 paragraph 37);
- Claim for an additional maternity pay under Paragraph 14 of the law on the protection of the mother (see, in that connection, Section 12 paragraph 114);
- The law on mass dismissals under Paragraph 17 of the law on protection against dismissal (see, in that connection, Section 13 paragraph 53);
- Requirement for approval in the case of dismissal of severely handicapped persons, in accordance with Paragraph 85 of Social Code IX (see, in that connection, Section 13 paragraph 47).

The reasons why they are overriding mandatory provisions are explained in greater detail at the relevant places referred to.

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\(^{129}\) Deinert, Internationales Arbeitsrecht, Section 10, paragraphs 96 et seq.
The following are not overriding mandatory provisions:

- The employment-law principle of equal treatment (Section 12 paragraph 87);
- Provisions on remuneration (Section 12 paragraphs 29 et seq.);
- Holiday money (Section 12 paragraph 100);
- Principles of compensation within the undertaking (immunities from liability whatsoever, Section 12 paragraph 129);
- Claim to part-time work under Paragraph 8 of the law on part-time work (Section 11 paragraph 8);
- Transfer of Undertaking provisions (on that and on the exemptions, see Section 13 paragraph 9);
- Law on fixed-term employment (Section 13 paragraphs 66 et seq.)
- General protection against dismissal (Section 13 paragraph 31).

The reasons why these are not overriding mandatory provisions are explained in more detail at the places referred to in each case.

3. Special connecting rules in the posting directive and their implementation in the Member States

a) Background

In the case of a habitual place of employment abroad, the employment law of the home country will as a rule continue to be applicable to temporary postings to the forum (see Section 9 paragraphs 97 et seq.).\(^\text{130}\) Thus, employers who, in the provision of cross-border services, post their employees across the border, will be able to exploit any existing gap in social costs.\(^\text{131}\) Against that background, the notion of social dumping has already been employed.\(^\text{132}\) If one disregards cases of secondary importance, that is to say exceptional and only short-term postings, this raises a problem from the perspective of the economy of the host country which cannot do anything about the cost advantage accruing to the foreign employer posting employees. The home law on employee protection will normally be mandatorily applicable and, from a conflict-of-laws perspective, could at most be circumvented by way of a choice of law. This, however, would be treated as a domestic case and would not avail owing to the hurdle set by Article 3 section 3 of the Rome I Regulation (see Section 9 paragraphs 38 et seq.). The employment market and the interests of the workers employed in it would also be affected since such a competitive pressure represents a long-term danger to employment. Ultimately, however, the interests of the posted workers are also

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\(^{130}\) Junker, JZ 2005, 481, 485, sees that as the realisation of the country of origin principle.

\(^{131}\) Cf. on these issues and the resulting endeavours in regard to a directive on the posting of workers, Däubler, EuZW 1993, 370; Hanau/Heyer, Mitb. 1993, 16 et seq.

\(^{132}\) Thus, Däubler, DB 1995, 726. Semantic criticism, in so far as exploitation of competitive advantage does not constitute undercutting and thus the term ‘dumping’ is not appropriate (conceded by Däubler, EuZW 1993, 330, 370) in Gerken/Löwisch/Rieble, BB 1995, 2370; Hanau, Festschrift Everling, 1195, 415, 416.
jeopardised because they are unable to benefit from the advantages of the higher level of protection, in spite of working in that particular environment. That gives rise to the social-policy issue of support under the collective bargaining system and employee protection by means of a minimum-wage scheme.\footnote{133}{On that point, Bieback, RdA 2000, 207 et seq.}

The host State normally regulates these problems through the grant of work permits or under its law on foreign persons. Thus, in Germany, the permit required for residents for employment purposes under Paragraph 18 of the residence law is subject to approval by the Federal Employment Agency (BA) which will only be issued, in accordance with Paragraph 39 section 2 of the residence law, if the foreign worker is not employed under less favourable terms and conditions of employment than comparable German workers. The Austrian law on the employment of foreigners is subject, under Paragraph 18 section 1, to a posting authorisation or employment permit which is based on the requirement that the terms and conditions of wages and employment of domestic workers are not jeopardised. This \textit{safety valve fails}, however, if the posted workers require no work permit. That is the case if the posting is guaranteed by European fundamental freedoms. In that connection, under the guarantees afforded by the freedom to provide services, an undertaking from another Member State enjoys the option of posting its workers, in the context of the provision of services, to another Member State.\footnote{134}{ECJ, EuZW 2001, 315 – Mazzoleni; cf. Bureau/Muir Watt, paragraph 946; Franzen, IPRax 2002, 186; Pataut, commentary on ECJ Rev. crit. DIP 2001, 495 et seq.} That applies also to the posting of workers who are nationals of a non-Member State.\footnote{135}{ECJ AP No. 1 on Article 59 EWG-Vertrag (EEC Treaty), paragraph 23 – Vander Elst; cf. Velikova, p. 166 et seq.} In regard to such workers, only such measures are permissible as are required to counter abuses (in particular, the prevention of disguised employment procurement). The requirement of a prior employment period of one year with the posting employer clearly goes beyond what is required.\footnote{136}{ECJ AP No. 12 on Article 49 EG – Commission/Germany.}

Following the most recent enlargement rounds, the problem of divergent social costs in the EU has worsened.\footnote{137}{Lalanne, ILR 2011, 211, 218 et seq.} Some Member States enjoyed transitional periods during which restrictions were permissible. Yet this concerns only Croatia.

**EU nationals** who are engaged at national level to carry out national employment enjoy the protection of domestic employment law under Article 8 sections 1 and 2 of the Rome I Regulation. For the most important condition of employment, remuneration, this could potentially fail because it is subject to contractual agreement unless statutory or collective agreement provisions come into play. However, Article 7 of Regulation No. 1612/68\footnote{138}{Lalanne, ILR 2011, 211, 218 et seq.} prohibits persons from being placed at a disadvantage on the ground of nationality.
The problems addressed relating to the international engagement of workers have at least been solved in part since 1996 as a result of the European directive on the posting of workers (reproduced in Annex, p. 445). The directive seeks to achieve a balance between the freedom to provide services and the interests of employees on whose backs competition should not be conducted (see also paragraph 63 et seq.). The directive requires the Member States to confer internationally mandatory character on certain conditions of employment. After two proposals for a directive, in 1991 and 1993, were unable to achieve a majority in the Council of Ministers, the directive was preceded by specific national solutions in several Member States where the law on the posting of workers was enacted (paragraphs 71 et seq.). Conversely, the directive does not cover the unlawful cross-border employment of workers or indeed the problem of sham self-employed persons which may, of course, also arise. In that connection legality is a public-law problem concerning the employment of foreigners.

The compatibility of the directive with higher-ranking law has at various times been called into question. Thus, its compatibility with the freedom to provide services has been debated. Also the lack of any legal basis was impugned. The ECJ, of course, proceeds on the assumption that the directive is lawful (see paragraph 64).

140 Moreau, JDI 1996, 889 et seq.
141 Criticism from the point of view of conflict-of-laws concepts by Borgmann, p. 221 et seq.
142 Proposal for a Council directive concerning the posting of workers in the framework of the provision of services, COM (91) 230 final; on that, see Däubler, EuZW 1993, 370; Löwisch, FS Zeuner, 1994, p. 91 et seq.
143 Amended proposal for a Council directive concerning the posting of workers in the framework of the provision of services, COM (91) 225 final.
144 Cf. Eichenhofer, ZIAS 1996, 55, 73; cf. from a French perspective, Robin, Dr. soc. 1994, 127, 130 et seq.
145 According to Cremers, in: Köble/Cremers (Eds.), Europäische Union: Arbeitnehmerentsendung im Baugewerbe, 1994, p. 25, 26, at the end of 1992 two-thirds of foreign building workers in Germany were illegal.
146 Cf. with further references, Deinert, RdA 1996, 339, 340.
147 Eichenhofer, ZIAS 1996, 55, 74 et seq.; Nettekoven, p. 139 et seq.; Wichmann, p. 150 et seq.; Theelen, p. 16 et seq.
148 Steck, EuZW 1994, 140; Koenigs, DB 1997, 225, 228; Wichmann, p. 155 et seq.; also Labour Court Wiesbaden NZA-RR 1998, 217, 223; Arbeitsgericht Wiesbaden AP No. 1 on § 1
The services directive\(^{149}\) has no effect on the extension of employment-law provisions as overriding mandatory law to posted workers.\(^{150}\) Under Article 3 section 2 the services directive is not applicable to private international law.\(^{151}\) In addition, the directive on the posting of workers takes priority under Article 3 section 1 (a) over the services directive\(^{152}\). Finally, under Article 17 section 2 the matters covered in the directive on the posting of workers are excluded from freedom to provide services under the services directive.

\(b\) Content

The scope of the posted workers directive extends, under the terms of Article 1 section 3, to workers who, in the context of the provision of services are posted across the borders of Member States, to intra-group cross-border temporary work and to cross-border temporary agency work, whether genuine or non-genuine. Whether there was prior employment abroad or an intention to return is, in both cases, immaterial.\(^{153}\) According to the ECJ case law agency work is characterised:

- by a service contract on hiring employees for a consideration while the employee remains in a contractual relation the the agency and does not conclude a contract with the user,
- the main objective that the posting of the employee is the main objective of the contract and
- the employee performs his work under the managerial power of the user.\(^{154}\)

Article 3 section 1 of the directive makes provision for the so-called ‘hard core’ of conditions of employment (see recital 14) to be extended to posted workers except in the case of initial assembly and/or first installation (Article 3 section 2).\(^{155}\) The extension is intended to occur by the Member States ensuring that, irrespective of the applicable law, the workers posted to their territory will be guaranteed those terms and conditions that are subsumed within the ‘hard core’ of conditions of employment. In other words, the Member States must

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\(^{150}\) Cf. Lalanne, ILR 2011, 211, 222 et seq.

\(^{151}\) For criticism on the conflict-of-laws content of the original draft of the services directive (proposal for a directive of the European Parliament and the Council on services in the internal market, Com (2004) 2 final; on that see Schlichting/Spelten, EuZW 2005, 238 et seq.; de Schutter/Françq, Cahier de droit européen 2005, 639 et seq.; Wiesner/Wiedmann, ZIP 2005, 1210 et seq., see Mankowski, IPRax 2004, 385; Sonnenberger RIW 2004, 321 et seq.

\(^{152}\) For criticism on the employment-law content of the original draft of the services directive (footnote 151); see, for example, Graue, EuroAS 2005, 126 et seq.; Reim, NJW 2005, 1554.

\(^{153}\) For another view, Carillo Pozo, REDT 2011, 1023, 1040 et seq.


\(^{155}\) Criticised, inasmuch as the interests of posted workers are not taken into consideration in regard to legislation in the host State, Ganesh, Colum. J. Eur.L 2008, 123 et seq.
frame analogous provisions as **overriding mandatory provisions**.\footnote{156} It is true that it is being called into question whether these are overriding mandatory provisions and not mandatory provisions of another kind\footnote{157}, but it cannot seriously any longer be disputed since recital 34 to the Rome I Regulation speaks of the ‘overriding mandatory provisions of the country to which a worker is posted in accordance with Directive 96/71/EC’. A more far-reaching view is that, in the case of an action by the posted worker in his home country after his return, the provisions of the directive on the posting of workers must come into play as the overriding mandatory provisions of a third country.\footnote{158} But this, of course, is not provided for by the directive on the posting of workers.

The hard core covers

- Maximum work periods and minimum rest periods.
- Minimum paid annual holidays.
- Minimum rates of pay, including overtime rates (without occupational pension provisions).\footnote{159}
- Conditions of hiring-out of workers, in particular the supply of workers by temporary employment undertakings.
- Health, safety and hygiene at work.
- Protective measures with regard to the terms and conditions of employment of pregnant women or women who have recently given birth, of children and of young people.
- Equality treatment between men and women and other provisions on non-discrimination.

In that connection, only such terms and conditions of employment can be considered, for an extension of application to posted workers, as are laid down in **legal or administrative provisions** and/or in **collective agreements for building work** declared universally binding.\footnote{160} In that connection, the building works are more specifically particularised in the annex to the directive.

\footnote{156} Bariatti, in: Corneloup/Joubert (Eds.), Le règlement communautaire ‘Rome II’, p. 325, 338; Fernández Rozas/Sánchez Lorenzo, paragraph 466; v. Hoek, p. 544; Luikkonen, p. 229 et seq; Moreau, JDI 1996, 889, 900 et seq.; Rodríguez-Piñero Bravo-Ferrer/Rodríguez-Piñero Royo, GS Zachert, 2010, p. 87, 91; Schlachter, Pécsi Munkajogi Közlemények 2010, 87, 89; v. Hoek/Houwerzijl, Comparative Study, p. 19; see also Preis/Temming, p. 73 et seq.; for a critical comment in that connection, see Borgmann, p. 223, who regards the posting directive as a special conflict of laws system. To similar effect, see also Carillo Pozo, REDT 2011, 1023, 1043 et seq., for an assumption that Article 9 of the Rome I Regulation covers only public-law provisions.

\footnote{157} Cf. Lagarde/Tenenbaum, Rev. crit. DIP 2008, 727, 747 et seq.; following on from Jault-Seseke, RDT 2008, 620, 622; see also Plender/Wilderspin, paragraph 11-080.

\footnote{158} Bariatti, in: Corneloup/Joubert (Eds.), Le reglement communautaire ‘Rome-II’, p. 325, 338.

\footnote{159} For the question which payments of the employer are presumed to be a fulfillment of the minimum rates obligation the ECJ focuses on the assessment if an allowance does not influence the relation of performance and consideration, ECJ ECI:EU:C:2013:711 – Isbir; likewise ECJ ECI:EU:C:2015:86 – SAK. Accordingly, the Federal Labour Courts follows a test of functional eqivalence, BAG NZA 2013, 392; BAG NZA 2014, 1277.
Many of the terms and conditions of employment referred to were, at least in Germany, already guaranteed by means of overriding mandatory law. From a practical point of view, it was above all the extension of application to minimum wages and, according to the prevailing view, also minimum leave entitlement that were significant (on whether Paragraph 3 of the Federal Law on holiday entitlement is an overriding mandatory provision, see Section 12 paragraph 99).

The Member States may permit exceptions, except in the case of cross-border temporary work, in the area of the minimum wage and minimum holiday entitlement in the case of ‘not significant’ work and in the case of a short-term postings up to one month (Article 3 sections 3–5) of the directive on the posting of workers.

For temporary workers, there is under Article 3 section 9 the option to apply to temporary workers the terms and conditions of employment which apply in the host State for temporary employees.

Article 3 section 10 of the directive expressly permits collective agreements outside the building sector to be declared internationally binding.

Article 3 section 10 of the directive on the posting of workers enables terms and conditions other than those of the hard-core laid down in the directive to be made binding provided they are ‘public policy provisions’. Thus, the Member States retain the possibility of creating overriding mandatory provisions. Of course, in that connection, there are limits to which we will revert (paragraph 61 et seq.).

Lastly, Article 3 section 7 of the directive on the posting of workers makes it clear that the mandatory implementation of the hard-core of the terms and conditions of employment does not preclude the application of terms and conditions of employment which are more favourable to workers. That seems at first sight to the posting directive as being in the nature of a minimum harmonisation directive. The ECJ has nonetheless construed the directive as being a maximum (complete) harmonisation directive (cf. paragraphs 63 et seq.).

The provisions regarding the applicable law are complemented by a provision concerning cooperation in regard to information (Article 4) as well as the obligation to confer jurisdiction on an optional basis in respect of actions brought by the employee in the host State (Article 6).

The directive on the posting of workers has formed the subject-matter of intensive legal-policy discussions. The Commission has had the directive’s economic and social consequences enquired into as well as transpositions, and problems in that regard, together with possible legislative improvements. In view

160 In Austria that would correspond to collective agreements declared to be regulatory (“Satzung”), see Rebhahn, DRdA 1999, 173, 177.
161 Hoppe, p. 252; Plesterinniks, p. 147 et seq.; Preis/Temming, p. 170 et seq.
162 Deinert, RdA 1996, 339, 342 et seq.
163 Study on the Economic and Social Effects Associated with the Phenomenon of Posting of Workers in the EU, Brussels 2011; v. Hoek/Houwerzijl, Comparative Study.
of the controversial case law on the influence of fundamental freedoms on employee rights in the posting cases (see paragraph 61 below), the Commission adopted a proposal for a regulation on the right to take collective action (‘Monti II’).\footnote{Proposal for a Council Regulation on the exercise of the right to take collective action within the context of the freedom of establishment and the freedom to provide services / COM (2012/130 final; for a critical commentary, see Rocca, ELLJ 2012, 19 et seq.; Bruun/Bücker, NZA 2012, 1136 et seq.; also Del Sol/Le Barbier-Le Bris, RDT 2012, 262 et seq.; Lafuma, RDT 2012, 265 et seq.} In addition, it has submitted a proposal for an enforcement directive for the purposes of implementation of the directive on the posting of workers in the framework of the provision of services.\footnote{Proposal for a Directive of the European Parliament and of the Council on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services, COM (2012) 131.} Both proposals have been subjected to heavy criticism by trade unions and Member States’ policymakers.\footnote{See Report in: AuR 2012, 208; also report in: Zesar 2012, 205 et seq.} The Monti II proposal was rejected by the Council on 21 June 2012 owing to reservations concerning subsidiarity and was referred back to the Commission for review or withdrawal. Its subsequent fate was unknown at the time of going to press.

In 2012 the commission has published a proposal for a directive concerning the enforcement of the posting directive.\footnote{Proposal for a Directive of the European Parliament and of the Council on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services, COM (2012) 131/3.} This \textit{enforcement directive} was combined in the first step with the proposal for a Monti II regulation which dealt with the relation between fundamental freedoms of posting employers and the fundamental right of the employees to engage in collective action. Later the commission cancelled the Monti II regulation proposal. Some hoped that the enforcement directive could become an instrument regulating priority for collective fundamental rights be very fundamental freedoms. But this was not true. The directive 2014/67/EU\footnote{Directive 2014/67/EU of the European Parliament and of the Council of 15 May 2014 on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services and amending Regulation (EU) No 1024/2012 on administrative cooperation through the Internal Market Information System (‘the IMI Regulation’), OJ L 159/11.} of 15 May 2014 that was to be implemented by the Member States till 18 June 2016 only deals with the effective enforcement of the posting directive without putting unnecessary authoritative burdens on service providers (recital 5). In the same way as the enforcement of substantial rules of the host country may violate fundamental freedoms this could be true for procedural clauses for enforcement, although the Member States are obliged to guarantee an effective enforcement.\footnote{Cf. Kullmann, IJCLLIR 2013, 283 et seq.} In this light the directive could be seen as a secondary law description of what is admissible according to primary law. Accordingly, Article 1 section 2 of the enforcement directive points out that the freedom to strike and other collective action according to national law will not
be restricted. One should wait, if and in how far this statement could influence the jurisdiction to determine the relation between fundamental rights and freedoms in a new way.

The enforcement directive only deals with enforcement and has nothing to do with conflict rules (recital 46). The directive regulates in detail:

- **Control**, if a posting situation is really given or only simulated (Art. 4). For employers it could be interesting in a competition situation to simulate a posting situation because irrespective of the ‘hard core’ and mandatory collective agreements they could apply ‘better’ conditions according to their domestic law. However, a substantial labour law rule on consequences of sham has not been created by the legislator.\(^\text{170}\) According to recital 46 the directive explicitly regulates any substantive law. Instead, it refers to the Rome I Regulation and the favourability principle in recital 11. This means that in the final end the law of the place where the work is habitually carried out will be applicable.\(^\text{171}\) One could doubt if this is an effective sanction instrument because normally the courts of the host country seem not to have jurisdiction in such situations and nor the posting neither the enforcement directive provide particular enforcement instruments like e.g. assistance by unions. Nevertheless, Article 20 of the enforcement directive demands for Member States' dissuasive proportionate sanctions in cases of violation of national implementation rules. And one has to accept that a sham is a violation of the rules that implement Art. 4 on determining real posting situations. Insofar, it could be possible to create labour law sanctions when implementing the posting directive. Furthermore, an exact definition of posting could promote clearness of the law. But the EU legislator failed insofar.

- **Art. 5** demands for access to information for service promotors as for employees in a free general easy way via distance communication and electronic communication. Member States shall provide information on a single official national website, including the contents of generally binding collective agreements. An essential problem is, nevertheless, the language question.\(^\text{172}\) According to Article 5 section 2 lit. c the information has to be provided in the official language of the host country. Additionally, the Member States shall provide information also in other important languages taking into account the needs of the labour market. But the selection of languages is at the discretion of the Member States.

- **Administrative cooperation** of the Member States (Articles 6 et seq.) and via the internal market information system ‘IMI’ (Art. 21 et seq.).

- **Monitoring** of granting the substantial labour conditions to posted workers. Article 10 prescribes that Member States implement appropriate efficient

\(^{170}\) Critically already on the directive Proposal Schubert, P. 46.


\(^{172}\) Cf. already Schubert, p. 47.
and proportionate monitoring machinery for performance in view to the posting directive. Particular measures are indicated. This concerns a duty of declaration of posting, service provider, posted workers, workplaces, duration and the request for holding documents like labour contract, payroll and working time proof. Provisions on the duty of notification and documentation are in conformity with European law.\textsuperscript{173} As a matter of principle, the objective of employee protection may be presumed to justify supervisory measures in this connection.\textsuperscript{174} In its judgment in \textit{Commission v Luxembourg}, the ECJ had merely criticised provisions under which documents had to be retained in the host State with a special representative; the designation, it held, of a worker to retain the documents necessary for supervision had to suffice in that connection.\textsuperscript{175} In the \textit{Dos Santos Palhota} case the ECJ, on the other hand, had no reservations concerning a Belgian provision requiring a copy of documents to be kept available and forwarded.\textsuperscript{176} It was also made clear that the requirement of a notification prior to posting for supervisory purposes was permissible; what was not permissible was to require the employer to be prevented from making the posting for a period of five working days for as long as no registration number had been issued to him. Likewise, in the \textit{Commission v Austria} case the ECJ made clear that a mere notification procedure was permissible, whilst the requirement of an EU confirmation of posting constitutes an unlawful restriction on freedom to provide services in relation to nationals of non-Member States.\textsuperscript{177} As a mere notification procedure, the duty of notification under Paragraph 18 of the posting legislation is thus in conformity with European law. The provisions concerning the duty of notification and the duty to keep documents available are, in that connection, in line also with the guidelines issued by the Commission.\textsuperscript{178} In the case \textit{Commission v. Belgium} the ECJ accepted that requirements of holding special documents in order to prevent sham was compatible with the freedom to provide services but could not proportionate if this duty is applicable only to foreigners who get in this way under general suspicion.\textsuperscript{179} In the case of subcontracting the primary undertaking may be liable for wages and social security contributions as set out in Article 12. But, as Article 12 section 5 states, the liability may depend according to the Member States’ implementation rules on violation of duties of care according to na-

\textsuperscript{173} Thüsing-Reufels, § 18 no. 5; § 19 no. 3; see also Hailbronner, EWS 1997, 401, 406; on the other hand Borgmann, IPRax 1996, 315, 318.

\textsuperscript{174} ECJ ECR 2001 I-7831 – Finalarte; ECJ ECLI: EU:C: 2014:2408 – De clercq and others.

\textsuperscript{175} ECJ ECR 2008 I-4323 – Commission v Luxembourg.

\textsuperscript{176} ECJ ECR 2010 I-9133 – dos Santos Palhota.

\textsuperscript{177} ECJ ECR 2006 I-9041 – Commission v Austria.

\textsuperscript{178} Communication from the Commission, Guidance on the posting of workers in the framework of the provision of services Com (2006) 159 final.

\textsuperscript{179} ECJ 19th December 2012 – C-577/10.
ational law. Overall, this rule is a minimum harmonisation according to Article 12 section 4 of the enforcement directive.

- **Complaints procedures** for posted workers respectively their unions. In this context, Article 11 section 1 of the enforcement States that employees must get access to complaints mechanisms and to courts procedures. This concerns in the first place the guarantee that employees must be able to claim for wages, unjust deductions for accommodation or employers' contributions to service establishments (Article 11 section 6). According to Article 11 section 3 trade unions and other organisations shall have the possibility to promote the workers or claims in their name on behalf of the rights of the employees. However, international jurisdiction is not intended to be regulated by the directive according to Article 11 section 2 and recital 46. Therefore, the possibility to claim with support of a union lies under the precondition of international jurisdiction.

- **Enforcement of administrative sanctions and fines** (Art. 13 et seq.).

In the meantime the European Commission has proposed a directive for revision of the posting directive.\(^{180}\) The proposal focuses on:

- application of the conditions for hiring of workers on posted temporary agency workers,
- application of remuneration rules on posted workers as set out in statutes or generally applicable collective agreements and
- after 24 months of posting legal change of habitual place of work, i.e. change of the applicable labour law.

c) Limits on Member State legislation

The possibility provided for in Article 3 section 10 of the directive on the posting of workers and of elevating other terms and conditions of employment under Article 3 section 1 of the directive to the status of overriding mandatory provisions is, however, expressly made subject to the reservation that the Treaty be adhered to, that is to say, that primary law should be observed. This is in line with the case law of the ECJ on freedom to provide services and, in the end, concerns all domestic provisions and to that extent is not a peculiarity of PIL.\(^{181}\) Even before the directive on the posting of workers was enacted, the Court emphasised in the *Arblade* case that the fact that provisions are overriding mandatory provisions does not exempt them from observing the provisions of the Treaty.\(^{182}\) The grounds for the enactment of an overriding mandatory provi-

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181 See Biagiioni, NLCC 2009, 788, 794 et seq.
sion could, of course, justify limitations on the fundamental freedoms, as overriding reasons in the public interest.183 This interpretation also underpins Article 3 section 10 of the directive on the posting of workers, as is apparent from the case law of the ECJ, in particular in the Commission v Luxembourg case (see paragraph 65 below). Amongst these overriding grounds in the general interest, the ECJ already included, prior to the directive on the posting of workers, employee protection, in particular, the social protection of employees in the building trade.184 Exceptionally, for small-scale postings of short duration in areas close to the border, the application of the host State’s universally binding collective agreement would be disproportionate.185

That shows that primary law sets boundaries to the conflict of laws by not permitting it to establish unlawful restrictions on the exercise of fundamental freedoms (see Section 3 paragraph 6). This has been further particularised in the ECJ’s most recent case law. In academic debate more attention has been paid to the demarcation of collective rights and fundamental freedoms. The conflict-of-laws implications were thereby largely ignored186 and have not been fully clarified by decisions of the court.187

In the Laval case, the ECJ, for the first time, following on from the judgement in Arblade, determined the interrelationship between the directive on the posting of workers and freedom to provide services.188 In that case, the question was whether a Latvian building undertaking could be compelled by industrial action taken by a Swedish trade union to undertake negotiations with regard to a collective agreement concerning the employment conditions of workers posted from Latvia. The ECJ assessed the objective of applying Swedish legislation to workers posted from Latvia in the light of the directive on the posting of workers. The directive seeks, in regard to posting configurations, to coordinate the application of Member States’ laws. The directive, construed in the light of Article 49 EC (now Article 56 TFEU), had also to be observed in the context of collective action by trade unions. Yet, the ECJ emphasised that the posting directive does not bring about a substantive harmonisation of employee protection.

186 But see in detail Fallon, Rev.crit.DIP 2008, 781 et seq.
That is freely determined by the Member States. The directive merely coordinates the application of substantive rules to posted workers. In that context, the ECJ established that Sweden had no minimum wage rates, as mentioned in the hard core, and that there were also no universally binding collective agreements.\textsuperscript{189} The requirement to expect employers from other Member States in the event of posting nonetheless to observe certain wage rates was not regarded by the Court as covered by Article 3 section 7 of the directive on the posting of workers under which the application to employees of more favourable conditions of employment is not precluded by the directive (paragraph 57). Article 3 section 7 does not permit posting undertakings to be required to grant conditions of employment going beyond mandatory provisions. Such an interpretation would run counter to the \textit{effet utile} of the directive. Manifestly, what is referred to is the coordination of the applicable rules in the event of cross-border postings.\textsuperscript{190} The ECJ emphasised that Article 3 section 1 of the directive, on the one hand, serves to promote fair competition in the case of cross-border services and, on the other hand, also to secure a minimum level of employee protection and, as a matter of priority, measured the provision in question against the directive on the posting of workers and not against the directive on freedom to provide services. It is clear from the latter that the ECJ construes the directive as governing the exercise of freedom to provide services and as determining the permissible restrictions on freedom to provide services as a result of employee-protection measures.\textsuperscript{191} Finally, the ECJ related Article 3 section 7 of the directive on the posting of workers to the fact that employees may already lay claim to more favourable conditions under other rules, that is to say, under the \textit{lex causae}.\textsuperscript{192} That means that, in the final analysis, the Member States must confer internationally binding effect on all the conditions of employment mentioned in Article 3 section 1 of the directive, but on no others.\textsuperscript{193} Thus, the directive retains its private international law significance which clearly is overshadowed by the regulation of freedom to provide services.\textsuperscript{194} It is after all a connecting factor with a substantive objective.\textsuperscript{195

189 On the issues in this regard, see Luikkonen, loc. cit., p. 214 et seq.
190 As also Temming, ZESAR 2008, 231, 236; Zwanziger, special annex to RdA 5/2009, 10, 16 et seq.
191 See also Schlachter, in: Blanpain/Śwatkowski (Eds.), The Laval and Viking Cases, Alphen an den Rijn 2009, p. 63, 67 et seq; also Greiner, ZIP 2011, 2129, 2133; see in detail on the multiple directive aims as construed in these cases, Fallon, recv. Crit. DIP 2008, 781, 798 et seq.; also Robin-Olivier, Dr. soc. 2011, 897, 901 et seq. This construction was, for example, already applied by Reich, EuZW 2007, 391, 395.
192 See already to that effect Luikkonen, p. 181.
195 See Fallon, Rev. crit. DIP 2008, 781, 800.
At the same time, the ECJ clarified the relationship of Article 3 section 7 to Article 3 section 10 of the directive. After the decision in the Laval case, the demand for the payment of Swedish wages by the Latvian employer could only be founded on Article 3 section 10 of the directive under which other conditions of employment can be implemented by overriding mandatory provisions. In the specific case, this possibility was, however, denied because there was no relevant determination by the competent State authorities. At the same time it may be inferred from this decision that a ‘most favourable’ principle in terms of the conflict-of-laws rules subsists in so far as the provisions of the host State cannot be extended where more favourable conditions of employment are available to the employee according to the lex causae. The assumption that Article 3 section 7 of the directive merely allows the parties to the employment contract to depart from the internationally binding provisions of the host State only for the employees’ benefit goes too far and is not underwritten by the case law of the ECJ. Of course, the favourability principle in terms of conflict of laws can lead to a situation in which posted workers enjoy better conditions than the local workforce. However, there is nothing in the directive on the posting of workers to prevent this.

Subsequent to the preliminary ruling by the ECJ, the Swedish Labour Court ordered the trade unions involved to pay damages, although the legal basis for that order was controversial. The statutory situation in relation to the law on posting has been brought into line by the Parliament with the requirements of the ECJ’s judgement (see Section 15 paragraph 28).

This view of the matter also underlay the ECJ’s decision in the Rüffert case. That case concerned the requirement under Lower Saxony’s public procurement law, as then framed, to observe the terms of collective agreements. That requirement was not construed as a minimum wage within the meaning of Article 3 section 1 of the directive on the posting of workers and, in the absence of the universally binding nature of the relevant collective agreement, could not be deemed to be a provision extending a minimum wage under a universally binding collective agreement of the building sector. Nor did the ECJ deem the requirement on the part of a foreign employer to comply with the collective

196 Fallon, Rev. crit. DIP 2008, 781, 816; Velikova, p. 222 et seq.; see also, along these lines, Rödl, EuZW 2011, 292, 293.
197 Thus, Greiner, ZIP 2011, 2129, 2131.
198 Lunk/Nehl, DB 2001, 1934 et seq.
199 See Report by Rönnmar, ILJ 2010, 280 et seq.
201 On the constitutionality of the requirement for loyalty to collective bargaining arrangements, see BVerfG NZA 2007, 42; to the contrary, BGH AP No. 1 on § 20 GWB.
agreement to be covered by Article 3 section 7 of the directive on the posting of workers; it deemed that provision only to refer to more favourable conditions of employment under the laws and collective agreements of the Member State of origin. This was also supported by the interpretation of the directive in the light of the freedom to provide services the fulfilment of which the directive on the posting of workers seeks to bring about. The requirement to abide by collective agreements in the award of public building contracts cannot be justified by the objective of employee protection or collective bargaining autonomy because, on the one hand, it is limited to public contracts without it being apparent that, in the case of private contracts, there is no analogous requirement of protection for employees and, on the other hand, because these are not universally binding collective agreements. With this decision, the ECJ has gone further down the path of recognising the directive on the posting of workers as a full harmonisation directive. At the same time, the construction, first applied in the Laval case (paragraph 63), of the directive on the posting of workers as a manifestation in secondary law of the extent of freedom to provide services and its limits, was affirmed. By implication the Court is manifestly also proceeding on the basis that the directive is, for its part, compatible with freedom to provide services. The freedom to provide services was brought into the picture only in order to enable the directive to be interpreted in the light of that freedom.

The result is noteworthy: the logic of the requirement to abide by collective agreements is that the State will not seek, in the case of public contracts, to undercut the provisions of collective agreements by offering, in the course of the search for the most favourable offer, an incitement to wage dumping. There is even an ILO Convention (number 94) concerning terms of employment which follows this logic and has been ratified by some Member States, although not by Germany. If one adheres to this logic and does not renounce the legislation on requiring persons to abide by collective agreements, the startling result is that all employers, whether or not bound by collective agreements, from within the national jurisdiction and from non-Member States, must pay wages laid down in collective agreements; only employers from other Member States can post workers at wages undercutting the collective agreement. And the public contract-awarding authority is also obliged to support this – what a concept of fair competition!

Some Federal States reacted on the Rüffert case by legislation imposing an obligation to pay a minimum wage, set out directly in the statute, in the case of public contracts. According to the newer case law of the ECJ this is compatible

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202 See Davies, ILJ 2008, 293, 295: ‘In short, the list in Article 3 is a maximum, not a minimum’.
203 For a critical commentary, see Rodríguez-Piñero Bravo-Ferrer/Rodríguez-Piñero Royo, GS Zachert, 2010, p. 87, 99.
204 Thus, also Bayreuther, NZA 2008, 626, 627.
205 ECJ AP No. 16 on Article 49 EG, paragraph 36 – Rüffert.
206 In detail on that, Bruun/Jacobs, AuR 2008, 417 et seq.
with the services contractor’s freedom to provide services. Only the obligation to ensure the payment of minimum wages also by subcontractors who carry out their services with employees who work exclusively outside the German territory is incompatible with the fundamental freedom because this is not justified for reasons of employee protection nor for reasons of safeguarding the social security system.

The decision in the Commission v Luxembourg case is ultimately also founded on the interpretation of the directive on the posting of workers as a fully harmonising directive. In this decision, as well, the relevant provisions of national law were measured against the yardstick of the directive on the posting of workers. Conditions of employment, not coming within the hard-core, as defined in Article 3 section 1 of the directive, could on the interpretation of the ECJ be endowed with internationally binding effect only under Article 3 section 10 of the directive on the posting of workers. That was, however, an exception from the principle of the freedom to provide services which the directive was intended to enhance and, as such, was to be narrowly interpreted. In line with its decision in the Arblade case (paragraph 61), the ECJ deemed the creation of further overriding mandatory provisions to be justified only if there was a sufficiently serious threat to public order affecting a fundamental interest of society. Thus the creation by a Member State of overriding mandatory law under Article 3 section 10 of the directive is permissible only in the context of the prohibition on restricting freedom to provide services as determined by the Court’s case law. Against that background, the ECJ deemed it unjustified to classify as an overriding mandatory provision a rule providing for the automatic adjustment of remuneration to the cost of living. Likewise, the ECJ deemed it impermissible to endow conditions of employment with internationally binding effect where they were based on directives on the ground that the substantive interest had already been satisfied by the transposing law of the home State. By definition, that signifies enforcement of the principle of mutual recognition (see Section 3 paragraph 19). Nor was it warranted generally to classify as overriding mandatory provisions collective agreements that have not been declared universally binding (see also paragraph 35 above).

Specifically on the question of the classification as overriding mandatory provisions of laws transposing directives, the decision in Commission v Luxembourg appears to be subsumed within the perspective of the freedom to pro-
vide services, perhaps ill-advisedly. At the very least, the reasoning is somewhat laconic. For the ECJ is overlooking the fact that the classification of a provision as overriding mandatory law does not produce effects only in intra-European trade but also, and specifically in relation to non-Member States. It may well be that there is little requirement to enforce the law imposed by directives as against other Member States, owing to comparable levels of protection\textsuperscript{214}; yet, that must not obscure the fact that, specifically in regard to legal systems which do not provide for comparable protection, the implementation as overriding mandatory law of the law imposed by directives by way of transposing law can be necessary.\textsuperscript{215} This consideration specifically underpinned the decision in \textit{Ingmar} (see Section 3 paragraph 5) with which the decision in \textit{Commission v Luxembourg} is inconsistent. Of course, for there to be an overriding mandatory provision, the indirect horizontal effect of the directive under the transposing law of the forum needs to be founded on the substantive objectives of the directive (see Section 3 paragraph 15 et seq.). Yet the ECJ did not go further into this question which, in regard to part-time work, fixed-term contracts and proof of conditions of employment, is by no means free from doubt (see Section 8 paragraph 19, Section 11 paragraph 8, Section 13 paragraphs 65 et seq.). For the rest, one is able to be entirely sanguine in regard to the transposing law of other Member States, which is likely to be equivalent. On that basis it would, for example, be justified not to insist on the enforcement of overriding mandatory law where the law applicable to the contract is that of another Member State.\textsuperscript{216} Of course, it should not be overlooked that the directive on the posting of workers itself in Article 3 section 1 includes as part of the hard-core conditions of employment, such as maximum working time or antidiscrimination provisions which are harmonised on a European-wide basis and must be implemented as overriding mandatory law and, indeed, even as against other Member States.\textsuperscript{217} In its zeal to uphold the fundamental freedoms, the ECJ has plainly overlooked this. In that connection, in the decision in \textit{Finalarte} (paragraph 71, it dismissed the doubts raised by the Wiesbaden Labour Court\textsuperscript{218} as to the disproportionate nature of extending the German law on holiday entitlement, owing to European harmonisation; it did so, observing that the directive on working time laid down merely a minimum period of holiday entitlement.\textsuperscript{219} It is entirely possible to cor-

\textsuperscript{214} v. \textit{Hoek/Houwerzijl}, Comparative Study, p. 172, point out that posted workers will not in every case enjoy, under the laws of a Member State, adequate protection as measured by the yardstick of the country of origin.

\textsuperscript{215} In Italy the argument is understood as meaning that in the light of the fundamental freedoms there is a prohibition on the implementation of overriding mandatory law in regard to harmonised law as against Union citizens, see \textit{Faioli}, Mass. Giur.Lav. 2009, 675, 680 et seq.


\textsuperscript{217} For legal policy criticism in regard to directive/transposing law (AEntG), see \textit{Krebber}, IPRax 2001, 22, 26.

\textsuperscript{218} ArbG Wiesbaden NZA-RR 1998, 217, 222; ArbG Wiesbaden AP No. 1 on § 1 AentG.

\textsuperscript{219} ECJ AP No. 8 on § 1 AEntG, paragraph 27 – Finalarte.
rect this. In the *Commission v Luxembourg* case this aspect of the implementation of overriding mandatory law based on directives was not raised as a specific problem with the result that nothing is prejudged. The problem could therefore be raised in the context of a preliminary reference to the ECJ, appropriately concerning law transposing a directive that is better suited as overriding mandatory law than the matters discussed in the action for failure to fulfil obligations brought against Luxembourg. A suitable opportunity would be presented in regard to the law on mass dismissals (see Section 13 paragraph 53).

The decision in the *Laval* case continues to cause controversy, chiefly in regard to statements by the ECJ concerning the right to take collective action. The relationship between fundamental freedoms and social fundamental rights resulting from this and the other decisions mentioned have given rise, particularly in Germany, to intensive legal debates (see also Section 3 paragraph 8) and has resulted in judges of the ECJ being prompted to defend or relativize the decisions.

As already in the *Viking* judgement, which was handed down a week previously, the ECJ upheld the right to take collective action as a fundamental right, but also emphasised that its exercise by associations is subject to restrictions. In the *Laval* case, that was the freedom to provide services and, in the *Viking* case, freedom of establishment. Collective action was not excluded from the scope of the fundamental freedoms, as the ECJ had ruled in the *Albany* case in respect


221 See most recently *Zwanziger*, Special annex to RdA 5/2009, 10 et seq.; also *Kamanabrou*, EuZA 2010, 157, 167 et seq.


224 ECJ AP No. 1 on Article 85 EG Treaty – Albany.
of collective agreements in relation to the competition-law provisions. Unlike in that case, one could not say, in respect of the relationship between fundamental freedoms and collective action, that infringements of fundamental freedoms were necessarily associated with the exercise of freedom of association.\textsuperscript{225} Even if the Court emphasises that fundamental freedoms must be weighed against social objectives\textsuperscript{226}, it assesses the collective action as a restriction on freedom to provide services in the light of the \textbf{recognised justificatory ground for restrictions on the freedom to provide services}. Here again, it is not, as required,\textsuperscript{227} the fundamental right as stated above that comes into play as a justificatory ground\textsuperscript{228}, but its objective, namely \textbf{employee protection}.\textsuperscript{229} In the Viking case that led to the question whether the collective action was suitable and necessary, in furtherance of the interests of employee protection, in order to justify a restriction on freedom of establishment.\textsuperscript{230} Even if, in the specific case, it was entirely possible to have doubts as to necessity, it is indeed strange that the ECJ pays only lip service to the weighing- up of opposing rights\textsuperscript{231} but, in fact, in light of the fundamental freedoms, reviews the aim of the industrial action in asking whether the collective action served to protect employees.\textsuperscript{232} According to current understanding of fundamental rights the \textit{ultima ratio} principle\textsuperscript{233} permits a review of whether action is necessary in order to achieve the collective-bargaining objective pursued, at any rate, where the collective agreement is obtainable without industrial action. Conversely, \textbf{collective bargaining autonomy prohibits a review of the claims under the collective bargaining process}.\textsuperscript{234} The ECJ case also seems questionable in regard to the international obligations of Member States and the protection of fundamental rights at Union level.\textsuperscript{235} At least, as a result of the enhancing of fundamental rights by the EU Charter of Fundamental Rights following the entry into force of the Lisbon Treaty, the ECJ will have to establish concordance between fundamental rights in regard to industrial action and the fundamental freedoms and will no longer be able to shelter behind the classic review of whether fundamental freedoms are restricted as a

\begin{footnotes}
\item[225] ECJ AP No. 3 on Article 43 EG, paragraph 52 – Viking.
\item[226] ECJ AP No. 3 on Article 43 EG, paragraph 79 – Viking; ECJ AP No. 15 on Article 49 EG, paragraph 105 – Laval.
\item[227] Bryde, SR 2012, 2, 11.
\item[228] Fallon, Rev. crit. DIP 2008, 781, 787.
\item[229] ECJ AP No. 3 on Article 43 EG, paragraph 79 – Viking; ECJ AP No. 15 on Article 49 EG, paragraph 103 – Laval.
\item[230] ECJAP No. 3 on Article 43 EG, paragraph 84 – Viking.
\item[231] Too undifferentiated is a classification by Frenz, RDA 2011, 199 et seq.
\item[232] Critical commentary in that connection also from Davies, ILJ 2008, 126, 141; Engels, ZE-SAR 2008, 475, 482; see also Hanau, SR 2011, 3, 7; see also Schlachter, in Blanpain/Śwątkowski (Eds.), The Laval and Viking Cases, Alphen aan den Rijn 2009, pp. 63, 65, 69 et seq.
\item[233] See with further references Kittner/Zwanziger/Deinert-Deinert, S. 136, paragraph 18.
\item[234] Dieterich, FS Otto, 2008, p. 45, 53; see also LAG Sachsen NZA 2008, 59, 70; for another view see Otto, FS Konzen, 2006, p. 663 et seq.
\item[235] Zwanziger, DB 2008, 294, 296; likewise AuR 2011, 386 et seq.
\end{footnotes}
result of collective action. This discussion of the conflict-of-laws rules is not the proper framework for a more detailed discussion of this. It remains, however, to be seen how the principle of proportionality which, moreover, the courts of the Member States are competent to examine, will be revitalised because this will ultimately determine whether any significant effects will be noticeable at national level.

In regard to employee protection as a justification for restrictions on freedom to provide services, the ECJ considered it possible for minimum wages to be extended to posted workers, as is also provided for in Article 3 section 1 of the directive on the posting of workers. That is ultimately a continuation adapted to the directive of the earlier case law on the fundamental freedoms (see, in that connection, paragraph 71 below). However, the ECJ took the view that the posting employer could not be required to enter into wage negotiations if he was unable to establish which requirements he would have to observe in regard to the minimum wage. From a German perspective, it is also particularly noteworthy that the ECJ regarded a blockade of building sites as plainly covered by the fundamental right to take collective action, and similarly that industrial action in favour of the conditions of employment of third parties is permissible from a European perspective.

As a result of all the foregoing considerations, it must be stated that the directive, as interpreted by the ECJ, establishes the scope of the freedom to provide services at the same time as harmonising the restrictions in terms of private international law imposed on it by the Member States. It constitutes a maximum harmonisation inasmuch as the intervention of overriding mandatory law from elsewhere, whilst not being entirely precluded, must be an exception to be justified under Article 3 section 10 of the directive on the posting of workers. The creation of overriding mandatory law is by no means provided for only in regard to intra-European posting configurations to which the directive, of course, only applies. Thus, overriding mandatory provisions of employment law cover both the employment contract of an employee provisionally posted from Canada and also the employment contract of a Chinese national who represents a Chinese undertaking in Germany and to whose employment contract Chinese law is applicable, pursuant to the escape clause. Overriding

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236 Zimmer, AuR 2012, 114 et seq.
237 ECJAP No. 3 on Article 43 EG, paragraph 80, 83 – Viking; emphasised also by v. Danwitz, EuZA 2010, 5, 17.
239 See also Joussen, ZESAR 2008, 333, 336.
241 Deinert, RdA 2009, 144, 151.
mandatory law must, for its part, meet the requirements of higher-ranking law, that is to say European directive law and primary law. The classification of the provisions of the forum as overriding mandatory provisions, whether by legislative enactment or by way of interpretation, will normally be justified by a public interest in specific employee protection. Nor moreover, does the directive on the posting of workers preclude the enactment of overriding mandatory law on grounds other than employee protection (paragraph 29), since this is outside its scope of application.

On an overall assessment, it is apparent that overriding mandatory provisions will have to retain their relevance, also in Europe, as **matters reserved for national policy** (see paragraph 29), as long as individual policy areas are left to the Member States (and under the Lisbon judgement of the Federal Constitutional Court243 those must be specific policy areas). This system is, however, **overlaid** by the European fundamental freedoms (as interpreted by the ECJ) and by the directive on the posting of workers.244 In that connection, **Francescakis** already in 1966 pointed out that the significance of overriding mandatory provisions would reduce with increasing Communitarisation.245 Viewed in that light, it must also be acknowledged that the directive on the posting of workers compels Member States to create overriding mandatory law, which is actually only a consequence of the community of law and of the European enrichment of (positive) public policy. On the other hand, the directive on the posting of workers acts as a maximum harmonising act, which ultimately is only an expression of the fundamental freedoms issue. In that context, the question then arises as to the scope of fundamental freedoms and fundamental rights, which is a matter of intense debate. The question raised as to the relationship of public policy under Directive 1996/71/EC to public policy246 under the Rome I Regulation ought to be answered in the following way. **Article 9 section 1 of the Rome I Regulation** provides the **doctrinal framework** whilst the detailed implementing rules are subject mainly to primary and secondary law and are only partially provided for in Article 9 of the Rome I Regulation itself (see paragraph 28). In that connection, the interaction of international employment law with European law247 is characterised by the fact that the national framework within which PIL operates can have far-reaching influences on the exercise of freedom to provide services to which a kind of brake is applied by the directive on the posting of workers.248 That militates in favour of the European legislature having a wide area of discretion since, viewed in that light, the directive on the posting of workers naturally enhances the freedom to provide services. That area of discretion must also have

243 BVerfG NJW 2009, 2267.
244 Calsen, p. 104 et seq.; see also Barnard, ILJ 2009, 122, 129 et seq.; Venturi, NLCC 2009, 771, 785 et seq.
245 Francescakis, Rev. crit. DIP 1966, 1 et seq.
247 In detail on that, see v. Hoek, p. 249 et seq.
248 See in detail Davies, CML Rev. 1997, 571 et seq.
been accepted by the ECJ which assumes the directive to be compatible with the freedom to provide services without conducting any express examination of this question (see paragraph 64). All the same, harmonisation by the directive **in a certain way creates legal certainty.**²⁴⁹ That is less true of the national level²⁵⁰ since under the directive within certain limits, more far-reaching overriding mandatory law is also possible. Yet, in regard to the ‘hard core’ of employment conditions, the posted worker is, however, fully cognisant of the fact that, at least in that regard, he is entitled to assert the rights applicable at the temporary place of employment.

²⁴⁹ See Marchal Escalona, REDI 2002, 811, 812 et seq.
²⁵⁰ On that, see Moreau, JDI 1996, 889, 901.
²⁵¹ For information on transposition in selected Member States, see v. Hoek/Houwerzijl, Comparative Study.

It is true that, under recital 40 in the preamble to the Rome I Regulation, the dispersal of conflict-of-laws rules among different legal instruments is to be avoided. On the other hand, under the second sentence of that recital, the possibility should be retained of including conflict-of-laws rules for contractual obligations in provisions regarding particular matters. Accordingly, recital 34 provides that the directive on the posting of workers, which predates the Rome I Regulation, is to remain **unaffect ed by the conflict rule for individual employment contracts** in Article 8 section 1 of the Rome I Regulation. Accordingly, the directive on the posting of workers is Union law taking precedence within the meaning of Article 23 of the Rome I Regulation.

**d) Transposition by Member States²⁵¹**

The anticipatory **German legislation** (see paragraph 48) was enacted in the **law on the posting of workers (AEntG)²⁵².** It was provided therein that collective wage bargaining agreements having a uniform minimum wage and collective agreements concerning leave entitlement could under certain conditions have internationally binding effect. Also collective agreements concerning joint facilities, as provided for under Paragraph 4 section 2 of the law on collective agreements, should have mandatory effect, provided that there was no doubling of the burden on the undertaking as a result of competition with domestic provisions.

The legislation subsequently acquired a European substructure in the form of the directive on the posting of workers (paragraph 44). Where the legislation was not compatible with the directive, it was necessary for the provisions of the latter to be transposed. That related specifically to implementation of the ‘hard-
core’ of terms and conditions of employment as overriding mandatory provisions. Until then, the legislation had limited itself to extending provisions of collective agreements concerning minimum remuneration and leave entitlement. The abovementioned transposition was effected by the insertion of a new Paragraph 7 (old version henceforth superseded as Paragraph 2 of the legislation) by means of the so-called correcting law. The initial time-limit imposed on the validity of the legislation was abandoned on transposition of the directive on the posting of workers. The constitutionality of extending to posted workers the conditions of employment of the host State was from the beginning a matter of controversy. But the Federal Labour Court held the Posting Act as compatible with the Constitution as far as it results to a blocking effect of a collective agreement extended under the legislation to have against other less favourable collective agreements to which the parties to the employment contract are bound (Paragraphs 1 to 4). Likewise, the ECJ deemed the extension, under the posting legislation, of minimum wages under universally binding collective agreements to workers in the building sector as a justified restriction on the freedom to provide services. It also deemed it possible in the Finalarte case, a judgement in response to a reference for a preliminary ruling from the Wiesbaden Employment Court, for the extension to posted building workers of the German holiday payment fund scheme to be compatible with freedom to provide services. At any rate the ECJ held that the transitional provisions in regard to the free movement of Portuguese workers after the act of accession were not relevant in relation to posted workers.


256 ECJ AP No. 4 on Article 49 EG – Portugalua Costruções.


258 ECJ AP No. 8 on § 1 AEntG – Finalarte. On the measures for examining whether additional protection is given, see Velikova, p. 187.

Accordingly, in the *Finalarte* case the ECJ did not test the paid leave funds scheme for posted workers against the yardstick of freedom of movement.261

As a result of an amending law of 2009 the law on the posting of workers acquired a conceptually fresh face.262 In the context of coalition negotiations, the SPD in the grand coalition with the CDU secured minimum wage legislation specific to certain sectors.263 Subsequently, the minimum wage legislation was made a reality for various sectors by the extension of collectively agreed minimum wages under the law on posting264 and by the possibility of laying down minimum rates of remuneration for employment (but not of other employment conditions) under the law on minimum conditions of employment265 in sectors in which employers bound by collective agreements at national level employ fewer than 50% of the workers falling within the scope of the collective agreements. In 2011, the minimum wage level for hired workers – already envisaged under the preceding grand coalition but not achieved266 – was laid down in Paragraph 3a of the law on the hire of workers as additional element of the German minimum wage legislation.267 If in the case of temporary agency work that is breached by a collective agreement, under Paragraph 9 section 2 of the law on the hire of workers the principle of equal treatment cannot be departed from under that collective agreement. But nor, by a mere reference to it, does the minimum wage level allow the hirer to depart from the principle of equal treatment.268 Under Paragraph 9 section 2 of the law on the hire of workers such departure is possible only by means of or on the basis of a collective agreement.

Paragraph 2 of the Law directs that the provisions of the hard-core also to apply to employment relationships between an employer established abroad and his workers employed within the country.

On the minimum rates of pay under Article 3 section 1 (c) of the directive on the posting of workers, it has to be stated, first of all, that there existed in Germany no statutory minimum wage for a long period. Since 1 January 2015 the situation changed. Since then the Mindestlohn gesetz269 states that every em-

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261 ECJ AP No. 8 on § 1 AEntG – Finalarte.
264 Law on the mandatory conditions of employment for posted workers and for male and female employees employed within the country (Law on the posting of workers AEntG) of 20.4.2009 BGBl. I 799.
269 Act on Minimum Wage (Mindestlohn gesetz) of 11 August 2014, BGBl I 1348.
ployee is entitled to a minimum wage of 8.50 € per hour. Minimum Wages may also feature in an extension of collective bargaining provisions. Furthermore, the principles on unethical remuneration elaborated by the courts under Paragraph 138 of the German Civil Code is to be regarded as overriding mandatory law by reference to Paragraph 2 section 1 of the legislation on posting. This may begin from the moment from which the employee transfers the central focus of his life, even if only temporarily, to the place of the performance of the work. That could be the case, for example, after six months. The minimum paid annual leave under Paragraph 2 section 2 of the posting law is the statutory leave entitlement under the Federal legislation on holiday entitlement. Maximum working time and minimum rest periods under Paragraph 2 section 3 of the posting law are determined by the working time legislation and also under more specific statutory provisions, such as the legislation concerning driving personnel. Under Paragraph 2 section 4 of the posting law the conditions governing the hire of workers, in particular by temporary employment undertakings, are internationally mandatory. Thus, practically the whole sector of the legislation on the hiring of workers is internationally mandatory, including the hire of workers where no licence is required.

The same must apply to the principle of equal treatment. For the employment law provisions of the legislation on the hire of workers are specifically also covered. The European directive on temporary agency work does not preclude that but confirms in Article 5 that the Union legislature also views the equal treatment of temporary agency workers as a fundamental principle of employee protection. The provisions concerning safety, health and hygiene

270 BAG AP No. 64 on § 138 BGB; BAG NZA 2012, 974.
271 Cf. Deinert, Internationales Arbeitsrecht, Section 10 paragraph 100.
272 This is also true for unlawful hiring of workers, BAG 17th April 2013 – 10 AZR 185/12. On substantive law issues concerning cross-border temporary work, see Kienle/Koch, DB 2001, 922.
274 C. Müller, p. 392; Franzen, EuZA 2011, 451, 460; Staudinger-Magnus, Art. 8 Rom I-VO paragraph 171; Däubler-Lakies, TVG, § 2 AEntG, paragraph 9; Thüising-Thüising, § 2 paragraph 2.
278 For another view see Franzen, EuZA 2011, 451, 464.
279 Cf. on the interpretation of both Directives in a way that is compatible, see Schlachter, U-JCLLIR 2012, 177.
at the place of employment (Paragraph 2 section 5 of the posting legislation) encompass the whole public-law area of German employment protection law, including those provisions on working time which directly relate to employment protection and not merely to maximum working time and minimum rest periods, such as, for instance, provisions as to night-time and shift working. Under this heading are subsumed the employment protection legislation, the numerous employment protection regulations, as well as accident prevention provisions on the basis of Paragraph 16 of Social Security Code VII. Protective measures for pregnant women, nursing mothers, children and young persons (Paragraph 2 section 6 of the posting legislation) are provided for in the legislation on the protection of mothers and in the legislation on the employment protection of young persons. The prohibitions on employment provided for therein are addressed. The concept of protective measures is to be construed broadly. For example, it also embraces the prohibition on the dismissal of pregnant women (see Section 13 paragraph 48).\textsuperscript{280} Advances on maternity benefit also fall under this provision (see Section 12 Paragraph 114). Amongst the provisions on antidiscrimination (Paragraph 2 section 7 of the posting legislation) are the general legislation on equal treatment with its employment law provisions, in particular the prohibition on unequal treatment under Paragraph 7, as well as the provisions on compensation under Paragraph 15. The protection against discriminatory dismissal would also fall under this provision. Paragraph 75 section 1 of the works council legislation\textsuperscript{281}, and Article 157, of the TFEU\textsuperscript{282} also form part of antidiscrimination law. Since what is mainly entailed are prohibitions against disadvantages, Paragraph 4 of the legislation on part-time working is also included.\textsuperscript{283}

Whereas general conditions of employment under Paragraph 2 of the legislation on the posting of workers are extended in such a way that the underlying legal provisions acquire the characteristics of overriding mandatory provisions and thus apply to all employment relationships covered by them, employment conditions laid down in universally binding collective agreements could be extended only to specific sectors from the beginning of the posting legislation. But the AEntG was amended several times and since the Act of August 2014 which also installed the Minimum Wage Act the AEntG was amended to all existing branches. From that time the AEntG is one piece of the Minimum Wage Legislation. It allows higher minimum wages for special branches by legal regulation after proposition of the social partners (or by generally binding collective agreement in the construction industry). Such a regulation or generally binding collective agreement may cover – besides minimum wages – minimum paid holidays, common facilities for paid holidays, including contributions and bene-

\textsuperscript{280} Däubler, RIW 1987, 255, 259.
\textsuperscript{281} Däubler, RIW 2000, 255, 259.
\textsuperscript{282} Ulber, AEntG, § 2, paragraph 42.
\textsuperscript{283} ErfK-Schlachter, Rom I-VO Section 2 paragraph 2.
fits, and working conditions in the sense of the ‘hard core’ of Section 2 of the Act.

Under a decision by chamber of the Federal Constitutional Court, the regulatory authorisation is constitutional.\textsuperscript{284}

Paragraph 14 of the posting legislation provides for general liability on the part of the undertaking. An undertaking will be liable, where it instructs another undertaking, for the liabilities of the undertaking instructed or its successor undertaking. The Federal Employment Court has affirmed its constitutionality.\textsuperscript{285}

The Act includes further provisions of supervision and enforcement. These do not implement satisfactorily the enforcement directive (see paragraph 60). At present, the German legislator has not yet adopted an implementation Statute.

Austria as well, did not wish to wait for the directive on the posting of workers and already in 1995, in the law against abuse, introduced its own legislation on posting by an amendment to Paragraph 7 of the law adjusting the legislation on employment contracts (AVRAG).\textsuperscript{286} The directive on the posting of workers was then transposed as a result of amendments made in a federal law of 1999\textsuperscript{287} to Paragraphs 7 AVRAG, 10 a AÜG and 4 section1 (1)(e) ASGG.\textsuperscript{288} The legal situation is now as follows: Paragraph 7 AVRAG provides that foreign employers who are not members of a party to an Austrian collective agreement must grant to their employees whose habitual place of employment is in Austria at least the same remuneration as is paid to comparable employees at the place of employment.\textsuperscript{289} This provision comes into play also in the case of permanent employment within national territory.\textsuperscript{290} It is an overriding mandatory provision.\textsuperscript{291} The Supreme Court, however, construes it not merely as an overriding mandatory provision but also includes it among the binding provisions which, under Article 8 section 1, second sentence, of the Rome I Regulation, cannot be derogated from by the choice of law.\textsuperscript{292} It covers statutory remuneration and remuneration laid down in decrees and in collective agreements. On the last men-

\textsuperscript{284} BVerfG AP No. 4 on § 1 AEEntG (=NZA 2000, 948 = SAE 200, 265); for a critical view see Scholz, SAE 2000, 266.

\textsuperscript{285} BAG AP No. 1 on § 1 a AEEntG. The constitutional complaint lodged against this was not accepted for determination by the Federal Constitutional Court, BVerfG NZA 2007, 609.

\textsuperscript{286} Article III Federal Law amending the law on the employment of foreigners, the general social assurance law and the law adjusting the employment contract law (Antimissbrauchsge-setz), BGBl. I No 895/1995 (Article III also printed in AuR 1996, 104); to the same effect on that, see Drs, RdW 1996, 65; Mayr, in Resch (Ed.), Arbeitnehmerentsendung, p. 33 et seq; Runngaldier, in: Feik (Ed.), Die Freizügigkeit der Arbeitnehmer in Österreich, Vienna 1998, p. 57, 72 et seq; Spitzl, ecolex 1996, 181; Burger, ZAS 2012, 4, 9 et seq.

\textsuperscript{287} Federal Law amending the law adjusting the employment contract law, the law on the temporary hiring of workers, the law of the social and labour courts, the law on the employment of foreigners, the federal procurement law 1997, BGBl. I No 120/1999; see for this Binder, DRDa 1999, 1; DRDa 1999, 100 et seq; Blum, DRDa 1999, 412 et seq.

\textsuperscript{288} More recent account by Friedrich, Pécsi Munkájogi Közlemények 2010, 7 et seq.

\textsuperscript{289} See in more detail on that, Kirschbaum, DRDa 1995, 533, 534 et seq.

\textsuperscript{290} Rebhahn, DRDa 1999, 173, 175.

\textsuperscript{291} Junker, IPRax 1987, 469, 471 et seq.

\textsuperscript{292} OGH IPRax 2007, 460, for a contrary view, see Junker, IPRax 1987, 469, 471.
tioned category, the case law imposes a restriction in the sense that remuneration under collective agreements can only be extended if comparable employees at the place of employment can claim analogous remuneration from comparable employers.\textsuperscript{293} Thus, Paragraph 7 b AVRAG governs the posting by an employer from the EEA to Austria. Under subparagraph 1 of the provision those employees have a claim to remuneration at the level prevailing in the place of employment and to the statutory leave entitlement provided for by the UrlG, unless the law on holiday entitlement for building workers applies, and to observance of the working time provided for by collective agreement. That provision is butressed in the subsequent paragraphs by provisions concerning implementation and supervision. In respect of employers from non-Member States local wages are directed to be applicable by the reference to Paragraph 7 AVRAG in Paragraph 7 a AVRAG. Also, for the duration of the posting, Paragraph 7 a section 3 AVRAG provides for analogous leave entitlement under the law on leave entitlement, as long as the law on holiday entitlement for workers in the building sector does not apply, and a claim to observance of the working time laid down by collective agreement. An extension of the procedure concerning employers’ contributions in connection with leave entitlement to employers who are not head-quartered in Austria was effected in 2005 by Paragraphs 33 d et seq. of the law on holiday entitlement for building workers.\textsuperscript{294} The most significant difference between the provisions in the case of postings by undertakings from the EEA and by undertakings from non-Member States is in regard to liability for interruptions. Alongside the employer the principal contractor is jointly liable under Paragraph 7 a section 2 AVRAG for the wages whilst, in the case of posting by an EEA employer, a general undertaking in the case of employment on building sites, or in the event of unlawful subcontracting, will be liable for remuneration as a guarantor under Paragraph 7 c sections 2 and 3 AVRAG. Where provisions of collective agreements are extended for remuneration and working time, that will not be limited to the building sector. In the case of cross-border employment purporting to be in the context of the temporary hiring of workers, Paragraph 10 of the law on the temporary hire of workers governs leave entitlement under the law on holiday entitlement for employees posted to Austria unless the home holiday entitlement is greater. Paragraph 4 section 1 (1) (e) of the law on the labour and social courts makes provision for the Austrian courts to have jurisdiction in regard to claims arising out of the period of posting.

Thus, wages (not only minimum wages)\textsuperscript{295}, leave entitlement and working time of the place of engagement are extended, but in regard to the temporary hire of workers only leave entitlement. For the other aspects of the conditions

\textsuperscript{293} OGH ZfRV 2005, 35.  
\textsuperscript{294} Article 1 of the law amending the law on leave entitlement and termination payments for building sector workers (BUAG), the law on the temporary hiring of workers, the law on the labour and social courts, the law on the employment of foreigners, the 1988 income tax law and the bad weather compensation for building workers law 1957, BGBl. I 104/2005.  
\textsuperscript{295} Rebhahn, DRdA 1999, 173, 175, 178.
of employment under the so-called ‘hard core’ there is no provision for extension. However, the legislature proceeded on the assumption that the relevant provisions in that regard were nontheless overriding mandatory provisions with the result that there was no further requirement for transposition. Thus, maximum working times and minimum rest periods under the law on working time and the law on rest periods, respectively, will prevail over the foreign law governing the contract. The same applies to the law on protection at work. The provisions of the law on the protection of mothers and the law on the employment of children and young persons are also overriding mandatory provisions. In addition, anti-discrimination provisions have internationally binding effect. As to the conditions applicable to the hiring of employees, it is inferred from Paragraph 16 of the law which governs the cross-border hiring of workers that there is an intention that the law on the temporary hiring of workers is to have internationally binding force. That covers, in particular, the claim to compliance with the employment-protection provisions under Paragraph 6 of the law and the claim to normal local remuneration under Paragraph 10.

By means of the law on wages and social dumping Paragraphs 7 et seq. of the AVRAG provided for implementation and monitoring.

Consequent upon the bilateral agreement on freedom of movement between Switzerland and the EU, Switzerland enacted a law on the posting of workers which as to its contents is strongly inspired by the directive on the posting of workers. It provides for a ‘hard core’ of employment conditions to be extended. Provision for these may be made in laws or universally binding employment contracts or in “normal employment contracts” (Normalarbeitsverträge, see paragraph 92), under Article 360a of the law on obligations. The latter provide for official minimum wages to combat the unlawful undercutting of the level of wages normal for the place of employment. The first of this kind was laid down in the domestic sector. The extension of conditions of employment in universal employment contracts is not limited to specific sectors. Under Article 3 of the law on the posting of workers, the employer must guarantee accommodation of a normal standard, but is entitled to make reasonable deductions for accom-

296 National Council, XX. Legislative period, initiative application 1103/A, commentary – General Part, 3rd paragraph (p.10).
298 Schwimann, p. 111; Rehbahn, FS Strasser, 1993, pp. 59, 76.
299 Schwimann, p. 111; Rehbahn, FS Strasser, 1993, pp. 59, 77; Mayr, in: Resch (Eds.), Arbeitnehmerentsendung, pp. 33, 53.
300 Schwimann, p. 111; Rehbahn, FS Strasser, 1993, pp. 59, 77; Mayr, in: Resch (Eds.), Arbeitnehmerentsendung, pp. 33, 53.
301 Rehbahn, DRdA 1999, 173, 176.
302 Schwimann, p. 111; likewise WBI 1994, 217, 222.
303 BGBl.I 24/2011, on that Kühteubl/Wieder, ZAS 2011, 208 et seq.
304 On its international civil-procedural consequences, see Furrer/Schramm, SZIER 2003, 37 et seq.
305 In Portmann, EuZA 2011, 419, 420, with further references.
moderation and subsistence, in accordance with local practices. Principal contractors must under Article 5 section 1 of the law on the posting of workers require subcontractors to abide by the law. Otherwise, they are liable under Article 5 section 2 of the law on the posting of workers jointly and severally with the contractor for non-observance of the minimum conditions. Finally, Article 11 of the law provides for a right of action for organisations representing the interests of employers or employees.

In France, the directive on the posting of workers was transposed by Article L 1261–1263-2 of the Labour Code. Under Article L 1261–3 the enactment deals with the temporary posting of workers by an employer from abroad. These provisions, in addition to transposing the directive, also regulate other matters. In France as well, the directive on the posting of workers was anticipated by national provisions. The extension of employment conditions under universally binding collective agreements under Article L 1264-4 in conjunction with Article L 2261–15 of the Labour Code is not limited to specific sectors. In addition, there is a special provision for extension for foreign airline companies having a base in France (see section 9, paragraph 153).

In Italy the directive on the posting of workers was transposed only in the year 2000 under Regulation 71/2000. In Spain, the directive on the posting of workers was transposed by law number 45/1999. Interestingly, this law obliges employers established in Spain to abide by the transposition provisions of the host State. The provisions are, however, made expressly subject to a reservation in favour of provisions under the ‘more favourable’ principle.

Worthy of note is the transposition in England: the non-applicability of laws in the case of work normally carried on outside the United Kingdom has been removed, in particular by the ERA 1996. That could of course lead to a comprehensive application of the English legislation on employee protection to posted workers going beyond the permissible limits under Article 3 section 10 of the directive on the posting of workers in the light of freedom to provide services. On the other hand, the courts do not seek to apply English laws in every case of employment abroad (see Section 13 paragraph 28). The intended statutory amendment in relation to the application to workers posted to the United Kingdom gives no indication as to the question of applicability to employment outside the United Kingdom.

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306 Callsen, p. 99.
307 In detail, Robin, Dr. soc. 1994, 127 et seq; see Demarne, p. 274; for a comparative-law account in regard to Germany, see Beisiegel/Mosbacher/Lepante, JZ 1996, 668 et seq.
308 Overview in Henssler/Braun-Radoccia, Italy, paragraphs 215 et seq.
309 See on that Marchal Escalona, REDI 2002, 811, 818.
310 On that see Deakin/Morris, paragraph 2.47; Dicey, Morris & Collins, paragraph 33-090; Morse, FS Gaudemet-Tallon, 2008, p. 763, 766.
311 Deakin/Morris, paragraph 2.49.
313 Morse, FS Gaudemet-Tallon, 2008, pp. 763, 769 et seq.
In Finland as well, where the directive on the posting of workers was transposed in 1999, the extension of employment conditions under collective agreements is not limited to the building sector.\textsuperscript{314} However, already before the adoption of the directive on the posting of workers statutory provisions were enacted declaring universally binding collective agreements to be internationally binding.\textsuperscript{315}

4. Overriding mandatory provisions of the lex causae

Article 9 of the Rome I Regulation contains in Paragraph 2 a provision concerning overriding mandatory provisions of the forum and, in Paragraph 3, a provision for overriding mandatory provisions of the \textit{lex loci solutionis}. However, no provision is made for the overriding mandatory provisions of the \textit{lex causae}. In itself, however, Article 9 section 3 of the Rome I regulation does not distinguish between the overriding mandatory provisions of the \textit{lex fori}, \textit{lex causae} or \textit{lex loci solutionis}. In fact, the \textit{lex fori} and/or \textit{lex causae} may at the same time be the \textit{lex loci solutionis}. Now it might be thought that the overriding mandatory provisions of the \textit{lex causae} likewise can only apply in the restricted framework of the special connecting rule under Article 9 section 3.\textsuperscript{316} However, Article 9 section 3 has no such restricting effect. The rule restricts the possibility of applying the overriding mandatory provisions of non-Member States but does not seek to restrict the application of overriding mandatory provisions called upon to apply on another ground. That is expressly put beyond doubt by Article 9 section 2 of the Rome I Regulation which expressly provides (alongside Paragraph 3) for the application of the overriding mandatory provisions of the forum, without that being in any way restricted. On a correct view, the law applicable to the employment contract also encompasses the overriding mandatory provisions of the applicable legal order.\textsuperscript{317} Thus, the same will apply for the \textit{lex causae} as for the \textit{lex fori} (see paragraph 31). In that connection, as well, the doctrine of the applicable law of obligations (see paragraph 84) is therefore relevant. But then the \textit{lex causae} will encompass the \textbf{overriding mandatory provisions of the law applicable to the employment contract} in the same way as it may encompass the overriding mandatory provisions of the \textit{lex fori}, where \textit{lex causae} and \textit{lex fori} are identical, without any \textbf{restriction} under Article 9 section 3 of the Rome I Regulation.

\begin{footnotes}
\footnote{314} Liukkonen, p. 197 et seq.
\footnote{315} Liukkonen, p. 86 et seq.
\footnote{316} See Maultzsch, RabelsZ 75 (2011), 60, 95; Kuckein, p. 69 et seq.; Reithmann/Martiny-Freitag, paragraph 646.
\footnote{317} See also E Lorenz, RdA 1989, 220, 226; cf. also Philip, in North (Ed.) EEC Convention p. 81, 81, 101, 103, passim.
\end{footnotes}
5. Effects of the overriding mandatory provisions of third countries

a) Problem and solutions

The problem as to the application of the overriding mandatory provisions of third countries raises the issue as to whether the overriding mandatory provisions of the state whose law is neither the lex fori (see on that paragraph 19 et seq.), nor the lex causae can be brought into play (see on that point paragraph 80). This question may arise in many different configurations, for example, where a French employee of a German employer is intended to be engaged outside the European Union under an employment contract in which German law was chosen to be the applicable law and where the employee has no employment permit for that purpose. It will also arise where, for example, the matter concerns compliance with local maximum working times in the case of a German worker temporarily posted abroad by a German employer. It may indeed be that the problem has hitherto not appeared to have discernible relevance in European courtrooms. It is however of much significance from an employment law point of view, and is especially important in regard to practical implementation, including outside judicial proceedings.

The examples are not random, in view of the fact that we are dealing with a sector entailing performance in a non-Member State. Most problem cases involving the overriding mandatory provisions of a non-Member State concern the lex loci solutionis. Specifically in their case consideration of such overriding mandatory provisions appears to be an issue of equity under private international law. For judicial consideration of such provisions is ultimately an illustration of the fact that the parties cannot evade the mandatory law applicable at the place of performance. Thus, consideration, from a conflict-of-laws perspective, of the interests of the parties thereby affected is thus required.

Article 7 section 1 of the Rome Convention provided for the possibility of giving effect to the overriding mandatory provisions of non-Member States. What is meant thereby are the provisions of a third country’s law in relation to the lex fori and the lex causae. However, in regard to this provision, Article 22 section 1(a) of the Rome Convention provided for the possibility of making a reservation in order not to apply that rule. The Federal Republic of Germany, amongst other countries, availed itself of this possibility. The draft proposal

318 For a comparative law view on the implementation of foreign overriding mandatory provisions, Symeonides (Ed.) Private International Law at the End of the 20th Century, p. 3, 70 et seq.
319 Lando/Nielsen, CMLRev. 2008, 1687, 1722.
321 Chong, J PIL 2001, 27, 40; in detail on the question whether Article 7 section 1 TEU (now Article 9 section 3 of the Rome II Convention) brings about equity in an individual case, see Coester, ZVglRWiss82 (1983), 1, 17, et seq.
on the reform of the PIL law\textsuperscript{324} (Section 2 paragraph 6) initially reproduced Article 7 section 1 of the Rome Convention in Article 34 section 1 of the EG-BGB.\textsuperscript{325} However, in the course of the further legislative procedure that provision was deleted and the question of the application of the overriding mandatory provisions of third countries remained a matter to be clarified by the courts and academic writers.

Prior to the Rome I Regulation three theories were advanced in Germany in regard to the solution of the issue of the overriding mandatory provisions of third countries.\textsuperscript{326} They refer in part to the question already discussed above (paragraph 31) as to whether a general referral, along with the law applicable to the contract, also calls into operation the overriding mandatory provisions of the law determined to apply; the replies given to that question have influenced those theories.

- The \textit{theory of the applicability of the law of obligations} regards the overriding mandatory provisions as part of the law applicable to the contract and (without prejudice to supervening German overriding mandatory provisions) permits only the overriding mandatory provisions of that legal order apply which is the law applicable to the contract. Where German law is the law applicable to the contract, the overriding mandatory provisions of a third country would not be applicable at all. As far as is discernible, that theory regarding third country overriding mandatory provisions has practically no supporters left.

- The doctrine of the \textit{substantive-law consideration} of foreign mandatory law which above all was advanced by the courts provided for foreign prohibitions, as factual constraints, to be taken into account under the law applicable to obligations where these, for example, impeded the performance of obligations, or as yardsticks of moral decency\textsuperscript{327,328}

- Academic writers, finally, have predominantly advocated the \textit{doctrine of the special connecting rule} (see paragraph 6 above).\textsuperscript{329} Under that rule third country overriding mandatory provisions are to be applied where they then-
selves demand to be unconditionally applied, there is a sufficiently close connection with the factual situation and the purpose of the overriding mandatory provision is approved by the forum in which connection, at least in part, the power of the issuing State actually to enforce the rule is also required (theory of power\textsuperscript{330}).\textsuperscript{331}

The doctrine of the special connecting rule is founded on the notion that overriding mandatory provisions must always have a separate connecting rule and cannot be called into operation by the law applicable to the contract. This premise is open to rebuttal for weighty reasons (see paragraphs 31 and 80) which, of course, does not preclude third country overriding mandatory provisions appertaining neither to the forum nor to the \textit{lex causae} from being subsumed under a special connecting rule. The doctrine of the law applicable to obligations. Conversely, the doctrine of the applicability of the law of obligations is correct to the extent that the special connecting rule for overriding mandatory provisions under Article 9 of the Rome I Regulation is not exclusive, but irrespective of it the overriding mandatory provisions of the law applicable to obligations may also be covered by it (cf. paragraphs 31 and 50 and 80). Of course, that still does not say anything about the question of a special connecting rule for the overriding mandatory provisions of third countries (the question was dealt with in the Rome I Regulation in the sense of cumulation, see paragraph 31 above).

In \textbf{Austria}, Paragraph 1 section 1 of the PIL law was used as the connecting rule for overriding mandatory provisions in general, that is to say, for both those emanating from third countries and for those of the forum.\textsuperscript{332}

Under Article 19 section 1 of the Swiss \textit{law on PIL} a law which deviates from that of the \textit{lex causae} may be taken into consideration if it is directed to be mandatorily applicable and manifestly demands the overriding interests of the party to be taken into account, and there is a close connection with that law.\textsuperscript{333}

Under Paragraph 2, in determining whether the other law has to be taken into account, regard must be had to objective and consequences. Conversely, already prior to the Rome Convention, \textbf{Netherlands legislation} proceeded on the basis that laws of a foreign state may demand to be taken into account, even beyond the territory of that State and thus, where there is a sufficiently close connection may be applied notwithstanding the applicable law.\textsuperscript{334}

\begin{footnotesize}
331 On the other hand see \textit{Radtke, ZVglIRWiss.} 84 (1985) 325, 357; \textit{Kreuzer, Ausländisches Wirtschaftsrecht vor deutschen Gerichten, Heidelberg 1986}, p. 95.
333 \textit{Schäfer}, p. 292 et seq.
\end{footnotesize}
That corresponds in part to the doctrine of the special connecting rule pronounced in Germany.

Under English law contracts were unenforceable if they entailed performance of an act in a foreign friendly State which, under the law there applicable, would be unlawful. Ultimately, this principle is founded on English public policy, which encompasses respect for foreign public policy. By definition, that means an indirect application of third country overriding mandatory provisions comparable to the theory of substantive-law consideration in German doctrine. Following the United Kingdom’s declaration of a reservation in respect of Article 7 section 1 of the Rome Convention and the exclusion of the provision from application under Section 2 paragraph 2 of the Contracts (Applicable Law) Act 1990, it had however become open to question whether this common law rule still had validity.

The American method of taking into account third country overriding mandatory provisions following a weighing up of interests reveals a certain similarity with the doctrine of the special connecting rule (paragraph 84). Section 187 (2) (b) of the Restatement (Second) of the Conflict of Laws, presents a concept running counter to the concepts hitherto presented. Under that concept account is taken of the public policy of a legal system with a ‘materially greater interest’ which, but for a choice of law, would have been applicable; this is done by disapplying the chosen law in a specific case. In this way, the mandatory law of the lex causae, which would have applied but for the choice of law, will often be implemented.

Article 9 section 3 of the Rome I Regulation henceforth contains a specific provision concerning the issue of third country overriding mandatory provisions. This is a restriction as compared to the Rome Convention. It is guided by the English conception of the matter (see paragraph 88). Effect may be given to the overriding mandatory provisions of the State in which the obligations are to

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335 Regazzoni v. KC Setha [1958] AC (HL) 301; Ralli Brothers v. Compañía Naviera Sota y Aznar [1920] 2 KB (CA) 287; also in further detail Hartley [1997], 341, 388 et seq.; Schäfer, p. 232 et seq.
336 Chong, JPIL 2006, 27, 41.
337 Cf. Hayward, p. 127.
338 Chong, JPIL 2006, 27, 34 et seq.; Kuckein p. 256 et seq. Arguing that it has also maintained under the Rome I Regulation, Stone, p. 340.
339 Cf. Hartley [1997], 341, 396 with further references.
340 Hartley [1997], 341, 379; Symeonides, paragraph 437 et seq.
341 Symeonides, paragraph 437.
342 Symeonides, paragraph 441 et seq.
343 Ballarino, Riv.dir.int 2009, 40, 61.
be performed, or have been performed, where the overriding mandatory provisions render performance of the contract unlawful. Article 9 section 3 of the Rome I Regulation is restrictive in nature inasmuch as it covers only the overriding mandatory provisions of the State of performance. In addition, only such overriding mandatory provisions are concerned as will render performance unlawful. Under employment law, this could for example be prohibitions on employment. This provision is ultimately narrower than the doctrine of the special connecting factor and the doctrine of substantive-law consideration. It is nonetheless to be construed as definitive and precludes the further application of overriding mandatory provisions under the special connecting rule doctrine or the doctrine of substantive-law consideration. But this question has been put to the ECJ by the German Federal Labour Court in a preliminary ruling. Furthermore, the court held that it could be incompatible with article 4 section 3 EU if the Member States were not able and obliged to apply mandatory rules of other Member States. This will then only be permissible within the framework permitted by Article 12 section 2 of the Rome I Regulation. The attendant restriction in relation to the possibility of bringing third country overriding mandatory provisions into play is ultimately a compromise between States which were rather sceptical about the possibility of taking account of third country overriding mandatory provisions and other States which, in that connection, had adopted a more generous approach. However, in practical terms there ought to be nothing to preclude, in a specific case, a more generous taking into account of third country overriding mandatory provisions if these are, as it were, made part of the public policy of the forum.

The Rome II Regulation contains no provision on third country overriding mandatory provisions in Article 16. Since this issue plays a role specifically in the law relating to labour disputes reference is made to the matters set out under that heading (Section 15 paragraph 43).

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347 Koch/Magnus/Winkler v. Mohrenfels, Section 5 paragraph 58; Martiny, ZEuP 2010, 747, 780; and RIW 2009, 737, 746.
348 Rauscher-Thorn, Article 9 Rom I-VO paragraph 81; Maultzsch, RabelsZ 75 (2011), 60, 98; for a more reserved view in that connection however see Freitag, IPRax, 2009, 109, 115; for another view relying on the fact that substantive law consideration specifically does not take place in terms of a conflict of laws, see Martiny, ZEuP 2010, 747, 780; and RIW 2009, 737, 746; W-H Roth, FS Kühne, 2009, p. 859, 875.
349 BAG NZA 2015, 542.
b) Third-country overriding mandatory provisions

What constitutes an **overriding mandatory provision** is determined in accordance with the principles set out above (see paragraph 19 et seq.). In that connection consideration will also be given to treating universally binding provisions of a collective agreement as overriding mandatory provisions (see, for German universally binding provisions under collective agreements, paragraph 35).\(^{352}\) Conversely, the application of a Swiss ordinary employment contract will, under Article 358 of the law of obligations, not be an overriding mandatory provision. If it were given regulatory effect, it could, in certain circumstances, be considered to be such if there were no overall employment contract which could be declared universally applicable. Since, however, the ordinary employment contract can be departed from under Article 360 section 1 of the law of obligations it will not prevail against a foreign law applicable to the contract.\(^{353}\) It is thus not an overriding mandatory provision. Nor indeed, can the English practice of applying the whole of statute law be upheld, at least from the perspective of the forum (see paragraph 117). Not all English laws will be regarded as overriding mandatory provisions on the basis of their contents. Nor would they satisfy the strict requirements of EU law as to permissibility in regard to the laying down of overriding mandatory law (see on that point, paragraphs 61 et seq.).\(^{354}\)

In examining whether a provision of a third country is an overriding mandatory provision the notions of the forum are not to be taken as the basis, but rather the **concepts of the State which enacted the rule**.\(^{355}\) Even if in the forum no such weight is attached to the interest pursued by the rule as would render it internationally mandatory enforceable, there may nonetheless be an overriding mandatory provision if in the State of enactment, the equivalent weight is attached to that interest.\(^{356}\) Conversely, a rule may not be an overriding mandatory one, even though the forum proceeded on the basis that there was an international will to enforce it, if the State of enactment does not have that interest or does not pursue it.

The relevant provisions are those of the State in which the obligations are performed. In that connection, however, the focus is not on the place of performance in the legal sense.\(^{357}\) Rather the law to be focused on, is the law of all those States which oppose the **actual** or actually necessary acts of contractual performance.\(^{358}\) This follows from the rationale of Article 9 section 3 of the

\(^{352}\) See also *Gamillscheg*, IAR, p. 363 et seq. distinguishing however between public law universally binding collective bargaining provisions and private law provisions, corresponding to the view then held by *Gamillscheg* as to a separation between public and private law employment law provision.

\(^{353}\) *Birk*, FS Heini, 1995 p. 15, 40.

\(^{354}\) *Barnard*, ILJ, 2009, 122, 127 et seq.

\(^{355}\) *E. Lorenz*, RIW 1987, 569, 578.


\(^{357}\) For another view see *Pfeiffer*, EuZW 2008 622, 628.
Rome I Regulation (see in that connection paragraph 90) and is to some extent reflected in the case law of the English courts (see paragraph 88). By definition, the rule concerns acceptance and dealing with what cannot be prevented.\textsuperscript{359} The question as to which law determines the place of performance does not therefore arise.\textsuperscript{360} In that connection, we are dealing with a prior question (on that, see Section 6 paragraph 12) because the question as to the place of performance in the context of the conflict rule does not involve a pre-existing legal relationship, but rather an issue of fact.

95 Article 9 section 3 of the Rome I Regulation covers only those third-country overriding mandatory provisions which render performance unlawful. That is to be presumed in the case of certain prohibitions on employment. Also coming under this heading will be restrictions in relation to the employee’s duty to perform work. Maximum working times, for example, will render performance unlawful in proportion as they are exceeded.\textsuperscript{361} More difficult, however, is the question whether certain employee rights can also be enforced as overriding mandatory provisions of the State. Where, for example, an employee habitually employed in France with French law as the law applicable to the contract brings an action at his employer’s place of establishment in Germany in respect of remuneration for the period of a posting to Italy under Italian law, the question that arises is whether Article 36 section 1 of the Italian Constitution which requires payment of a wage ensuring a free and dignified existence can come into play by way of Article 9 section 3 of the Rome I Regulation. This provision could be construed under Italian legal doctrine as a \textit{norma di applicazione necessaria}, that is to say an overriding mandatory provision.\textsuperscript{362} Remuneration falling short of that must be replaced by an appropriate level of remuneration on an analogous application of Article 2099 section 2 of the Civil Code.\textsuperscript{363} However, remuneration falling short of what is required under Article 36 section 1 of the Italian Constitution does not render performance unlawful.\textsuperscript{364} Such a view of the matter is, however, too narrow. That is illustrated by the following example: if there were, for example, a maximum wage, it could be covered by Article 9 section 3 of the Rome I Regulation. The mandatory application of a maximum rate, but not of a minimum, would signify a contradiction in terms of value judgment, which would not be justifiable,\textsuperscript{365} although both cases involve a relationship of equivalence. Thus, the \textit{minimum entitlement of an employee} could be

\begin{itemize}
  \item \textsuperscript{358} Freitag, IPRax, 2009, 109, 114.
  \item \textsuperscript{359} Mankowski, IHR 2008, 133, 148.
  \item \textsuperscript{360} See also Lando/Nielsen, CMLRev. 2008, 1687, 1722; Magnus, IPRax 2010, 27, 41 focuses on the actual place of performance and in the case of where performance has not occurred the focus is on the place of performance applicable under the \textit{lex causae}.
  \item \textsuperscript{361} Freitag, IPRax, 2009, 109, 112.
  \item \textsuperscript{362} Cf. with further references Hausmann, JbItalR 4 (1991) 49, 55. However this is not to be inferred from the decision of the Corte Css. Giust.civ.Mass. 1974, 1872.
  \item \textsuperscript{363} Cf. with further references Hausmann, JbItalR 4 (1991) 49, 55.
  \item \textsuperscript{364} For another view see W-H Roth, FS Kühne, 2009, p. 859, 876.
  \item \textsuperscript{365} For a persuasive view see Freitag, IPRax, 2009, 109, 113.
\end{itemize}
implemented as a third country overriding mandatory provision. A separate question, in the example given, is then as to the treatment of the foreign situation (habitual place of employment in France) in the context of the application of Italian substantive law.  

In the German language version provisions are addressed, which will render the contract invalid. But in no way is only subsequent invalidity addressed. It is indeed clear from other language versions (e.g. English: “render the performance of the contract unlawful”, Dutch: “de tenuitvoerlegging van de overeenkomst onwettig maken”) that all provisions under which the contract would be unlawful, are addressed.

A comprehensive overview of third country overriding mandatory provisions which are capable of being given effect to by domestic employment courts cannot be given in the context of this exposition because ultimately all the legal orders of this world would have to be examined for potential third country overriding mandatory provisions. At this juncture, no such an attempt will therefore be made.

c) Taking into account the third country overriding mandatory provision

Under Article 9 section 3, second sentence, of the Rome I Regulation, the court’s discretion (cf. paragraphs 103 and 104) must be focused on the question of whether effect is to be given to overriding mandatory provisions, the nature and purpose of those provisions and the consequences to be expected. In that connection restraint is required and the application of those overriding mandatory provisions is to be restricted to exceptional cases because, under recital 37, overriding mandatory provisions on public interest grounds will be applied “in exceptional circumstances”.

From the point of view of legal certainty, it is indeed problematic to permit third country overriding mandatory provisions to be within the remit of judicial discretion since this will make it difficult for the parties to determine the legal situation. On the other hand, this consideration cannot justify completely abandoning the consideration of such overriding mandatory provisions because specifically in regard to performance they have actual influence on the parties’ options for action (assisted specifically also by the doctrine of substantive-law consideration in German case law, and by English case law).

As regards substantive law consideration under the old law, it could be questioned whether those substantive law consequences were to be too deduced from the law applicable to the contract or were to be reduced to the possibly milder

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367 See also Freitag, IPRax, 2009, 109, 113.  
368 Cf. Koch/Magnus/Winkler v. Mohrenfels, Section 5 paragraph 58.  
effects of the State of enactment. Where, for example, the overriding mandatory provision in the State of enactment merely precludes a right from being asserted, the question arises as to the validity of a transaction where ethical standards are contravened under Paragraph 138 of the Civil Code and German law is applicable to the contract. This question continues to arise under the new law. In that connection, much is to be said in favour of the courts’ discretion being restricted to conferring on the third country overriding mandatory provision no greater effect than it enjoyed in the State of enactment.

The application of third country overriding mandatory provisions requires, in the same way as application of the overriding mandatory provisions of the forum (see paragraph 36), a sufficient connection to the third country. This will follow from the statutory restriction to provisions of the State in which performance takes place or is to take place.

Under the Rome Convention there was also a provision in regard to the law at the place of performance. Article 10 section 2 required this law to be taken into account in regard, inter alia, to the manner of performance. This resulted in difficult demarcation problems with the law applicable to the contract which, as a matter of principle, also covered performance. In that connection, Article 9 section 3 of the Rome I Regulation contains a clear provision because it merely concerns overriding mandatory provisions having an effect on the lawfulness of performance.

Article 9 section 3 of the Rome I Regulation lays down first of all, that there should be a certain discretion in regard to whether third country overriding mandatory provisions should be taken into account. Effect may be given to third country overriding mandatory provisions. Since under the second sentence of this provision, in the same way as under Article 19 section 2 of the Swiss PIL law, in deciding whether to apply or not to apply the overriding mandatory provision, its nature and purpose, and the consequences of its application, are to be taken into account. It becomes apparent that what is being addressed here is the issue of equity in private international law. In that connection, it is of particular significance whether the overriding mandatory provision is of practical relevance to the parties, as is the case under the Common Law, where the focus is on whether performance is to be carried out in the State of enactment. That corresponds to the theory of power to some extent advocated in Germany (see paragraph 84).

A further feature of the discretion is manifested by the fact that effect may be given to third country overriding mandatory provisions. This discretion is not

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372 Rauscher-Thorn, Art. 9 Rom I-VOParagraph 69; Harris, in Ferrari/Leible (Eds.) Rome I Regulation p. 269, 310 et seq; Audit/d’Avout, paragraph 839; see also Velikova, p. 37.
373 Cf. also Mankowski, IHR 2008, 133, 148; Güllemann, p. 98.
374 Rauscher-Thorn, Art. 9 Rom I-VO Paragraph 69, 74.
subject to the binding matters which are laid down by the circumstances to be taken into consideration in deciding whether overriding mandatory provisions are to be applied. The specific question is whether such effect will be of direct or indirect in nature. The problem addressed is whether the relevant forum is itself to decide the manner in which such effect is given.

First, all it does not, for instance, state that third country overriding mandatory provisions may be applied but that effect may be given to them, even if it is conceded that in the second sentence the focus is on application and non-application. Conversely, the regulation does not appear to lay down a substantive-law consideration. Such substantive-law consideration would specifically have no impact from a conflict of laws point of view and would therefore also be permissible without any analogous provision in that regard. This supports the suggestion that the **decision is in fact left to the Member States** as to the manner in which they wish to give effect to the overriding mandatory provisions of third countries. Thus, the Netherlands courts may continue to give preference to a special connecting rule, whereas the German courts may prefer a substantive-law consideration. Nor can it be objectively against the latter point that it would not be able to resolve the conflict of laws issue. For the substantive-law solution in the end also serves to deal with a problem arising out of a conflict of laws issue. Openness to various ways of giving effect to overriding mandatory provisions indeed affects the international concordance of decisions, even if not to a great extent since the results will often be the same. Thus there will often be a compromise to accommodate to an extent the legal systems which had declared a reservation against Article 7 section 1 of the Rome Convention, despite avowedly observing the overriding mandatory provisions of third countries (paragraph 90).

Nor does Article 9 section 3 of the Rome I Regulation provide a vehicle for **more far reaching consideration** of third country overriding mandatory provisions. Certain views previously expressed to that effect (paragraph 90) have to that extent been reined in.

A precondition for giving effect to a third country overriding mandatory provision will be, moreover, that the **substantive preconditions of that rule** are met (for the overriding mandatory provisions of the forum, see paragraph 39). Thus it was discussed whether the requirement for official authorisation of dismissal under Netherlands law requires to be taken into account where the applicable law is German law in the case of an employee engaged and working in the

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375 Freitag, IPRax, 2009, 109, 111.
376 Freitag, IPRax, 2009, 109, 114. In favour of a special connecting rule under the conflict of laws see Rauscher-Thorn, Art. 9 Rom I-VO Paragraph 69, 78 et seq.
377 But see Biagioni, NLCC 2009, 788, 803.
378 Thus also the interpretation of the English doctrine on the indirect effects of third-country overriding mandatory provisions see Chong, JPIL 2006, 27, 63; Dickinson, JPIL 2007, 53, 78.
379 But see Pfeiffer, EuZW 2008 622, 628.
Chapter 3. Connecting factors

Netherlands. If, as the Netherlands case law would suggest (see Section 13 paragraph 33), it was to be concluded that the provision is not applicable in the absence of any effect on the Netherlands employment market, its application as a third country overriding mandatory provision would have to be precluded.380

Such application must also be precluded if it is incompatible with public policy.381 In that connection, public policy of European provenance (see Section 3 paragraph 13) is also to be taken into account.382 There is no need for a separate examination of public policy under Article 21 of the Rome I Regulation since appraisal of matters concerning public policy must be conducted already in connection with the appraisal of whether effect should be given to the third country overriding mandatory provision.383

6. Conflicting overriding mandatory provisions

Various configurations are conceivable in which overriding mandatory provisions may conflict with another, not only as between the overriding mandatory provisions of a third country and the overriding mandatory provisions of the forum, but also as between the overriding mandatory provisions of different States and as between the overriding mandatory provisions of the lex causae and the overriding mandatory provisions of third countries, as well as finally between such provisions of the forum and those of the applicable substantive law. In light of the various restrictions in regard to the consideration of the overriding mandatory provisions of a third country (see paragraph 98), that ought not amount to all that many cases.

The exercise of discretion will encounter difficulties where the overriding mandatory provisions of different legal systems are in competition.384 It is true, however, that this problem was the reason for introducing discretion in regard to the taking into account of the overriding mandatory provisions of a third country already when the Rome Convention was drawn up.385 To point to general solutions in that connection is possible only with difficulty. As a matter of principle, one must proceed on the basis that the court has to apply both the overriding mandatory provisions of the forum and those of the law applicable to the contract (see in that connection, paragraph 80). Discretion can relate only to the issue of whether, in addition, the overriding mandatory provisions of the lex loci solutionis can apply. That may be answered in the affirmative if such an overriding mandatory provision of a third country is even more in the public interest pursued by the overriding mandatory provision of the forum or of the law applicable to the contract. Where different overriding mandatory provisions

381 E. Lorenz, RIW 1987, 569, 582.
382 Freitag, IPRax, 2009, 109, 111.
383 Rauscher-Thorn, Art. 9 Rom I-VO paragraph 71.
385 Giuliano/Lagarde, BT-Drucks 10/503, p. 33, 59.
are involved which operate as minimum rules, the **most favourable principle** will apply. If it falls short of that, or indeed precludes it, it can produce no effect (see, in that conviction, also, paragraph 125). To be distinguished from this problem of the overriding mandatory provisions of different legal systems on the same subject matter is the already existing possibility that overriding mandatory provisions of various legal systems will apply to different legal issues.

III. Implications as to the treatment of public-law employment law

1. Stating the problem

One of the main problems that arose in the development of international employment law was the manner in which public law was to be dealt with. Whilst for private law universal conflict rules were developed by private international law, the starting point in public law is the principle of territoriality (paragraph 111). Nonetheless, both legal sectors are particularly closely enmeshed, particularly in regard to employment law. From the perspective of the conflict of laws, that is a factor which must be duly taken into account. Whilst Gamillscheg in his time had to elaborate a system for which there were no discernible legal parameters, discussion later turned on the implementation of public interests, by way of special connecting rules, in which context the Rome I Regulation henceforth lays down binding connecting rules in Articles 8, 9 and 12 section 2. These have to be taken into account in dealing with public law (see paragraph 115). The principles that emerge from that will then take definitive shape (paragraph 121 et seq.).

2. System of connecting rules

First of all, it follows from Article 1 section 1, first sentence, of the Rome I Regulation that contractual obligations are governed by the conflict rules provided for in that regulation whilst under the second sentence of that provision administrative law matters are not covered by it. In respect of public law its own conflict rules must be presumed to apply, as was already upheld by the German Imperial Employment Court. For public employment law, as for public law generally, the principle of territoriality may be presumed to apply: the authorities and courts of the states apply their own public law (*lex fori*) in the case of employment within their own country. In that connection, the French Court of

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386 Wimmer, p.185 et seq.
387 Gamillscheg, IAR, p.185 et seq.
388 Cf. Lipstein, in Holl/Klink (Eds.), p. 39 et seq.; see also Gamillscheg, ZfA 1983, 307, 342 et seq.
389 RAGE, 11, 100, 104, 109.
390 BGHZ 31, 367, 371; cf. from an English perspective McClean/Beevers, paragraph 3-012.
Cassation for example will decline to test administrative actions abroad according to domestic procedural provisions.\textsuperscript{392} That does not of course preclude that occasionally public law provisions connect with factual requirements which, whether wholly or in part, have to be satisfied abroad (see paragraph 114)\textsuperscript{393} as for example where an employer within the country has to ensure that permissible driving periods for employees are also observed whilst they are driving abroad.\textsuperscript{394} Essentially, however, this does not happen and States can enforce their sovereign power only on their own territory.\textsuperscript{395} That does not preclude the laws of foreign States from being brought to bear by national authorities, for example, on the basis of express supranational provisions or agreements, such as for example in the case of the coordination of social security laws\textsuperscript{396} 397 Nothing of that nature, however, exists in employment law. The directive on the freedom to provide services in its original conception made analogous provision in the form of the principle of the country of origin. However, the sector of relevance to the present discussion was excluded therefrom (see paragraph 50).

The territoriality principle is of course a \textit{multifaceted concept}.\textsuperscript{398} In reality it involves two aspects: one is the issue of the enforcement of public employment law by State authorities (see paragraph 111 above), the other is the question of the applicability of a public-law rule in the event of cases with a foreign connection (see on that, paragraph 114).

In consequence, the Austrian PIL law in Paragraph 1 excluded from referral public-law provisions. Public employment law was accordingly not covered by the law applicable to the contract\textsuperscript{399}, but could be brought into play only as overriding mandatory law under a special connecting rule.\textsuperscript{400} However, the Austrian Supreme Court has also applied these overriding mandatory provisions in the case of temporary postings.\textsuperscript{401}

\begin{itemize}
  \item \textsuperscript{392} Cass.crim. Recueil Dalloz 1988, 128.
  \item \textsuperscript{394} Cf. (Austria) VwGH, infas A81/85.
  \item \textsuperscript{395} Gamillscheg, IAR, p. 187 et seq.; for an Austrian perspective see \textit{Grillberger}, FS Schwarz, 1991, p. 69, 73 et seq.
  \item \textsuperscript{397} \textit{Mayer}, RIDC 1986, 467, 474 et seq.
  \item \textsuperscript{398} For a critical view therefore see \textit{Gamillscheg}, RabelsZ 23 (1958), 819, 830.
  \item \textsuperscript{399} \textit{Schwimann}, DRdA 1981 281, 283; \textit{Schwimann/Schlemmer}, DRdA 1984, 201, 205.
  \item \textsuperscript{400} OGH ZAS 1988, 56 (= WBL 1987, 193); OGH JBL. 1990, 671 (= DRdA 1991, 240 or ZAS 1991, 196); OGH Arb 11.048. In general conflict of law terms OGH IPRax 1988, 240. See \textit{Reichelt}, IPRax 1988, 251 et seq.; likewise ZfRV 1988, 82 et seq.
  \item \textsuperscript{401} Cf. OGH JBL. 1990, 671 (= DRdA 1991, 240 or ZAS 1991, 196).
\end{itemize}
However, the Rome I Regulation does not differentiate according to public law and private law, but according to the subject-matter of legal relationships. In that connection, it must be observed that public-law provisions may also govern the relationship under the law of obligations.\footnote{Kronke, DB 1984, 404, 405; for another view see Carillo Pozo, REDT 2011, 1023, 1062 et seq.; Czernich/Heiss-Rudisch, art. 6 paragraph 21.} This was recognised by the Swiss Federal Court as early as 1954.\footnote{BGE 80 II 53, 62.} In that connection, Article 13, second sentence, of the Swiss PIL law lays down that the application of a foreign provision is not precluded solely on account of its public law nature. That was also recognised by the French courts and by academic commentators.\footnote{Mayer, RIDC 1986, 467 et seq.} It also underpinned the thinking of the framers of the Rome Convention, as is apparent from the\footnote{Giuliano/Lagarde, BT-Drucks 10/503, p. 33, 57.} Giuliano/Lagarde report.\footnote{BT-Drucks. 10/504, p.81.} The Federal German Government also adopted this idea in its explanatory memorandum on Article 30 of the introductory law to the Civil Code (EGBGB).\footnote{BT-Drucks. 10/504, p.81.} Subsequently, this view was shared in academic writings\footnote{Gamillscheg, ZFA 1983, 307, 347; MünchKomm-Martiny, Art. 8 Rom I-VO paragraph 35; Hausmann, JbltaR 4 (1991) 49, 52; for another view see Philip, in: North (Ed.), EEC Convention, p. 81, 84, 98; Kegel/Schurig, p. 684 and also Hartley, Rec 1997, 341, 374.} and in the end corresponds to a much older view prevalent in academic doctrine.\footnote{See Rabel, Conflict of Laws III, p. 193.} On the earlier Austrian law the view was likewise expounded that, in regard to their private-law aspects, public-law duties incumbent on the employer could be called on to apply along with the law applicable to the contract by way of the referral rule in Paragraph 44 of the PIL law, although Paragraph 1 section 1 of that law expressly states that the law applies only to the private-law aspects of arrangements.\footnote{Rebhahn, FS Strasser, 1983, p. 59, 65 et seq.}

The Rome I Regulation make as little differentiation in that regard.\footnote{Streithofer, DRdA 2012, 191, 192.} Public-law provisions may at the same time be subsumed under the law applicable to the contract. Thus, all \textbf{the ways in which public law may impact} on the contractual relationship are addressed.\footnote{Along similar lines see Kärcher, p. 115 who states that only the substantive public law provisions which are addressed to the employer in that specific capacity that may be considered applicable.} The consequence is that public law will be treated, from the perspective of the conflict of laws, in two distinct ways, that is say, on the one hand, as law enforced by public authorities and, on the other hand, as law governing the employment relationship.\footnote{Gamillscheg, IAR, p. 187; likewise RabelsZ 23 (1958) 819, 831; Junker, Internationales Arbeitsrecht im Konzern, p. 119; Deinert, RdA 2009, 144, 153; cf. also Heilmann, p. 100 et seq.; Geppert, DRdA, 1970, 259,264 et seq.; for a fundamentally critical view see Lando, Scandinavian Studies in Law 1964, 107, 174 et seq.} Whether and how exactly this is to occur will ultimately be a matter for the relevant \textit{lex causae}.\footnote{Gamillscheg, IAR, p.189; cf. Birk, FS Heinl, 1995 p. 15, 35, 36.}
German law one follows the transformation doctrine (Section 1 paragraph 34). Yet an Austrian *lex causae* would, for example, also provide for an analogous transformation.\(^414\) This also applies to Swiss substantive law on the basis of the reception clause in Article 342 section 2 of the law on obligations.\(^415\) The ‘doctrine of the private-law core of public-law employment law’ has therefore, contrary to an initial presumption\(^416\) by no means become superfluous as a result of the connecting rule under the Rome Convention and henceforth under the Rome I Regulation.\(^417\) That is not altered by construing the private law and public law consequences of a substantive law as two sides of a medal with the result that the one cannot form the core of the other.\(^418\) That is ultimately a question of the interpretation of legal effect which is to be dealt with by the *lex causae*.

That at the same time resolves the classification question as to whether classification as public law is effected under the *lex fori* or under the *lex causae*\(^419\). The relevant provision itself determines whether it founds obligations on the part of the employer against the State or against the employee; the private-law consequences for the former case, are determined by the law applicable to the contract.\(^420\)

The influence of public law on the private-law relationship determined by the law applicable to the contract presupposes that, for its part, the public-law provision seeks to govern the relevant factual situation.\(^421\) In that connection again the starting point is the territoriality principle.\(^422\) Since public law provisions as a rule cover work within the country, from the perspective of the relevant law there will in that case be a unilateral conflict rule: application to work within the country.\(^423\) This can be elevated into a universal conflict rule. As a general principle, the public employment law of the place of employment can have an effect on the employment relationship.\(^424\) That is also a case in which one may speak of the territoriality principle (see paragraph 112).\(^425\) That does not, however, apply without restriction. Public law can under certain circumstances also produce effects abroad.\(^426\) Whether that is the case will ultimately depend


\(^{415}\) Cf. Geiser/Müller, paragraph 926.

\(^{416}\) See Kronke, DB 1984, 404, 405.

\(^{417}\) Heilmann, p. 101.

\(^{418}\) See Junker, Internationales Arbeitsrecht im Konzern, p. 119.

\(^{419}\) Gamillscheg, RabelsZ 23 (1958), 819, 825 points out this question.

\(^{420}\) Similarly Lipstein, in Holl/Klink (ed.), p. 39, 50 who naturally does not examine the issue of whether obligations are directed to the State but the issue of their absolute applicability (that is to say of the provision as an overriding mandatory rule).


\(^{422}\) Cf. Deinert, Observations on BAG AP No. 409 on § 613 a BGB.


\(^{424}\) Gamillscheg, IAR, p. 193; likewise RabelsZ 23 (1958), 819, 826 et seq.; 829 et seq., 832; C. Müller, p. 327; see Rabel, Conflict of Laws III, p. 192 et seq.

\(^{425}\) Junker, Internationales Arbeitsrecht im Konzern p. 126 et seq.
upon the protective purpose and the ability of the authorities in regard to implementa-

*Gamillscheg* rightly worked out that one cannot, for example, arrive at a spe-
cial connecting rule for all mandatory provisions of the place of employment,
thus allocating to the law applicable to the contract only the provisions that can
be derogated from. Conversely, he also pointed out that there cannot be a gen-
eral special connecting rule for the law of the place of employment in relation to
public-law provisions but that the purpose of the provision is determinant. Accord-
ingly, he endeavoured to establish general principles to facilitate the har-
monisation of public employment law and the law applicable to the contract. In
determining how such harmonisation may proceed, the courts and advocates
are not as free as then. They are bound by the system laid down in Articles 8 and
9 of the Rome I Regulation which, moreover, precludes a general doctrine of
special connecting factors*. That means specifically:

It is not the public-law classification of a provision that is determinant as re-
gards the question of its applicability. But what is decisive is whether it makes
provision for the employment relationship. If that is the case it will be called
upon to apply along with the law applicable to the contract. Whether that is
the case is to be answered by the relevant *lex causae*. In this regard, for example,
Paragraph 3 of the legislation on working time will be called upon to apply
when German law is the law of the contract (see Section 12 paragraph 69). That
is not affected by the fact that it may be in the nature of an overriding mandatory
provision (see paragraph 31). Thus provisions of public employment law are ap-
licable to the employment relationship in the case of work abroad if the law of
the place of employment is the *lex causae*; provisions of German public em-
ployment law are applicable to work within the country if German law is the *lex
causae*.

It may however also be the case that public law provisions concern em-
ployment conditions without involving obligations of the employer to the em-
ployee. An example of this is Paragraph 39 section 2, first sentence, of the Ger-
man law on residence under which the Federal Agency for Employment may
agree to the issue of a residence permit for the purpose of carrying on em-
ployment only if the foreigner is not employed on less favourable conditions of
employment than comparable German employees. That does not warrant a claim

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426 BAG AP No. 15 on § 12 SchwG; cf. *Kegel/Schurig*, IPR, p. 148 et seq.; from the perspective
of French law *Mayer*, RIDC 1986, 467, 468 et seq., passim; from the perspective of Austrian
law see OGH JBl. 1990, 671 (also DRdA, 1991, 240 and ZAS 1991, 196); specifically for
public employment law see *Gamillscheg*, RabelsZ 23 (1958), 819, 830; *Führich*, p. 63; *Her-
genröder*, ZfA 1999, 1, p. 145 et seq.


428 *Gamillscheg*, IAR, p. 194 et seq.

429 *Gamillscheg*, IAR, p. 198.

430 *Gamillscheg*, IAR, p. 198 et seq.

431 For an argument in favour of special connecting rule of the employment protection law at the
place of employment see *Führich*, p. 133 et seq.
to equal treatment with the country’s nationals which would be called upon to apply, were German law is the law applicable to the contract. Likewise, the argument discussed in relation to Austrian law will not apply in the case of Germany, namely that Paragraph 8 section 1 of the Austrian law on the employment of foreigners providing for equal treatment with comparable national employees of the undertaking contains a unilateral conflict rule providing for a special connecting rule for the whole gamut of Austrian employment law as a minimum standard.

Even if public law provisions may be called upon to apply by the law applicable to the contract, that does not mean that they may also in each case be applied against their will. Thus, the earlier provision in the ERA 1996 until its amendment in 1999 (see paragraph 78) meant that statute law always applied within the country but, in the case of work abroad, never applied. The issue of the distinction between private and public law in that connection played no role at all. Nor does it today after the courts have more or less come to the same conclusion (see paragraph 78). But where an English law only seeks to be applied in the case of work within the country, that, in itself, should be respected. Of course, that would lead to a lacuna which is why the disguised renvoi concealed within it should be rejected and the law is nonetheless to be applied to work outside Great Britain (see Section 6, paragraph 8). Violence is not done to the foreign provision because in that connection. It is a conflict of laws question for the forum.

The problem may, moreover, not only arise in the case of statute law, but also in the case of continental public law which seeks to restrict its scope of application to work within the country, as is for example the case with the special protection under German law against the dismissal of severely disabled persons (see Section 13 paragraph 47). Yet there is frequently a public-law provision of the place of employment to offset the non-applicability of a public-law provision of the law applicable to the contract with the result that the lacuna will be remedied.

Whether public-law provisions may demand to be applied although they are not part of the law applicable to the contract is dealt with in Article 9 of the Rome I Regulation. The protection of public interests, which is also allowed by Article 9 of the Rome I Regulation against a foreign law applicable to the contract, can of course also and specifically be effected by means of public-law pro-

433 Rebhahn, FS Strasser, 1983, p. 59, 69 et seq.
435 Cf. also Gamillscheg, RabelsZ 23 (1958), 819, 836.
visions.\textsuperscript{436} Accordingly, public law that is not part of the law applicable to the contract can come into play by way of a special connecting rule as overriding mandatory law.\textsuperscript{437} That is, however, only possible in the case of a sufficient connection with the country (paragraph 36). Nonetheless, public-law provisions, as a rule, only seek to be implemented where the place of employment is within the country.

There may be a conflict where the public employment law of the law applicable to the contract seeks to make provision for a matter in the same way as the public law of the place of employment. This is resolved by the Rome I Regulation in Articles 9 section 3 and 12 section 2. Only those provisions of the place of employment can be applied which preclude performance (Article 9 section 3 of the Rome I Regulation). Moreover, in the context of the law applicable to the contract, regard is to be had to the law of the country in which performance takes place.

A distinction must be made between public employment law called into operation with the law applicable to the contract by way of overriding mandatory law and the application of other public law.\textsuperscript{438} Thus tax law is not dealt with under Article 9 of the Rome I Regulation, but is not at all caught by the scope of application of the regulation (Article 1 section 1, second sentence, of the Rome I Regulation). Contrary to the view of the Regional Employment Court Hamm,\textsuperscript{439} an agreement as to the law under which remuneration is to be taxed cannot be considered to form the subject matter of the parties’ autonomy under private international law.

3. Specific examples

a) Public law

From a public-law perspective, the State can enforce public law provisions protecting employment such as working time in the case of work within the country, irrespective of whether German law or a foreign law is the law applicable to the contract.\textsuperscript{440} Conversely, a foreign State will enforce its public law in the case of work performed within its territory, irrespective of the law applicable to the contract.\textsuperscript{441}

\textsuperscript{436} Of course of primary importance will be the content and not the formal classification as public or private law, \textit{Mayer}, RIDC 1986, 467, 471.
\textsuperscript{437} \textit{Junker}, Internationales Arbeitsrecht im Konzern p. 119. However the enmeshment with public law is held to be a central feature I the classification of employment law provisions as overriding mandatory law by \textit{Junker}, FS BAG, 2004, p. 1197, 1214.
\textsuperscript{438} \textit{Straube}, p. 63 et seq.
\textsuperscript{439} LAG Hamm, BB 1989, 2191 (also DB 1989, 1243 [guiding principles]).
\textsuperscript{440} \textit{Gamillscheg}, RabelsZ 23 (1958) 819, 838.
\textsuperscript{441} \textit{Birk}, RabelsZ 46 (1982), 384, 411.
b) Private employment law

(1) Work within the country

In regard to the private international law consequences in the case of work within the country, where German law is the law applicable to the contract, the situation is one where the public law become subsumed within the employment relationship with the result that the provisions come into play as part of the law applicable to the contract.442

Where foreign law is the law applicable to the contract, the public law of the country in which the work is performed will fall to be considered as possible overriding mandatory provisions. Since the doctrine of overriding mandatory provisions does not distinguish between private and public law,443 the previously difficult issue as to the private-law consequences of the enforcement of overriding mandatory provisions can now readily be solved: prohibitions on employment, for example, under the legislation on maternity protection will be enforced together with the obligation under private law to continue to pay remuneration (see section 12, paragraph 114).444 Also insofar as the foreign public law is called upon to apply as part of the law applicable to the contract, domestic overriding mandatory provisions will be enforced under Article 9 section 1 of the Rome I Regulation. They will give way only to more favourable provisions of the law applicable to the contract. In the case of overriding mandatory provisions under collective agreements, provision is made in regard to the posting of workers in Paragraph 8 section 1 of the legislation on the posting of workers. In addition, Article 3 section 7 of the directive on the posting of workers lays down analogous requirements within its scope of application (see paragraph 63). The same must apply outside the ambit of the law on the posting of workers particularly since, within the sphere of application of the TFEU, there could be a restriction on the fundamental freedoms of the employer which would not be justified (see, on this aspect of the implementation of overriding mandatory law, paragraphs 61et seq.) where comparable protection of employees were not envisaged under the law of the country of origin. Moreover, a foreign public law will not apply as part of the law applicable to the contract if precluded by public policy considerations under Article 21 of the Rome I Regulation.445

(2) Work abroad

In the case of work abroad, public law may be subsumed within the employment contract if the contract law of the place of employment applies.446

442 Führich, p. 149.
443 German government’s explanatory Memorandum on Article 34 EGBGB BT Drucks. 10/504, p.83; BAG AP No. 30 on Internationales Privatrecht – Arbeitsrecht; Kropholler, IPR, p. 23.
444 Cf. on the earlier law also Gamillscheg, IAR, p. 200.
445 Cf. Gamillscheg, IAR, p. 205; cf. also Mayer RIDC 1986, 467, 482 et seq.
446 Gamillscheg, RabelsZ 23 (1958), 819, 844.
It is true that then the application of the public policy reservation under Article 21 of the Rome I Regulation will theoretically fall to be considered. As a general rule, however, it will not be applied because there will not be a sufficient domestic connection (Section 5, paragraph 16).

If another law applicable to the contract comes into play, for example, domestic law, public law (just as other overriding mandatory law, see on the application of statute law on English territory, paragraph 117) may produce effects as overriding mandatory law or the local law the place of performance under Article 9 section 3, and Article 12 section 2 of the Rome I regulation. Of course, application of the public-policy reservation may then fall to be considered. However, where German law is the law of the contract and work is performed abroad German, public law will likewise fall to be applied as part of the law applicable to the contract. The earlier transmission doctrine favoured in this connection has insofar lost its relevance. Where there is a permanent posting abroad, as a rule, the domestic employment law will no longer be called upon to apply. Should it exceptionally be otherwise owing to the escape clause, there is in principle nothing to prevent public law provisions of the law applicable to the contract from applying, where they themselves seek to be applied (see Paragraph 114), even if, in a specific case, that may not be so. This configuration, of course, can lead to a situation in which there are overlapping or conflicting public law provisions. The earlier preference, in the case of equivalent public law provisions, in favour of the public law of the place of employment as against the law applicable to the contract can no longer be upheld under the Rome I Regulation. Article 9 section 3 of the Rome I Regulation creates only the possibility of applying foreign overriding mandatory provisions, but does not compel such application. Article 12 section 2 of the Rome I Regulation merely provides for regard to be had. In that connection, the direction as to application by the law applicable to the contract will have greater force (see paragraph 109).

The question whether under private international law foreign public law seeking excessively to protect the employee or other public interests will not apply but will only be taken into consideration as a matter of substantive law, no longer arises today. Article 9 section 3 and Article 12 section 2 of the Rome I Regulation provides for flexible decision-making possibilities (on competition between the law of the place of employment in regard to working time and that of the law applicable to the contract, see section 12, paragraph 68). It seems

447 Führich, p. 158 et seq.
448 Gamillscheg, IAR, p. 200.
449 Cf. Gamillscheg, IAR, p. 201 et seq.; also Führich, p. 72 et seq.; and Birk, RabelsZ 46 (1982), 384, 411.
450 Adhering thereto under the Rome Convention, Borgmann, p. 117.
451 See Gamillscheg, IAR, p. 201 et seq.
doubtful, however, whether it is conceivable that specific legal systems would provide for internationally binding employee protection going further than would be acceptable from the perspective of German law. The examples mentioned in that connection, such as the prohibition on bringing alcoholic beverages into business premises or the demand for seating facilities with comfortable footrests, in certain cases cannot come under this heading. Frequently, in any event, the question will not arise because from the point of view of foreign law there may possibly be a public law provision, though not an overriding mandatory provision which would be determinant in this configuration.

454 See Gamillscheg, IAR, p. 207 et seq.
Chapter 4: Scope of the law applicable to the employment contract

In this Chapter the scope of the law applicable to the employment contract will be discussed. Matters which relate to questions of the individual employment contract will be examined in order to ascertain whether they are to be evaluated according to the legal order called upon to apply under Article 8 of the Rome I Regulation or are governed by a special connecting rule to facilitate, for instance, the implementation of overriding mandatory law. The chapter begins with the coming into existence of the employment contract (Section 11), moving on to content (section 12), termination and succession (Section 13) and, finally, ending with the post-termination continued effects of the employment contract (Section 14). It must be borne in mind that under the doctrine of the law governing obligations provisions protecting employees which are to be classified as overriding mandatory provisions, may also be subsumed under the law applicable to the contract (see Section 10 paragraph 31).

Where in what follows provisions of German law are classified as overriding mandatory provisions, by reference to Paragraph 2 AEntG (Arbeitnehmer-Entsendegesetz), this will generally refer to work within the country for which Paragraph 2 AEntG is solely relevant. In light of the requirement for there to be a sufficient connection with the country all typical configurations of the implementation of overriding mandatory law are nonetheless covered. Overall it may therefore be assumed that Paragraph 2 AEntG contains a general list of overriding mandatory provisions (see Section 10 paragraph 41) which, of course, is not exhaustive.

Articles 10 section 1 and 12 of the Rome I Regulation contain fundamental provisions concerning the scope of the law applicable to the contract and determine the matters covered by it. Consensus and substantive validity of the contract are governed, under Article 10 section 1 of the Rome I Regulation, by the law applicable to the contract or by the law which would be applicable if the contract were valid. In addition, the law applicable to the contract covers questions of interpretation, performance, consequences of non-fulfilment, extinction of obligations, prescription and the consequences of the nullity of the contract.

In so far as the older case law and academic writings from the period preceding the Rome I Regulation, or even the Rome Convention, are used for the purposes of classification, that will be by analogy. The evidence is to be construed in such a way that, in light of the new legal provisions, the statements made at that time lend support to the propositions now contended for. Conflict of laws considerations are preceded by accounts of substantive law in the Federal Republic and in other countries (on the selection of the legal systems to be included, see section 1, paragraph 30). They are intended to give an impres-
sion of the spectrum of possible provisions, provide material for examples and highlight peculiarities in foreign legal systems which have to be taken into account for conflict of laws purposes. Therefore, at least in regard to major issues, such as dismissal or remuneration, there will be no narrow focus on the specific matters necessary to the account to be given but priority will be given to a coherent overall view.

11 Creation of the contract

I. Substantive law

1 In general the contract will come into existence in all legal systems as a result of consensus. Under Swiss law a contract will come into existence even without consensus under Article 320 section 2 of the Law of Obligations (OR) if work is accepted which under the circumstances could only be expected to be performed for remuneration. That will also apply specifically where no contract may be inferred. However, the freedom to enter into contracts is as a rule restricted by prohibitions on discrimination. In that regard Directives 2000/43/EC, 2000/78/EC and 2006/54/EC and the national laws enacted for their transposition (in Germany the General Law on Equal Treatment – AGG- Allgemeines Gleichbehandlungsgesetz) make provision for comprehensive prohibitions on discrimination. Prohibitions on discrimination are also specifically enshrined in US law (Section 12 paragraph 86). These will be explored as part of the account of the content of the employment contract (Section 12 paragraphs 79 et seq.).

2 English law – like American law – requires consideration for a contract to be valid. In employment law this principle is reflected in the requirement that there be a mutuality of obligations (see, on that, Section 4 paragraph 21). In regard to the conclusion of the employment contract this is however generally without any problem because work and remuneration are agreed reciprocally. Ancillary agreements may however in a given case fail, owing to a lack of consideration. A further peculiarity of English law is the addition to the express terms of the contract of implied terms of the employment contract. These are contractual obligations which are necessary to the operation of the contract as well as obligations which appear to be self-evident to the parties. However, as a

1 Rehbinder, paragraph 57.
5 Cf. Thau, paragraph 118.
6 Thomas v. Thomas (1942), 2 QB 851.
7 Deakin/Morris, paragraph 3.29.
8 Cf., for instance, Deakin/Morris, paragraphs 4.3 et seq.
matter of principle the implied terms are not mandatory. They cannot subsist where they would run counter to express terms.\(^9\)

On formal requirements, see section 8 and, on evidence, see section 8, paragraph 19.

Many legal systems have restrictions in regard to the competence to enter into an employment contract. Thus, under Paragraph 28 section 1, first sentence, of the German Law on occupational training (BBiG- Berufsbildungsgesetz), the engagement of persons yet to be trained is precluded if they lack personal aptitude. In Germany the employment of children is prohibited under Paragraph 5 section 1 of the youth employment protection Law. The same applies in Austria under Paragraph 5 of the Law on the employment of children and young persons. In addition, the employment of young persons by specific persons is prohibited under Paragraph 25 of the Law on the youth employment protection law.

There are scarcely any private law prohibitions on engagement though they may be imposed by collective agreement (see for German law, Paragraph 1 section 1 of the law on collective agreements (TVG- Tarifvertragsgesetz)). The same also applies to obligations to conclude a contract. There may also be private law requirements to reinstate. In Germany they appear as corrective mechanisms in relation to the forecasting principle under the law on protection from dismissal.\(^10\) Conversely, there are various public law obligations to conclude contracts, in particular under German law for the employment of severely disabled persons in Paragraph 71 of Social Code IX (SGB) or under Austrian law in Paragraph 1 of the law on the engagement of disabled persons.\(^11\) See also Section 12 paragraph 117.

II. Conflict of laws

As a matter of principle, the creation of the employment relationship is governed by the law applicable to the contract (Article 10 of the Rome I Regulation). That specifically concerns the question of consensus between the contracting parties. Article 10 section 2 of the Rome I Regulation, however, allows there to be an alternative connecting rule in regard to the question whether conduct is to be assessed as assent to the agreement. In that connection, after an appraisal of the overall circumstances of the individual case,\(^12\) the law of the habitual residence of the party concerned may additionally be called upon to apply in order to examine the question as to whether there assent to the contract is lacking. That primarily concerns the question of the conclusion of the contract as a result of silence or inferential conduct. That specifically covers the statutory notional contract under Article 320 section 2 of the Swiss Law of Obligations (see

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9 ELL-\textit{Hardy}, Great Britain, paragraphs 151 et seq.
11 A comparison of both systems by Hartmannshenn is to be found in: Aschauer/Kohlbacher (Eds.), Jahrbuch Sozialversicherungsrecht 2012, p. 137 et seq.
12 Palandt-Thorn, Art. 10 Rom I-VO paragraph 4.
That would also come into play in connection with Japanese case law which presumes a contract to have been entered into already on consent being given to an engagement.\(^\text{13}\) The same result would be arrived at in relation to the Netherlands provision in Article 7:610a of the Civil Code (BW) under which there will be a rebuttable presumption of an employment relationship where for three months at least 20 hours work per month have been regularly performed for remuneration. In that connection Article 18 section 1 of the Rome I Regulation will come into play under which the law applicable to the contract also includes statutory presumptions (see section 4, paragraph 30). This rule is also applicable in the case that someone denies the conclusion of the labour contract for the reason that, under his domestic law concluding, a contract in a foreign language would not be possible.\(^\text{14}\)

The legal possibilities and the limits of contractual amendments are matters covered by the law applicable to the contract. That therefore also addresses the issue as to the circumstances in which contractual amendments can be forced through by one party. That concerns, for example, the protection under German law in accordance with Paragraph 2 of the law on protection against dismissal (KSchG), the unilateral possibility of amendment, as provided for by Spanish law in Article 41 of the Labour Code (ET), which can be challenged only by the employee,\(^\text{15}\) the possibility of a transfer and allocation of work not provided for in the contract under Article 42 section 4 of the Polish law on employment \(^\text{16}\) or the right conferred on the employer by Estonian law, where unforeseen economic circumstances occur, unilaterally to reduce remuneration for three months within a twelve month period to which the employee may react by means of a specific right to give notice.\(^\text{17}\) Ultimately, it is otiose to decide whether those are provisions concerning the right to give notice or provisions concerning contractual content because provisions concerning the right to give notice are also governed by the law applicable to the contract (see Section 13 paragraph 31 et seq.). On parental leave, see Section 12 paragraph 115. On the problem of formal requirements in connection with contractual amendments, see Section 8 paragraph 13.

Specific problems arise insofar in connection with the issue of entitlement to part-time work. The case law assigns entitlement to a reduction in working time to the law applicable to the contract (Paragraph 8 of the German law on fixed-term and part time work (TzBfG), Article L 3123-6 of the Labour Code under French law \(^\text{18}\) or the law on the adjustment of working time in Netherlands \(^\text{19}\) law),\(^\text{20}\) as do academic commentators, and does not regard it as an over-

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\(^{13}\) See in detail \textit{Nishitani}, p. 155 et seq.

\(^{14}\) BAG NZA 2014, 1076.


\(^{17}\) \textit{Muda}, IJCLLIR2010, 347, 360 et seq.
riding mandatory provision; the individual interests of the employee are primordial and employment market interests merely reactive; in addition, there is no provision for administrative implementation. The reasoning is sketchy because, in referring to the objectives of the German legislature in connection with the transposition of Directive 97/81/EC, it overlooks the fact that what is determinant is the directive which under recitals 4 and 5 primarily pursues employment market policy objectives and at the same time adopts the primary employment market policy objectives of the underlying agreement between the social partners. The result is nonetheless correct. The fact that Paragraph 8 of the law on part-time employment is not in the nature of an overriding mandatory provision may be accounted for by the consideration that the framework agreement under Paragraph 1(b) transposed with the Directive pursues the employment market policy objectives by means of a consensual solution by the parties to the employment contract and thus specifically does not provide for mandatory enforcement.

The amending agreement as such can be subject to an autonomous connecting rule and thus will not be automatically subject to the law previously applicable to the employment contract. If, however, the place of employment does not change the same connecting rule will apply with the same result. In all other cases the escape clause may result in the applicability of the previous law.

But the view that a change in the place of employment requires the agreement of both parties cannot be upheld. Where the employer is entitled under the employment contract to allocate another place of employment that must be heeded from a conflict of laws perspective and can result in a change in the applicable law. Even if such a change in the place of employment entails a change in the applicable law because the escape clause, for whatever reason, does not come into play it still does not amount to a choice of law agreement. Even if the con-

18 Lokiec, Vol. 1, paragraph 143; Pélissier/Auzero/Dockès, paragraph 252.
19 Jaspers, RdA 2006, 246 et seq.; Waas, Modell Holland, p. 165 et seq.
20 Entitlement to a reduction in working time is not conferred by all legal systems. For an overview of the law in the Netherlands, Great Britain, France, Denmark, Sweden and Germany, see Eisemann/Le Friant/Liddington/Numhauser-Henning/Roseberry/Schinz/Waas, RdA 2004, 129 et seq.; on the legal situation in Italy (claim to working-time reduction only in the public service) in comparison with the German situation, see Albers, Rechtsanspruch auf Verjährung der Arbeitszeit in Deutschland und Italien, Eine rechtsvergleichende Studie unter Berücksichtigung der Richtlinie 97/81/EC des Rates zu der von UNICE, CEEP und EGB geschlossenen Rahmenvereinbarungen über Teilzeitarbeit vom 6. Juni 1997, Baden-Baden 2010 (also Bremen, Univ., Diss. 2009), p. 135 et seq.; see also Fuchs, NZA 2004, 956, 958; on the requisite collective bargaining regulation for private industry, see Ales, ELLJ 2012, 70, 73.
21 BAG AP No. 8 on Art. 27 EGBGB (n. F.); concurring, Junker, EuZA 2009, 88, 93 et seq.; see also MünchKomm-Martiny, Art. 8 Rom I-VO paragraph 120; C. Müller, p. 365.
23 Likewise, in the result, subject however to acceptance of a tacit choice of law, CA Paris JDI 1991, 711.
necting factor can be determined subjectively, the place of employment is a matter of an objective connecting rule and not a subjective connecting factor. Where private law requirements to enter into agreements, or prohibitions on doing so, exist they are part of the legal system called upon to apply under Article 8 of the Rome I Regulation. That legal system will also determine the legal consequences resulting from a prohibition on entering into a contract (see e.g. Section 13 paragraph 69). In that connection Paragraph 134 of the German Civil Code (BGB) is applicable only where the law applicable to the contract is German law. It is conceivable that public policy (Article 21 of the Rome I Regulation) will preclude a foreign prohibition on entering into a contract; the contract would then be valid but would have to be dealt with in the same way as an employment relationship that has been unlawfully terminated.

Public law obligations to employ persons that do not give rise to private law claims are not governed by the law applicable to the contract. For example, that is the case in regard to the duty to employ persons under Paragraph 71 of Social Code IX or the duty to check if a workplace could be offered to a disabled person under Article 81 section 1 of Social Code IX. Whether these provisions are to be deemed to constitute overriding mandatory law, will then be significant only as between the employer and the State. They will come into play as a general rule in the case of employment within the country but not in the case of work abroad even if it involves the country’s own nationals. The same applies the other way around to foreign requirements to employ persons. An employment relationship founded on a foreign public law on the basis of a requirement to employ a person is to be acknowledged under the law applicable to the contract provided the public policy reservation (Article 21 of the Rome I Regulation) does not come into play.

On reinstatement after dismissal, see section 13, paragraph 74. There is a self-standing connecting rule for capacity under Article 13 of the Rome I Regulation (see section 7). However, restrictions on freedom to enter into contracts in respect of certain persons do not constitute matters concerning capacity, for example, in regard to the employment of persons requiring further training (see in a substantive law context, paragraph 4 above). The prohibition on the employment of children (see Paragraph 5 of the German youth em-

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25 C. Müller, p. 268.
26 Deinert, Zwingendes Recht, paragraph 39; for another view, Gamillscheg, IAR, p. 199.
27 Gamillscheg, IAR, p. 218.
28 Gamillscheg, IAR, p. 199.
29 Nor will the verification duty create subjective entitlements to engagement, see with further references, Deinert, in Deinert/Neumann (Eds.), Rehabilitation und Teilhabe behinderter Menschen, Handbuch SGB IX, 2nd ed., Baden-Baden 2009, p. 17, paragraph 84.
31 Gamillscheg, IAR, p. 223.
32 Gamillscheg, IAR, p. 224.
33 Gamillscheg, IAR, p. 224.
34 Gamillscheg, IAR, p. 213.
ployment protection law—Jugendarbeitsschutzgesetz) must be treated in the
same way. In that connection they either constitute protective provisions under
Article 8 section 1 of the Rome I Regulation and/or overriding mandatory provi-
sions under Article 9 section 1 of the Rome I Regulation, in that connection the
prohibition on the employment of persons under training, will apply as a matter
of principle as overriding mandatory law in regard to training within the country.
Of course, in light of its objective the prohibition ought also to apply to work
abroad. Conversely, an analogous foreign prohibition will have to be taken into
consideration in the context of the law applicable to the contract under Article 8
section 1 of the Rome I Regulation.

In respect of employment agencies there are special provisions in Paragraphs
292 et seq. of Social Code III. Their public-law aspects obey the territoriality
principle (see section 10, paragraph 111). Conversely, the principles concern-
ing the agency agreement (in Germany, Paragraph 296 et seq. of Social Code III)
are not employment contracts and consequently the connecting rule applicable to
them will be Articles 3 and 4 of the Rome I Regulation. In that connection en-
forcement of abovementioned Paragraphs 296 et seq. as overriding mandatory
provisions will also need to be considered.

The law governing the work permit, like the law concerning foreigners, will
be determined as to its public-law aspects in accordance with the territoriality
principle (see Section 10 paragraph 111). Where it is a question of a foreign
work permit the application of Article 9 section 3 of the Rome I Regulation falls
to be considered (see Section 10 paragraph 90). The contractual law implications
are of course governed by the law applicable to the contract. However, the em-
ployment law consequences of the illegal employment of nationals of third
countries will be deemed to constitute overriding mandatory law for the purpos-
es of Paragraph 98 a of the German Law on residence because they have a
sanctioning purpose in line with Article 6 of the sanctions directive. A pub-
lic-law guarantee document from the employer in conjunction with the issue of a
legitimacy card can confer on the employee claims under Paragraph 342 section
2 of the law on obligations (cf. Section 10 paragraph 113). Nor does equal

35 Gamillscheg, IAR, p. 214.
36 On taking account of foreign prohibitions, see also Gamillscheg, IAR, p. 214.
37 C. Müller, p. 273; thus also ultimately MünchArbR-Oetker, section 11, paragraph 11; Hönsch,
NZA 1988, 113, 117.
38 C. Müller, p. 274.
39 MünchKomm-Martiny, Art. 8 Rom I-VO paragraph 87; Hönsch, NZA 1988, 113, 117; also
40 C. Müller, p. 271. On the validity but subject to termination of an employment contract gov-
erned by German law in the absence of a work permit (now residence permit for the purpose
of carrying on employment), see BAG AP No. 2 on § 19 AFG; on claims arising out of factual
employment under Austrian law, see OGH Arb 12.019.
41 See in that connection Huber, NZA 2012, 477 et seq.
ing for minimum standards on sanctions and measures against employers of illegally staying
treatment with national workers as a precondition for the Federal Employment
Agency authorising the issue of a residence permit for work purposes under
Paragraph 39 section 2, first sentence, of the Residence Law have any conflict-
of-laws implications (Section 10 paragraph 116).44

In regard to prohibitions on employment (for example, in the case of chil-
dren, see paragraph 4) the territorality principle applies as regards public law.
For work within the country domestic prohibitions on employment will come in-
to play, irrespective of the law applicable to the contract. Article 9 of the Rome I
Regulation will determine the consequences for the employment relationship.
They will not normally come into play for work abroad.45

Under Article 9 section 3 of the Rome I Regulation foreign prohibitions on
employment may lose validity (see, in general, Section 10 paragraph 90). In re-
gard to the decision whether this will occur (Article 9 section 3, second sen-
tence, of the Rome I Regulation), the foreign law must be taken into considera-
tion if it pursues aims similar to those pursued by national law.46 In other cases a
substantive-law consideration may also impede performance of the contract.

Obligations arising out of contractual negotiations are excluded from the
scope of the Rome I Regulation under Article 1 section 2(i) thereof. Liability for
faults occurring in the course of negotiations (culpa in contrahendo) is deter-
mined under Article 12 of the Rome II Regulation.47 However, Article 12 sec-
tion 1 provides as a subsidiary connecting rule for the (notional) law applicable
to the contract to apply. In this way pre contractual duties of disclosure and du-
ties to provide information are subsumed under the law applicable to48 the con-
tract.

However, this subsidiary connecting rule applies only to obligations arising
out of contractual negotiations. Damage which is not directly connected with the
contractual negotiations but merely arose during the negotiation is not covered
by it.49 That is made plain in recital (30). It is also stated therein that personal
injuries sustained during the contractual negotiations are subsumed under the
general law of torts (Article 4 of the Rome II Regulation). The same must apply
to material damage occurring during the contractual negotiations.50 That means
that the ordinary law of torts comes into play in regard to any infringement of

43 BGE 135 III 162, 165 et seq.
44 On equal treatment under the proposal for a directive on intra-corporate posting of third-coun-
Parliament and of the Council of 15 May 2014 on the conditions of entry and residence of
third-country nationals in the framework of an intra-corporate transfer, OJ 157/1), see
Bayreuther, ZESAR 2012, 405 et seq.
45 Gamillscheg, IAR, p. 230.
46 Gamillscheg, IAR, p. 231.
47 In detail on liability under culpa in contrahendo in PIL, see Lütringhaus, RIW 2008, 193.
48 MünchArbR-Oetker, section 11, paragraph 59; Winkler v. Mohrenfels/Block, EAS B 3000,
paragraph 194.
49 Winkler v. Mohrenfels/Block, EAS B 3000, paragraph 194.
50 Winkler v. Mohrenfels/Block, EAS B 3000, paragraph 194.
personal integrity; under Article 4 section 3, second sentence, of the Rome II Regulation, the accessory connecting factor under Article 4 section 3, second sentence, of the Rome II Regulation may be a pre-existing contract.  

Whether **contractual claims prior to the conclusion of the employment contract** (in particular in regard to the costs of introductory discussions) can be independently brought under Articles 3 and 4 of the Rome I Regulation seems doubtful. Those are matters arising prior to conclusion of the contact. An analogous appraisal of Article 12 of the Rome II Regulation could prompt the suggestion that the law applicable to the prospective contract should apply under the escape clause in Article 4 section 3 of the Rome I Regulation. This is, however, not an entirely satisfactory solution because it cannot give effect to employee protection in the case of a choice of law in the same way as under the most favourable principle in Article 8 section 1 of the Rome I Regulation.

In regard to pre-contractual **discrimination** the prohibitions on discrimination under the equal-treatment legislation (AGG) come into play as overriding mandatory provisions (Section 12 paragraph 88). Irrespective of that, claims in tort arising out of pre-contractual discrimination will be brought under Article 12 of the Rome II Regulation, which will then normally lead to the ancillary contractual connecting rule. Conversely, the connecting rule for other **infringements of rights of personality** occurring prior to conclusion of the contract will be the laws of tort generally applicable under Article 4 of the Rome II Regulation.

**Involvement by the advisory board** in the event of employment will be determined by the law applicable to the works council, which will also be the case in regard to the consequences for validity of the contract.

Questions as to substantive **validity** are likewise directed by Article 10 section 1 of the Rome I Regulation to be determined under the law applicable to the contract. Whether the contract is valid is thus determined by the law that is applicable to the contract in the event that it is valid. That concerns, for example, issues of the validity of the contract in regard to statutory prohibitions (on that, see paragraph 11) or offences **contra bonos mores**. Issues as to challengeability and revocation are also covered by the law applicable to the contract.

Article 12 section 1(e) of the Rome I Regulation also encompasses the consequences of the nullity of the law applicable to the contract. That concerns pro-

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51 MünchArbR-Oetker, Section 11 paragraph 59; Winkler v. Mohrenfels/Block, EAS B 3000, paragraph 194.
52 See e.g. for German law, BAG AP No. 8 on § 196 BGB; BAG NZA 1989, 468; for Austrian law, see Marhold/Friedrich, p. 125 et seq.; for Swiss law, Geiser/Müller, paragraph 248.
53 It is thus in the case of a pre-contract instruction in relation to travel and subsistence expenses in connection with an application, MünchArbR-Oetker, Section 11 paragraph 60; concurring Staudinger-Magnus, Art. 8 Rom I-VO, paragraph 215.
54 See already earlier, Mansel, FS Canaris, 2007, 809, 824 et seq.
55 MünchArbR-Oetker, Section 11 paragraph 59; Winkler v. Mohrenfels/Block, EAS B 3000, paragraph 195.
56 Deinert, Internationales Arbeitsrecht, Section 17 paragraph 42.
cessing issues, and in particular the treatment of a factual (and erroneous) employment relationship. There was earlier analogous provision under Article 10 section 1(e) of the Rome Convention.\textsuperscript{57} The fact that employment relationships were mentioned alongside employment contracts in the earlier connecting rule in Article 6 of the Rome Convention as connecting factors proved to be immaterial. Therefore, it is immaterial to the inclusion of a factual employment relationship under Article 8 of the Rome I Regulation that henceforth only the employment contract is the connecting factor.\textsuperscript{58}

\textbf{23} Full or partial nullity of the contract\textsuperscript{59} is a matter to be determined by the law applicable to the contract.\textsuperscript{60} That follows from Article 12 section 1(e) of the Rome I Regulation. If the law applicable to the contract is e.g. German law, the reply would be ascertained by reference to Paragraph 138 of the Civil Code (BGB).

\textbf{24} A specific connecting rule applies to formal requirements (see Section 8). On proof of employment conditions, see Section 8 paragraph 19.

\textbf{25} On the question of permissible fixed-term contracts, see section 13, paragraph 66. On agreements precluding termination, see Section 13 paragraph 43, and on trial-period agreements, see Section 13 paragraph 44.

\textsuperscript{57} Gamillscheg, ZfA 1983, 307, 332; Junker, RIW 2006, 401, 402; see also Czernich/Heiss-Rudisch, Article. 6, footnote 8.

\textsuperscript{58} Staudinger-Magnus, Art. 8 Rom I-VO paragraph 33; Deinert, RdA 2009, 144, 152; see also Bamberger/Roth-Spickhoff, Art. 8 Rom I-VO paragraph 10.

\textsuperscript{59} Cf. § 139 BGB. English law also allows the possibility of partial nullity of an employment contract, see Kearney v Whitehaven Colliery Co. [1983] 1 QBD 700.

\textsuperscript{60} Gamillscheg, IAR, p. 218.
The rights and duties of the parties to the employment contract are determined in accordance with the law applicable to the contract.\(^1\) Similarly, interpretation of the contract is governed by the law applicable to the contract in accordance with Article 12 section 1(a) of the Rome I Regulation. Of course that is subject to the general reservation in favour of the special connecting rule rendering mandatory protective rules applicable under the most favourable principle in Article 8 section 1 of the Rome I Regulation and, in an appropriate case, in favour of a special connecting rule for overriding mandatory provisions.

The scope of the law applicable to the contract, choice of law, protective provisions, and the special connecting rule in favour of overriding mandatory provisions will be investigated \textit{in regard to individual aspects} of the content of the employment relationship. This account will begin with the performance of work by the employee (paragraphs 2 et seq.), in particular, in regard to the work obli-

\(^{1}\) MünchKomm-Martiny, Art. 8 Rom I-VO paragraph 89.
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gation itself (paragraphs 4 et seq) and in respect of the employee’s intellectual creations (paragraphs 9 et seq). There then follows an examination of the employee’s ancillary duties (paragraphs 14 et seq), then of the employer’s obligations in regard to remuneration (paragraphs 20 et seq.), including continued payment of remuneration in the event of illness (paragraph 37) and on holidays (paragraph 38). The employer’s ancillary duties (paragraphs 52 et seq.) will follow, in particular employment protection law (paragraphs 59 et seq.), equal treatment and anti-discrimination law (paragraphs 79 et seq). A further section will deal with the hiring of workers (paragraphs 102 et seq), followed by a brief examination of occupational training (Paragraph 112) before an examination of special protection regimes (paragraphs 113 et seq). There will then follow a presentation of the consequences of breaches of obligations (paragraphs 118 et seq.) with particular regard to limits on liability (paragraphs 129 et seq.), together with special provisions in the event of work-related accidents (paragraphs 130 et seq.), before finally duties under a situation of inactivity are looked at (paragraphs 136 et seq).

I. Performance of work

1. Substantive law

2 Under all legal systems the employment contract entails an obligation in regard to the performance of work in which case the scope of the law applicable can be variable. Like Paragraph 106 of the German Trade Regulation (GewO) Italy has a corresponding provision in Article 2104 section 2 of the Civil Code (C.c.). Analogous provisions apply in Austria and in Switzerland. Performance of the work obligation is as a rule to be fulfilled in person; and there are express provisions to that effect in Germany (Paragraph 613 of the Civil Code – BGB), in Austria (Paragraph 1153 of the Austrian Civil Code – ABGB) and in Switzerland (Article 321 of the Law on Obligations – OR). English law acknowledges as an implied term the obligation on the part of the employee that he will follow lawful and reasonable instructions.

3 In regard to the employee’s position under the law relating to inventions views differ. Whereas German law allows the employer under the legislation to claim rights to an invention in the course of employment (as does French law under Article L 611-7 of the Intellectual Property Code, under Paragraph 7 of the Austrian patent law that applies only where an agreement in that connection

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2 Gamillscheg, IAR, p. 234 et seq.
3 Cf. Markhold/Friedrich, p. 77.
4 Cf. Geiser/Müller, paragraphs 329 et seq.; on the limits of the applicable law in relation to dress codes, see Schwaab, AuR 2011, 100 et seq.
5 ELL-Hardy, Great Britain, paragraph 165.
6 Translated legislative texts and country reports in Fabry/Trimborn, Arbeitnehmererfindungsrecht im internationalen Vergleich, Köln, 2007.
7 Cf. ELL-Despax/Rojot, France, paragraphs 479 et seq.
had been reached between employer and employee\(^8\); similarly to the Swiss law in Article 332 of the Law on Obligations\(^9\), under Section 39 section 1 of the Patent Act 1977, English law\(^10\) proceeds on the basis that the employer has direct entitlement; the situation in Italian law is analogous under Article 64 of Law No 30/2005.\(^11\) Conversely, in the USA (apart from contractual obligations in respect of the invention) the employee is primarily the one with sole entitlement to the inventions but may be contractually obliged to transfer such entitlement to the employer.\(^12\)

2. Conflict of laws

The obligation to perform the work follows accordingly from the law applicable to the contract.\(^13\) That also concerns the extent of work performance for which the employee is liable\(^14\) and also any compensatory free time for overtime worked.\(^15\) The same applies to the conditions and limits applicable to part-time work and attendant rights.\(^16\) The minimum degree of social protection in the case of part-time on-call work and job-sharing under German Paragraphs 14 and 15 of the part-time work legislation (TzBfG) likewise have overriding mandatory nature as internationally binding law.\(^17\) In regard to entitlement to a reduction in working time, see Section 11 paragraph 8.

In relation to the manner of performance the provisions of the law of the place of performance are to be observed under Article 12 section 2 of the Rome I Regulation. They will not override a divergent law applicable to the contract but allow an area of discretion to the person applying the law.\(^18\) That may, for example, relate to provisions concerning prayer breaks or norms in relation to the performance of work.

The right to give instructions and, above all, its scope are determined in accordance with the law applicable to the contract.\(^19\)

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9 Cf. Geiser/Müller, paragraphs 113 et seq. An employee will be the originator even where the creation of the work takes place in the context of an employment relationship, BGE 136 III 225, 229 et seq.
11 Cf. ELL-Treu, Italy, paragraphs 277 et seq.
13 Birk, RebelsZ 46 (1982), 384, 396; Däußler, RIW 1987, 249, 254; Franzen, AR-Blattei SD 920, paragraph 133; Winkler v. Mohrenfels/Block, EAS B 3000, paragraph 198.
14 Hönsch, NZA 1988, 113, 118.
15 MünchKomm-Martiny, Art. 8 Rom I-VO paragraph 127; MünchArbR-Oetker, Section 11 paragraph 89.
16 MünchArbR-Oetker, Section 11 paragraph 64; Winkler v. Mohrenfels/Block, EAS B 3000, paragraph 197.
17 MünchArbR-Oetker, Section 11 paragraph 64.
18 Schlachter, NZA 2000, 57, 62.
The question of the acquisition of property by means of the performance of work is a question of the law governing the assets in question and must therefore be dealt with under that law (paragraph 36).

On the legal limits on working time, see paragraph 68.

On the conditions under which the employee performs temporary agency work, see paragraphs 102 et seq. and Section 10 paragraph 71.

In regard to the employment law issues in connection with employee inventions the law applicable to the contract is determinant. That seems also to be the case under the conflict-of-laws rules in the USA. For Austrian law that is expressly provided for in Paragraph 34 section 2 of the PIL law. Article 122 section 3 of the Swiss PIL law subsumes agreements concerning employee inventions under the law applicable to the contract. In that connection it is a matter of attributing an invention in regard to protected rights with the result that the principle of the country claiming protection, that would otherwise be applicable to the law concerning intellectual property rights (Article 8 of the Rome II Regulation), does not come into operation. Claims to compensation by the employee will also be determined by the law applicable to the contract.

Under Paragraph 22, first sentence, of the German law on employee inventions (ArbNErfG), its provisions cannot be derogated from; they are protective rules within the meaning of Article 8 section 1 of the Rome I Regulation. Employee rights to inventions will therefore be subject to a special connecting rule where, in the event of a choice of law, the law on employee inventions chosen with the law applicable to the contract falls short of the provisions of German law. Conversely, the employee invention legislation does not constitute overriding mandatory law. Nor ought the application of a law which awards the employer without compensation the invention by the employee in the course of his employment offend against public policy.

Distinct from the question of attribution is the question as to grounds for protection, its nature and extent. This is determined by the law applicable to

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21 Cf. Rüve, p. 174 et seq.
22 MünchKomm-Martiny, Art. 8 Rom I-VO paragraph 97; for another view, Drobing, RabelsZ 40 (1976), 195, 206 et seq.; for a more restrictive view (principle of country of protection decides only to whom the right is accorded, and the law applicable to the contract concerning compensation claims) Beitzke, DB 1958, 224, 226.
23 Winkler v. Mohrenfels/Block, EAS B 3000, paragraph 212.
24 Winkler v. Mohrenfels/Block, EAS B 3000, paragraph 212; MünchArbR-Oetker, Section 11 paragraph 95; Sack, FS Steindorff, 1990, p. 1333, 1344.
the intellectual property rights, in the same way as the question as to the consequences of infringements of those rights. In regard to rights personal to the inventor the law applicable to the intellectual property rights will likewise be determinant.

Where German law is the law applicable to the contract, Paragraph 14 of the law on employee inventions (ArbNERfG) makes substantive law provision for the intellectual property rights to be applied for abroad. The law subsequently applicable will then again be determined in accordance with the law applicable to the intellectual property rights.

In regard to the right to a European patent there is a self-standing connecting rule in Article 60 of the European Patent Convention. The connecting factor is then the principal place of employment or, in the alternative, the employer’s plant. That can lead to a divergence between the law applicable to the contract and the law applicable to employee inventions. In order to avoid that it is proposed to construe Article 60 of the European Patent Convention as a total referral with the consequence that the applicable law will be determined in accordance with the conflict rules of the principal place of employment of the employee, with the further consequence that the law applicable to the contract and the law applicable to employee inventions will go hand in hand.

Likewise, it is the law applicable to the contract that decides about the employer’s rights in relation to copyright under the employment relationship. In regard to copyright protection the principle of the country claiming protection is determinant. By analogy with the law on employee inventions, matters personal to copyright must also be determined in accordance with the law applicable to intellectual property rights (see paragraph 10).

II. Ancillary duties of the employee

1. Substantive law

Similarly to German law (Paragraph 241 section 2 of the Civil Code – BGB), other legal systems are also acquainted with contractual ancillary duties incumbent on the employee, thus, for instance, Austrian law or Swiss law (Article 321 a of the Law on Obligations – OR). Under Italian law Article 2105 of the
Civil Code (C.c.) provides that the employee cannot compete with the employer and cannot pass on or exploit information received in the course of his employment. Further, Article 2104 section 1 of the Civil Code requires the employee to observe general care in regard to the employer’s interests. Ancillary duties are incumbent on the employee under French law under the duty of good faith. It is also worth mentioning the mandatory requirement on the employer to draw up internal rules of procedure under Article L 1321-1 of the French Labour Code (CT) in undertakings with at least 20 employees. Those rules refer to provisions regarding employment protection, combatting discrimination and plant discipline; they do not concern contractual provisions or provisions that are subject to collective bargaining negotiations.

The provisions have mandatory effect under Article L 311-2 of the Labour Code in regard to the works unit concerned. In England the duty of loyalty is also incumbent on the worker as an implied term (see on that, Section 11 paragraph 2) with the various implications flowing therefrom.

2. Conflict of laws

The employee’s **ancillary duties** are likewise determined by the law applicable to the contract. In addition to the duty of confidentiality there are also issues concerning a **prohibition of competition**. Paragraphs 74 et seq. of the German Commercial Code (HGB) are protective provisions within the meaning of Article 8 section 1 of the Rome I Regulation. Where provisions of the criminal law, such as, for example, German Paragraph 17 of the Unfair Competition Law (UWG) apply, they apply irrespective of the law applicable to the contract. **Entitlement to further training**, as provided for under French law (Article L 6323-1 of the Labour Code), come under the law applicable to the contract.

Difficulties arise in regard to the protection of whistle-blowers as provided for in Section 806 of the American Sarbanes Oxley Act (18 U.S.C. Section 1514 a). In German law the question is as to the extent of the contractual duty of confidentiality which is a matter to be determined by the law applicable to the contract.

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35 The duty of loyalty, as in German law, in particular duties of loyalty and to provide information, the prohibition on competition and prohibition on the acceptance of bribes, cf. Geiser/ Müller, paragraphs 349 et seq.
36 Mazeaud, paragraphs 634 et seq.
37 Mazeaud, paragraphs 143 et seq.; ELL-Despax/Rojot, France, paragraphs 78 et seq.; Pansier, paragraphs 64 et seq.
38 Tolley’s Employment Handbook, paragraph 7.16; ELL-Hardy, Great Britain, paragraphs 173 et seq.
39 Birk, RabelsZ 46 (1982), 384, 396; Block, p. 78; Hönsch, NZA 1988, 113, 118; C. Müller, p. 366; see also Dicey, Morris & Collins, paragraph 33-059.
40 C. Müller, p. 366.
41 Overall, on whistleblower protection in US law, see ELL-Goldmann/Corrada, USA, paragraph 162; Petrovicki, p. 112 et seq.; for English law, see ELL-Hardy, Great Britain, paragraph 177.
contract and which in its determination has been influenced by the ECHR\textsuperscript{42} and the fundamental rights\textsuperscript{43} contained in the Constitution (Grundgesetz – GG)\textsuperscript{44}; under American law it is not a specifically employment law provision but a provision of statute law for which the connecting rule operated by the American courts is a territorial one and which does not apply to work abroad.\textsuperscript{45} The question then arises whether a disguised renvoi may be discerned in the territorial delimitation (see Section 6 paragraph 8). In the present case the answer to that question would be in the negative because one is dealing with an overriding mandatory provision applicable for reasons other than employment law. American law does not retreat in the sense that it would like to leave resolution of the issue to another law but is entirely indifferent to whistleblowing abroad. That supports the view that the territoriality principle should be accepted in the same way as occurs in continental law in regard to public-law provisions (see Section 10 paragraph 114). Disregard for fundamental rights (see above) will have to be countered in a given case by the public-policy reservation (Article 21 of the Rome I Regulation).

The law applicable to the contract will also embrace claims for the reimbursement of expenses by the employer against the employee owing to taxes paid.\textsuperscript{46}

The right or refusal to perform work under Paragraph 11 section 5 of the German Act on temporary agency work (AÜG) is as much an overriding mandatory provision as in general the right to refuse strike-breaking work (see paragraphs 15, 41 and 42). At same time those are contractual rights which therefore follow the law applicable to the contract under Article 8 of the Rome I Regulation.

The rules of procedure under Article L 1321-1 of the French Labour Code (CT) (see paragraph 14) are unilaterally drawn up by the employer and make statutory provision for the employee as member of the staff. That justifies the place where the plant is located being the connecting factor in regard to the law applicable to the rules of procedure (on the rules of procedure as the law applicable to the employment contract, see Section 9 paragraph 53). Moreover, that is supported by administrative review under Article L 1322-1 of the Labour Code and inclusion of the employee representatives under Article L 1321-4 of the Labour Code. Thus, it is not covered by the law applicable to the contract. The same result would be reached, for example, with works regulations under Japanese law.\textsuperscript{47}

\begin{footnotes}
\item[42] Cf. ECHR (EMGR), AuR 2011, 279 et seq. – Heinisch.
\item[44] Cf. BAG NZA 2004, 427; BAG DB 2007, 808.
\item[45] Carnero v. Boston Scientific Corp. 5.1.2006 U.S. Court of Appeals (First Circuit); to similar effect also Reiter, RIW 2005, 169, 172 et seq.; for a critical view in that connection, see Knöfel, RIW 2007, 493 et seq.
\item[46] BAG IPRspr. 1991, 122.
\item[47] On that see Nishitani, p. 104 et seq.; and Kuwamura, RdA 2012, 155, 157 et seq.
\end{footnotes}
III. Remuneration

1. Substantive law

20 In **Germany** the determination of wages is traditionally a matter for the social partners who establish collectively agreed minimum wages. However, there are minimum wages applicable in specific sectors that are underpinned by collective bargaining. Higher wages under employment contract will take priority under Paragraph 4 section 3 of the law on collective agreements (TVG). As a basic protection line employees are entitled to a minimum wage of 8.50 € according to the minimum wage Act. In the absence of agreement and application of the provisions of a collective agreement, the habitual remuneration will be payable (Paragraph 612 of the Civil Code – BGB, Paragraph 59 of the Commercial Code – HGB). Remuneration is payable in arrears (Paragraph 614 BGB).

In the event of illness, the legislation on continued payment of remuneration provides for a six-week period of continued payment which, in an appropriate case, will be followed by a period of claim to sickness benefit payments from the sickness fund under Paragraph 44 of Social Code V – SGB V. The employer bears the operating and financial risk.\(^{48}\)

21 In **Austria** determination of wages is also a matter within the remit of the social partners. Under Paragraph 1152 of the Austrian Civil Code (ABGB), unless there is an agreement that there be no remuneration or a different remuneration, there is entitlement to reasonable remuneration. Analogous provision is made under Paragraph 6 section 1 of the law on salaried employees (AngG): they have entitlement to remuneration which is habitual to the place of employment or, alternatively, to reasonable remuneration. In both cases these are provisions that may be derogated from. In addition, under the conditions laid down in Paragraph 22 of the legislation on the constitution of work (ArbVG), there is a possibility of fixing the minimum wage level through the intermediary of the Federal Conciliation Office in a case where collective agreements cannot be entered into in the relevant sector. The wage agreement may be contrary to good morals under Paragraph 879 of the Austrian Civil Code in the event of wage usury.\(^{49}\) That will lead to the invalidity of the agreement on remuneration which will confer on the employee, if he so wishes, entitlement to remuneration in the amount provided for in Paragraph 1152 of the Civil Code.\(^{50}\)

Under Paragraph 10 of the legislation on working time overtime (AZG) is to be remunerated by a 50% supplement or by means of compensatory time-off. In the event of illness, the employee will receive the continued payment of remuneration for a six-week period in accordance with Paragraph 1154 b of the Civil Code and Paragraph 2 of the legislation on the continued payment of remuneration (EFZG); this may be increased to a period of up to 12 weeks depending on

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\(^{48}\) BAG AP No. 2 on § 615 BGB – Betriebsrisiko.

\(^{49}\) OGH DRdA 1979, 208.

\(^{50}\) Kozak, DRdA 2011, 167, 170.
the length of time the contract has subsisted. In the case of salaried employees Paragraph 8 of the legislation on salaried employees makes provision for different extensions of the period during which payments will be made.\textsuperscript{51} In addition, for workers and salaried employees there is a further period of continued remuneration of four weeks on half pay. The rules on the continued payment of remuneration also come into play in the event of accidents at work, in which connection the period of continued payment of remuneration may, however, be extended.\textsuperscript{52} Smaller employers may receive a partial set-off in the form of an advance on continued payment of remuneration from the accident insurance scheme.\textsuperscript{53}

The employee is precluded from availing himself of the proportion of remuneration excluded from execution under Paragraph 293 section 2 of the Enforcement Order (EO); the same applies, save for exceptions, to set-off under Paragraph 293 section 3 EO thereof.

Under Austrian law, too, remuneration is paid monthly in arrears (Paragraph 1154 of the Civil Code). Under Paragraph 15 of the law on salaried employees, provision is made for the remuneration of the salaried employee to be paid on the 15th and on the last day of the month, in each case, in the amount of 50\%, though this provision may be departed from. Paragraph 77 of the C German Trade Regulation (GewO) of 1859 makes provision for weekly remuneration. Wages are subject to a three-year prescription period under Paragraph 1486 section 5 of the Civil Code.

In Switzerland as well the duty to pay remuneration under Article 332 of the Law of obligations (OR) is determined in order of precedence by an overall employment contract, an ordinary employment contract or the employment contract or, in the alternative, in accordance with habitual usages.

Under Article 321 section 4 OR the employer bears the risk of a delay in acceptance as well as the risk in respect of the remuneration in the event that, owing to his fault, performance of the work is not possible. In the event of illness, or for other personal reasons, continued payment of remuneration under Article 324a OR will come into play for a limited period.

In the event of illness the employer must, under Article 324a of the Law on Obligations continue to pay the employee his wages for at least three weeks in the first year of employment and thereafter ‘for a reasonable longer period’. In regard to the duration of the extension the various courts have elaborated their own scales.\textsuperscript{54} A precondition of entitlement to claim is, however, that the employment relationship has lasted three months or was entered into for a period of more than three months. Under Article 324b of the Law on Obligations claims under statutory social insurance schemes are to be included in the computation

\textsuperscript{51} See, on further differences in the rules for workers and employees, Jabornegg/Resch, paragraph 444.

\textsuperscript{52} For details, see Marhold/Friedrich, p. 207, 210.

\textsuperscript{53} See in that connection Löschnigg, paragraphs 6/612 et seq.

\textsuperscript{54} Geiser/Müller, paragraphs 438 et seq.; Rehbinder, paragraph 201.
up to 80% of wages; smaller social security payments are to be supplemented by
the employer.

There is no general obligation on the employer to pay wages in respect of
holidays. Where such an obligation does not already follow from the agreement
as to weekly or monthly remuneration, it may be agreed under the employment
contract, under the customary usages of the place of work, or under any provi-
sion directing release from work.\textsuperscript{55} A general obligation to pay wages lost as a
result of a public holiday does not exist, except in the case of 1 August.\textsuperscript{56}

As under German law the employer bears the operating risk.\textsuperscript{57}

Failing any other agreement or statutory provision, wages are payable month-
ly in arrears in accordance with Article 323 of the Law on obligations. Under
Article 128 (3) thereof any claim in that regard will be time barred after five
years. Agreements as to the use of wages are invalid under the truck prohibition
in Article 323 b section 3 and 362 of the Law on obligations. Set-off by the em-
ployer is possible under Article 323 b section 2 of the Law on obligations only to
the extent to which wages may be subject to a pledge. The assignment and
pledging of future wages claims is possible under Article 325 of the Law on
obligations only in order to secure family-law obligations and only within the
parameters of the pledging limits.

\textbf{In France} as well the determination of wages is within the remit of the parties
to the collective agreement. However, Article L 3231-1 et seq. of the Labour
Code (CT) guarantees an indexed general statutory minimum wage (\textit{ salaire min-
imum interprofessionel de croissance – SMIC}).\textsuperscript{58} Deductions are permissible for
minors under Article D 3231-3 CT and for trainees under Article D 6222-26 CT.
French law makes comprehensive provision for wage protection including, in
particular prohibitions on deductions in respect of expenditure and prohibitions
on repayment obligations in Articles L 3251-1 et seq. of the Labour Code. The
employer is subject to the duty to set off wages under Article L 3243-2 CT.\textsuperscript{59}
Acceptance without objection of the set-off does not imply, under Article
L-324-3 of the Labour Code, a waiver of the remaining remuneration.

On statutory holidays (Article L 3133-1 of the Labour Code) the employer,
under Article L 3133-2 of the Labour Code, remains under an obligation to con-
tinue payment of remuneration. Sickness will cause the employment contract to
be suspended.\textsuperscript{60} However, after one year’s employment by a firm socially in-

\textsuperscript{55} \textit{Rehbinder}, paragraph 165.
\textsuperscript{56} BGE 136 I 290.
\textsuperscript{57} \textit{Rehbinder}, paragraphs 206 et seq.
\textsuperscript{58} See in that connection \textit{Lokiec}, Bd. I, paragraphs 371 et seq.; \textit{Pansier}, paragraphs 489 et seq.;
\textit{Seifert}, in: \textit{Rieble/Junker/Giesen} (Eds.), Mindestlohn als politische und rechtliche Heraus-
forderung, München 2011, p. 75 et seq.
\textsuperscript{59} In more detail, see \textit{Lokiec}, Bd. I, paragraph 369.
\textsuperscript{60} \textit{Mazeud}, paragraph 847; \textit{Teyssié}, Article L 1226-1, notes 25 et seq.; \textit{ELL-Despax/Rojot},
France, paragraph 273.
sured employees will be entitled to continued payment of remuneration under Article L 1226-1 CT.

**Netherlands** law imposes liability to pay a strict penalty. As from the fourth working day the employer is liable, under Article 7: 625 of the Civil Code (BW), to pay 5% default interest per working day, albeit not on more than one half of the outstanding pay. However, that will only come into play if the delay is attributable to the employer.61 Under section 2 thereof, that provision cannot be derogated from. The claim accrues in addition to the statutory rate of interest as a statutory increase (‘wettelijke verhoging’).62 This produces practical effects principally where the employer ceases payment of wages after an extraordinary dismissal which in the end is declared unlawful.63

A further unusual Netherlands provision has in the meantime been repealed. Articles 11 et seq. of the decree on employment relations (BBA), which allowed for extensive nationalisation of wages policy, were repealed by the law on the determination of remuneration.64 Currently, there is only a general statutory minimum wage under the law on the minimum wage and minimum holiday allowance.

In **Italy** Article 36 of the Constitution provides that workers are entitled to reasonable remuneration for work performed.65 There is however no statutory minimum wage.66 The amount of wages will normally be apparent from provisions of collective agreements67 or from the employment contract. Determination of the reasonableness of remuneration allows the judge of the facts a certain margin of discretion.68 Apart from the prohibitions on discrimination, there is no general entitlement to equal treatment in regard to remuneration.69

The employer will be obliged, under Article 2110 section 1 of the Civil Code (C.c.), to continue to pay remuneration in the event of accident, sickness, pregnancy or maternity for a specific period in so far as there is no equivalent statutory provision. For salaried employees specific effect is given to this in collective agreements whereas workers receive benefits under the statutory health insurance scheme and some provision is made by collective agreement for supplementary payments to be made by the employer.70 In the event of an accident at work benefits from State accident insurance schemes will be supplemented under a collective agreement by the employer.71

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61 HR JAR 1997/24.
62 Bakels, p. 93.
63 Bakels, p. 94.
64 See on that Peters, Verdund sociaal recht, Deventer 2006, p. 256, footnote 15.
65 Cf. Galantino, p. 308 et seq.; Del Punta, p. 478 et seq.
66 ELL-Treu, Italy, paragraph 178.
67 On the role of the collective agreement in this context, see Ferraro, RIDL 2010, 692 et seq.; Magnani, RIDL 2010, 769, 776 et seq.
69 Henssler/Braun-Radoccia, Italy, paragraph 255.
70 In greater detail ELL-Treu, Italy, paragraphs 202 et seq.
An interesting prescription rule is worthy of mention. Under Article 2955 (2) and 2956 (1) C.c. a presumed prescription period comes into operation after one or three years respectively and the employer, if the employee objects to prescription, can require the employee to swear an oath in order to establish extinction of the debt under Article 2960 of the Civil Code. Under Article 2948 (4) of the Civil Code an extinguishing prescription will supervene after five years.

In **England** wages are subject to contractual agreement which may, in some cases, be determined by collective agreement.\(^\text{72}\) On the basis of the national Minimum Wage Act 1998 a statutory minimum wage is determined by the Secretary of State for Trade and Industry.\(^\text{73}\) These are implemented by civil servants under Section 19. The employee will also have a claim under Section 17 of the National Minimum Wage Act in conjunction with Section 13 of the ERA.\(^\text{74}\)

Continued payment in the event of sickness is initially dependent on a contractual agreement or on existing usage.\(^\text{75}\) In the event of an accident at work, owing to the infringement by the employer of contractual obligations, the employee can claim the lost remuneration as damages.\(^\text{76}\) As a matter of principle, it is possible for there to be an obligation to continue payment of remuneration in the event of illness as an implied term, although the employer could evade that obligation in the course of contractual negotiations by incorporating an express term.\(^\text{77}\) The employee after three days of absence is entitled to claim against the employer statutory sick pay (weekly maximum of £85.85 \(^\text{78}\)) under the Statutory Sick Pay (General) Regulations 1982 in conjunction with Sections 151 et seq. of the Social Security Contributions and Benefits Act. During this period claims under social insurance schemes are excluded.

If the employer cannot employ the employee, the employee retains entitlement to remuneration under Section 28 of the ERA 1996 as guaranteed pay. The same applies under Section 64 of the ERA 1996 in the event of suspension from the duty to work on grounds of occupational safety.

In regard to the Truck Acts England took a certain pioneering role. The provisions which served to maintain the employee’s income and, in particular, to regulate wage reductions\(^\text{79}\), are today to be essentially found in Section 13 of the ERA 1996.

In the **USA** there are statutory Federal provisions only in two areas, namely, on the one hand, in regard to the minimum wage and overtime and, on the other hand, in regard to exemptions on family and health grounds. First of all, the Fair

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\(^{72}\) ELL-Hardy, Great Britain, paragraph 219.
\(^{73}\) In greater detail, Deakin/Morris, paragraphs 4.46 et seq. The hours to be paid in the case of non-active periods are not identical to hours relevant in terms of the law on working time; see South Manchester Abbeyfield Society v. Hopkins [2011] IRLR 300.
\(^{74}\) On implementation, see Deakin/Morris, paragraph 4.59.
\(^{75}\) ELL-Hardy, Great Britain, paragraphs 247 et seq.
\(^{76}\) ELL-Hardy, Great Britain, paragraph 253.
\(^{77}\) Deakin/Morris, paragraph 4.124.
\(^{78}\) Section 157(1) Social Security Contributions and Benefits Act.
\(^{79}\) Deakin/Morris, paragraphs 4.71 et seq.
Labor Standards Act provides in Section 29 U.S.C. 206 a general minimum wage for employment in trade or in production for trade which is currently set at 7.25 US$ per hour. The Federal States may lay down higher minimum wages and to a great extent have done so. Maximum working time is 40 hours a week under Section 207; where these hours are exceeded supplementary payments for overtime of 50% will become due.

Under the Family and Medical Leave Act (29 U.S.C. Sections 260 et seq.) workers will have a claim under certain conditions to up to 12 weeks per year unpaid leave, inter alia, in the event of the birth of a child or sickness of the employee or of a close relative. An important restriction is that the legislation applies to employers with more than 50 employees in accordance with Section 2611 (4).

From a comparative perspective, it should be stated that the wage level is to a considerable extent provided for by the social partners. However, there are numerous countries with legislation on a minimum wage. In addition, countries variously have far reaching provisions concerning wage protection. As a rule, the employer is required to continue payment of remuneration in the event of sickness, even though that is formulated very differently in the individual countries. Continuance of remuneration on holidays is not guaranteed in all countries.

2. Conflict of laws

The obligation on the employer to pay wages as a contractual obligation is naturally enough determined by the law applicable to the contract. That also applies to the level of wages. The same is true of seafarers’ pay. Even where it is fixed by collective agreement the law applicable to the contract and, pursuant to it, the relevant collective agreement determines the amount of wages. Minimum wage levels which may come into play as overriding mandatory law (see paragraph 30) cannot apply in the case of work abroad either under the law applicable to the contract or as overriding mandatory law. However, where German law is the law applicable to the contract, the prevention of unethical wages could fall to be considered under Paragraph 138 of the German Civil Code (BGB). Where a foreign law applies to the contract it will, in an appropriate case, be necessary to consider public policy. Where Austrian law applies to the

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81 Comparative observations on collective negotiations in Europe in Sciarra, ZESAR 2006, 185 et seq.
82 Comparative overview in Ohashi, Japan Labour Review 2011, 4 et seq.; Schulten, WSI-Mitt. 2012, 124 et seq.
83 Hess. LAG IPRspr. 1992, 161, 163; Däubler, RIW 1987, 249, 254; MünchKomm-Martiny, Art. 8 Rom I-VO paragraph 92; Franzen, AR-Blattei SD 920, paragraph 133; Winkler v. Mohrenfels/Block, EAS B 3000, paragraph 201.
84 Deinert, RdA 1996, 339, 343.
85 BAG AP No. 32 on Internationales Privatrecht – Arbeitsrecht.
86 Gamillscheg, IAR, p. 300.
contract the Austrian Supreme Court however regards Paragraph 7 of the law
adjusting the law on the employment contract (AVRAG) as covered by the law
applicable to the contract in the case of work within the country (see Section 10
paragraph 72).

The obligation to pay a **minimum wage** can of course apply as overriding
mandatory law in the case of work within the country in the same way as equal
treatment accorded to temporary agency workers in respect of remuneration in
the event of a breach of the minimum wage level (Section 10 paragraph 71).
Similarly, the prohibition on unethical wages constitutes overriding mandatory
law which can give rise to claims to higher remuneration for work performed in
Germany (Section 10 paragraph 71). The Italian case law discerns a principle in
the constitutional requirement that reasonable remuneration must be paid under
Article 36 of the constitution whose contravention constitutes a breach of public
policy. ⁸⁷

**Obligations to pay overtime** are determined solely by the law applicable to
the contract. ⁸⁸ It is true that statutory rates of overtime could also constitute
overriding mandatory provisions under Paragraph 2 (1) of the German law on
the posting of workers (AEntG), ⁸⁹ but that is not the case in Germany. The time
from which **overtime is presumed** to become payable is a matter that has also
to be determined by the law applicable to the contract even if, under the law
of the place of employment, overtime would have been presumed to be payable
from an earlier moment in time. ⁹⁰ However, this may be otherwise provided for
under foreign overriding mandatory law, such as for example under Section 207
of the American Fair Labor Standards Acts (paragraph 27). Finally, the question
of the burden of proof in regard to the performance of overtime is a matter gov-
erned by the law applicable to the contract. ⁹¹

**The legal consequences of a labour dispute** will be determined by the law
applicable to the labour dispute (Section 15 paragraph 38).

**In the case of commission claims** the law applicable to the contract will also
determine the question whether such claims are well founded. ⁹² The treatment of
other specific forms of wages will also be determined according to the law ap-
licable to the contract. ⁹³

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⁸⁸ BAG AP No. 2 on § 4 TVG Arbeitszeit; LAG München NZA 1987, 206; MünchKomm-Mart-
tiny, Art. 8 Rom I-VO paragraph 127; MünchArbR-Oetker, Section 11 paragraph 88;
⁸⁹ Prior to the law on the posting of workers, this was by implication rejected by the BAG in
regard to the earlier Paragraph 15 of the working time regulation, without any further explana-
tion on that question, AP No. 2 on § 4 TVG Arbeitszeit.
⁹⁰ Gamillscheg, IAR, p. 279, in regard to work in Germany under the aegis of a foreign law ap-
licable to the contract; otherwise however at p. 280 in respect of work abroad where German
law is the law applicable to the contract.
⁹¹ Cass.Soc. Dr.soc. 2012, 412, 413.
⁹² BAG AP No. 23 on Internationales Privatrecht – Arbeitsrecht.
⁹³ Gamillscheg, IAR, p. 308.
In regard to participation in share option schemes these may be presumed, as constituting remuneration, to fall under the law applicable to the contract.\textsuperscript{94} A partial choice of law is possible yet will have to compete with the most favourable principle.\textsuperscript{95} Where the matter is agreed with a foreign holding company there will be no employment contract connection with the result that the self-standing connecting rule in Articles 3, 4 of the Rome I Regulation will have to be relied on.\textsuperscript{96} The contract to grant an option does not satisfy the criteria of an employment contract\textsuperscript{97} even if it has to be conceded that an inescapable precondition will normally be a pre-existing employment relationship.\textsuperscript{98} It is merely conceivable that, owing to special circumstances, the law applicable to the employment contract may come into operation by virtue of the escape clause and under an ancillary connecting rule.\textsuperscript{99} This solution is in line with French case-law on the earlier French PIL which required the totality of relations between the parties to be taken into consideration.\textsuperscript{100}

There is a separate connecting rule in regard to the rights and duties arising out of the rental of work-related accommodation. The law of the place where the accommodation is situated will apply under Article 4 section 1(e) of the Rome I Regulation (\textit{lex rei sitae}). Irrespective of the law otherwise applicable to the employment contract, in the case of such accommodation situated in Austria, for example, the duty to vacate the premises within a month of the employee’s death will apply.\textsuperscript{101}

With regard to the acquisition of property by the employer through the production process the question arises whether that is to be classified as a matter of employment law\textsuperscript{102} or as a matter of the law relating to assets. Ultimately, it entails acquisition by compounding, mixing or processing. As a matter of principle, that is governed by the law applicable to the law relating to assets.\textsuperscript{103} In that connection, the \textit{lex rei sitae} rule like in the German Article 41 section 1 of the EGBGB will apply.

\begin{thebibliography}{9}
\bibitem{94} Mankowski, Anm. on Hess. LAG LAGE BGB § 611 Mitarbeiterbeteiligung No. 2; see also TS, 26.1.2006 – 3813/2004.
\bibitem{95} Hess. LAG IPRspr. 2000, 83 et seq.
\bibitem{96} Driver-Polke/Melot de Beauregard, BB 2004, 2350 et seq.; Franzen, AR-Blattei SD 920, paragraph 135; Junker, FS Kropholler, 2008, p. 481, 491; MünchKomm-Martiny, Art. 8 Rome I-VO paragraph 93; for another view, see (connection under Article 8 of the Rome I Regulation) MünchArbR-Oetker, Section 11 paragraph 71.
\bibitem{97} Mankowski, Anm. on Hess. LAG LAGE BGB § 611 Mitarbeiterbeteiligung No. 2.
\bibitem{98} With this reasoning in favour of an employment-law connecting rule, see Buhr/Radtke, DB 2001, 1882, 1883.
\bibitem{99} Mankowski, Anm. on Hess. LAG LAGE BGB § 611 Mitarbeiterbeteiligung No. 2; see also Dyon-Loye, Anm. on Cass.soc. JDI 1995, 134, 141.
\bibitem{101} Cf. Gamillscheg, IAR, p. 325.
\bibitem{102} Thus Gamillscheg, IAR, p. 325; likewise, AcP 155 (1956), 49, 64.
\bibitem{103} MünchKomm-Wendehorst, Art. 43, paragraph 86.
\end{thebibliography}
The obligation to continue payment in the event of sickness is as to subject-matter a question of the consequences of non-performance of the obligation to work and therefore is covered under Article 12 section 1(c) of the Rome I Regulation.\textsuperscript{104} Of course, sometimes, an ancillary social insurance connecting rule is advocated because, in practically all States, continuance of payment of remuneration\textsuperscript{105} relieves the burden on sickness insurance schemes.\textsuperscript{106} Whilst that is true, the conclusion alluded to cannot automatically be followed. Even if the continued payment of remuneration relieves the burden on the sickness insurance scheme, it does not, thereby, become an obligation on the employer under social insurance law. Rather, it is a civil-law obligation because Paragraph 3 of the German Law on the continued payment of remuneration (EFZG) confers on the employee a (private-law) claim to continued payment of remuneration by the employer in the event of sickness. Nor does the law on the offsetting of expenditure alter that since that operates merely to adjust financing with claims to reimbursement in favour of the employer. Whilst there is affinity with the law on sickness insurance, it does not call in question the private-law nature of entitlement to continued payment of remuneration. Accordingly, it is argued by some that the law on the continued payment of remuneration in the event of sickness is covered by the law applicable to the contract.\textsuperscript{107}

However, in the first \textit{Paletta case}, the ECJ categorised the continued payment in the event of sickness by the employer as a social security benefit and, thus, subject to coordinating Regulation 1408/71 and implementing Regulation 574/72.\textsuperscript{108} In the new coordinating system under Articles 11 and 12 of Regulation (EC) 883/2004, Article 27 of Regulation (EEC) 987/2009,\textsuperscript{109} that would essentially confer competence on the State of residence. That has been subjected to criticism from a practical point of view.\textsuperscript{110} Nor, however, can it necessarily be inferred from this decision that the continued payment of remuneration is to be subsumed under social insurance law or under an ancillary social insurance rule\textsuperscript{111} or, at any rate, that within the EU it is to be subsumed under the coordinating law.\textsuperscript{112} The connecting rule based on who is responsible is appropriate for institutions paying social benefits, but not for employers who can become liable to pay benefits only under a contractual relationship. The ECJ did not draw this

\textsuperscript{104} See, already under the old law, Gamillscheg, IAR, p. 312.
\textsuperscript{105} See the comparative-law review for Europe as at 1987 in Birk/Abele/Kasel-Seibert/Maurer, ZIAS 1987, 45 et seq. and 159 et seq.
\textsuperscript{107} Heilmann, p. 124; MünchArbR-Oetker, Section 11 paragraph 78.
\textsuperscript{108} ECJ AP No. 1 on Art. 18 EWG-Verordnung Nr. 574/72 – Paletta I; see also ECJ AP No. 9 on Art. 48 EWG-Vertrag – (= NJW 1988, 2171).
\textsuperscript{109} Cf. Section 10 paragraph 111, footnote 395.
\textsuperscript{111} Thus, Winkler v. Mohrenfels/Block, EAS B 3000, paragraph 201; similarly, Nunes Fernandes Gil Wolf, p. 102 et seq.
\textsuperscript{112} MünchArbR-Oetker, Section 11 paragraph 78.
conclusion with such clarity but dealt solely with the question of the recognition
of a medical certificate of incapacity for work in regard to which it is much
more appropriate to apply the coordinating law. In my view there is no reason
not to continue with a connecting rule under contract law for entitlement to con-
tinued payment of remuneration. Ultimately, that would, however, have to be
clarified by the ECJ in the context of a reference for a preliminary ruling.

The question then arises, however, whether the aim of relieving the burden on
the sickness insurance scheme can confer an **overriding mandatory nature** on
the continued payment of remuneration. The case-law would seem to point in
that direction.\footnote{BAG AP No. 10 on Art. 30 EGBGB n. F.; likewise Gamillscheg, ZfA 1983, 307, 360; MünchArbR-Oetker, Section 11 paragraph 78; rejected by Franzen, IPRax 2003, 239, 242 et seq.; for another view, see also Heilmann, p. 127.} If one considers that the whole social security system is a basic
socio-political concern of the legislator, then continued payment of remuneration
must also be, to the extent to which giving effect to that major concern is partly
made the responsibility of the private-law employer. Thus, the continued pay-
ment of remuneration in the event of sickness under Paragraph 3 EFZG must be
classified as overriding mandatory law. That is not precluded by the fact that
the claim to remuneration in general does not constitute overriding mandatory law
and entitlement to continued remuneration merely buttresses the general entitle-
ment to remuneration.\footnote{But to that effect, see Junker, RIW 2001, 94, 103; ErfK-Schlachter, Rom I-VO paragraph 24.} Irrespective of the fact that claims to remuneration, at
least in regard to minimum protected levels, may constitute overriding mandato-
ry law, there is a difference between remuneration as consideration for work per-
formed and the securing of a subsistence level by the conferral of entitlement
even where it is not possible for work to be performed. Where German law is
the law applicable to social insurance matters entitlement to sick pay under Para-
graph 44 of Social Code V (SGB V) will go into abeyance under Paragraph 49
section 1(1), of Social Code V for the duration of entitlement to continued pay-
ment of remuneration. Where the employee is subject to a foreign law applicable
to the contract, the consequence will be that the continued payment of remunera-
tion will be subject to German law.\footnote{See also in the result Eichenhofer, EuZA 2012, 140, 150.} Any lacuna in regard to the obligation to
continue to pay remuneration under the law applicable to the contract will there-
fore not be to the detriment of the socially insured community.

Implementation of the continued payment of remuneration by way of overrid-
ing mandatory law will **frequently have the same result** as an ancillary social
insurance connecting rule or a connecting rule under social insurance law, but is
not identical thereto. The law on social insurance proceeds on the basis of the
place of employment and is subject to external influences and may also exert
such. Conversely, overriding mandatory law as the connecting factor entails the
applicability of the law on the continued payment of remuneration in the case of
work within the country, irrespective of the law applicable to the contract, but

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\footnote{BAG AP No. 10 on Art. 30 EGBGB n. F.; likewise Gamillscheg, ZfA 1983, 307, 360; MünchArbR-Oetker, Section 11 paragraph 78; rejected by Franzen, IPRax 2003, 239, 242 et seq.; for another view, see also Heilmann, p. 127.}

\footnote{But to that effect, see Junker, RIW 2001, 94, 103; ErfK-Schlachter, Rom I-VO paragraph 24.}

\footnote{See also in the result Eichenhofer, EuZA 2012, 140, 150.}
also irrespective of the law applicable in matters of social insurance. **Example:** a person working in Germany with Netherlands law being the law applicable to the contract and Netherlands social security law also being applicable will be able to claim continued payment remuneration under Paragraph 3 of the German law on the continued payment of remuneration. Conversely, the Federal Labour Court will apply that provision only where German social security law applies because the provision seeks to relieve the burden on the German social insurance system.\textsuperscript{116} That does not carry conviction: social insurance or payment by the employer is a technical issue; the relevant consideration in terms of overriding mandatory law is, however, the objective: securing a basic subsistence level in the case of incapacity for work.

The involvement of international social law of course arises in regard to the subsuming of certificates of incapacity to work under the social security coordinating law.\textsuperscript{117} Under Article 27 section 8 of implementing Regulation (EEC) 987/2009, such certificates of incapacity for work will only have the legal value provided for by national law. In that connection, under German law he employer is entitled to adduce proof that the employee is not sick.\textsuperscript{118}

Where the Netherlands law on the continued payment of remuneration (paragraph 64) performs a **preventive safety function**, those provisions will also be presumed to be in the nature of overriding mandatory provisions because this will be a projection of the overriding mandatory nature of employment safety law (paragraph 68).

**Continued payment remuneration on official holidays** raises specific problems. In principle, the release of workers on statutory holidays may be assumed to be subsumed under the law applicable to the contract. However, in regard to the applicability of the public law on public holidays, the guiding principle will be that of the principle of territoriality. Official holidays within the country constitute overriding mandatory law which will apply irrespective of a situation in which a foreign law is applicable to the contract.\textsuperscript{119} Under another view the law applicable to public holidays at the place of employment would come into play under Article 12 section 2 of the Rome I Regulation.\textsuperscript{120} There will then also be a sufficient domestic connection where the employee is temporarily posted abroad, but not if he works permanently abroad. That is not a question of acquired entitlement to public holidays\textsuperscript{121}, but rather a question of the applicability of the provisions of public law relating to public holidays. However, initially, that is only a question of the applicability of the law relating to public holidays

\textbf{\textsuperscript{116} BAG RIW 2012, 638, 639.}
\textbf{\textsuperscript{117} ECJ AP No. 1 on Art. 18 EWG-Verordnung Nr. 574/72 – Paletta I.}
\textbf{\textsuperscript{118} See with further references ErfK-Dörner, § 5 EFZG, paragraph 14.}
\textbf{\textsuperscript{119} MünchKomm-Martiny, Art. 8 Rom I-VO paragraph 127; C. Müller, p. 342 and p. 327 et seq.; see also Gamillscheg, IAR, p. 283.}
\textbf{\textsuperscript{120} Junker, Internationales Arbeitsrecht im Konzern, p. 297 et seq.; Hergenröder, ZfA 1999, 1, 28.}
\textbf{\textsuperscript{121} But see MünchArbR-Oetker, Section 11 paragraph 79.}
at the seat of the undertaking, where work is performed abroad where German law applies to the contract or, vice versa, where work is performed in Germany with a foreign law being the law of the contract in relation to the domestic law on public holidays.

Since the law on continued payment remuneration on public holidays must be subsumed under the law applicable to the contract, liability for payment of remuneration in respect of those days will be governed by the law applicable to the contract.

**Local law on public holidays** must, however, be brought into application as overriding mandatory law. That may be based on Article 12 section 2 of the Rome I Rome I Regulation or on Article 9 section 3 of the Rome I Regulation. For payment of remuneration on public holidays, there will then be substitution (see Section 16 paragraph 16). Thus, paid leave will also be required on local public holidays. That may also apply in the case of further provisions on public holiday supplements to remuneration. Where the local law on public holidays provides for a holiday to be worked prior to or after the public holiday, as is, for example, the case in China where employees, in exchange for the day off, can be required to work on another day, which would otherwise be free, that will readily come under the law applicable to the contract by there being no liability to continued payment of remuneration in respect of the relevant public holiday. Moreover, where the local law is not opposed to work on a public holiday, but the employer is impeded from employing the employee for reasons related to the organisation of work (because, for example, of the absence of support works), it will have to be determined, in accordance with the law applicable to the contract, whether the employer, for instance, under principles concerning risks incurred by undertakings, is obliged to continue to pay remuneration (cf. paragraph 41).

However, in exceptional cases that may lead to an accumulation of public holidays under both the law of the home country and local law, which is neither required nor desired by any of the legal systems involved, for instance, where under the law applicable to the contract work on Christmas Day is precluded, whilst under the local law it is not permitted to work on 6 January. In

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12 BAG RIW 2012, 638, 639; Franzen, AR-Blattei SD 920, paragraph 161; Winkler v. Mohrenfels/Block, EAS B 3000, paragraph 200; MünchArbR-Oetker, Section 11 paragraph 79; Beitzke, GS Dietz, 1973, p. 127, 141; for another view, Birk, RabelsZ 46 (1982), 384, 397 et seq., seeking to subsume payment of holiday pay under the law on holidays; to this effect, at any rate for national holidays, Gamillscheg, IAR, p. 285.
124 Junker, Internationales Arbeitsrecht im Konzern, p. 299 et seq., mentions adjustment.
125 Kittner/Zwanziger/Deinert-Mayer, Section 158 paragraph 33; Dübnler, FS Birk, 2008, p. 27, 37; C. Müller, p. 342 et seq.; for another view (only if provided for under the law of the performance) Birk, RabelsZ 46 (1982), 384, 397.
126 See also Gamillscheg, ZFA 1983, 307, 360.
127 See also Gamillscheg, IAR, p. 287.
128 Thus, in particular, Geppert, DRdA 1970, 259, 272 et seq., without possibility of correction in the case of Austria.
respect of payment for public holidays. One would therefore be faced with an accumulation of provisions requiring an **adjustment** (in that connection, see Section 16 paragraph 15). That may best be brought about at a substantive-law level. Even where the local law on public holidays through the intermediary of Article 9 section 3 of the Rome I Regulation precludes any employment, the employer will be liable to continue payment remuneration only up to the number of public holidays provided for under the law applicable to the contract.\(^\text{129}\) It is not a solution to say that local law also decides on the number of public holidays to be remunerated.\(^\text{130}\) As a rule the mandatory law on public holidays demands only a release from the performance of work, but has nothing to say about how many paid days off the employee should have. On other public holidays, the employer may accordingly not employ the employee or even compel him to work or draw negative consequences from a failure to perform work but is exempt from the obligation to continue to pay remuneration. The employee’s interest in evading a reduction in remuneration as a result of this accumulation of public holidays may best be met by allowing the employee the right to decline to work on public holidays within the country which, in their accumulated form, exceed the number of public holidays under the law applicable to the contract; the employee may exercise such right or not, as he sees fit.

In light of the extension in section 5 to non-insured persons, the **entitlement to be released in order to care for a sick child** under Paragraph 45 of the German Social Code V (SGB V) is in no way subsumed under an ancillary social insurance rule.\(^\text{131}\) It is a claim to be released from work as a matter of the law governing the contract and as such is governed by the law applicable to the contract. In light of Article 6 section 1 and section 2 of the Constitution (GG), the provision must however be classified as overriding mandatory law.\(^\text{132}\) Any duty to continue to pay remuneration under Paragraph 616 of the Civil Code (BGB) does not of course partake of the internationally binding nature of this provision in view of the express indifference to the obligation to continue to pay remuneration (see section 5).\(^\text{133}\)

40 On the employer’s **advance** in respect of **maternity pay**, see paragraph 114.

Questions concerning the continued payment of remuneration, **in the event of other matters frustrating performance**, are subject to the law applicable to the contract in accordance with Article 12 section 1(c) of the Rome I Rome I Regulation.\(^\text{134}\) That will include, for instance, default interest under Netherlands law

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\(^\text{130}\) But see Birk, RabelsZ 46 (1982), 384, 397; ultimately, also E. Lorenz, RdA 1989, 220, 224.

\(^\text{131}\) Likewise C. Mülller, p. 355 et seq.

\(^\text{132}\) For another view, see C. Mülller, p. 356.

\(^\text{133}\) Thus, ultimately, also C. Mülller, p. 355.

\(^\text{134}\) MünchArbR-Oetker, Section 1 paragraph 80.
(paragraph 24). Where, however, the duty to perform work gives way to public-law obligations, such as in the case of a person being required to give evidence in court, the local provisions concerning continued payment of remuneration must also apply.\(^\text{135}\) Where any obligations to continue to pay remuneration are provided for under the employment contract, they will have to be adjusted if there is provision for compensation under public law.\(^\text{136}\)

Rules relating to set-off and assignment principally serve to balance the interests of creditor and debtor and are therefore to be subsumed under the law applicable to the contract. That applies to setting-off under Article 17 of the Rome I Regulation and to assignment under Article 14 section 2 of the Rome I Regulation. Even though such rules may affect the general interest, that does not warrant the conclusion that they are overriding mandatory provisions.\(^\text{137}\)

Accounting obligations will solely be subsumed under the law applicable to the employment contract.\(^\text{138}\) Conversely, wage protection by rules on calculating and payment of wages under Paragraph 107 of the German Trade Regulation (GewO) must be classified as overriding mandatory law.\(^\text{139}\) At the same time, however, this wage protection must be regarded as forming part of the contract where German law is the law applicable to the contract.\(^\text{140}\) A statutory allowance for inflation is also to be subsumed under the law applicable to the contract.\(^\text{141}\)

In relation to performance by the employer, the law of the place at which performance iss to take place must also be considered under Article 12 section 2 of the Rome I Regulation (see on that point in regard to the duty to perform work, paragraph 4). That is, for instance, conceivable in regard to an obligation to pay in the currency of the country (see that connection also Paragraph 107 section 1 of the the German Trade Regulation (GewO) and, on that point, see paragraph 43)\(^\text{142}\) or a requirement to pay in cash.

In regard to prescription, an earlier problem was that this was, and is, treated under English\(^\text{143}\) and American law\(^\text{144}\) as a procedural matter. Nonetheless, even at an early stage coverage by the employment contract was contended for,\(^\text{145}\) as indeed from a comparative law point of view, it was predominantly classified in substantive-law terms.\(^\text{146}\) In the meanwhile, Article 12 section 1(4) of the Rome

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135 Gamillscheg, IAR, p. 235.
137 Birk, RabelsZ 46 (1982), 384, 399; for another view, see MünchArbR-Oetker, Section 11 paragraph 73; presumably also Winkler v. Mohrenfels/Block, EAS B 3000, paragraph 202.
138 C. Müller, p. 380 et seq.
139 To this effect, see also Winkler v. Mohrenfels/Block, EAS B 3000, paragraph 202; see also Gamillscheg, IAR, p. 316; for another view, see MünchArbR-Oetker, Section 11 paragraph 70. C. Müller, p. 379 et seq.
140 Thus, also Gamillscheg, IAR, p. 316; cf. for Austria, Geppert, DRdA 1970, 259, 268 et seq.
141 LAG München IPRax 1992, 97.
144 Cf. Hay/Borschers/Symeonides, Sections 3.9 et seq.
145 Gamillscheg, IAR, p. 306.
I Regulation has expressly come down in favour of the law applicable to the contract. This covers also the presumption of prescription familiar, for example, to Italian law (see paragraph 25).

46 For other ways in which the debt may be extinguished the law applicable to the contract will apply in accordance with Article 12 section 1(4) of the Rome I Rome I Regulation. That will apply, for instance, to a receipt in respect of the balance of remuneration. It will also apply to preclude a waiver in the event of acceptance without objection of the payslip by the employee under Article 3243 – 3 of the French Labour Code (CT) (on that see paragraph 23).

47 Retention of remuneration for the purposes of accounting for tax is determined, however, not by the law applicable to the contract, but by the applicable tax law.\textsuperscript{147} The same applies to social security contributions. Even though the courts regard the deduction from wages under Paragraph 28 g of German Social Code IV (SGB IV) as a specific objection to performance,\textsuperscript{148} that is nonetheless to be classified not as a matter of contract law, but as a matter of social insurance law and consequently will be governed by German social security law. Likewise, the restriction on deductions from wages falls under the law applicable to social security matters. That will also apply where work is performed under a foreign law applicable to the contract but where German law applies in regard to social security matters. Even if within the country work is performed which is subject to a foreign law applicable to social security matters, Paragraph 28 g of Social Code IV will apply as an overriding mandatory provision. The protection of the employee from indebtedness to the social security scheme is a concept underlying social-policy regulation, which is compulsorily implemented at international level.\textsuperscript{149} The Federal Employment Court also ultimately came to this conclusion, although emphasising that it was under a German applicable law to the contract; however, it was not clear whether it would have applied the restrictions on deductions from wages if a foreign law had been applicable to the contract.\textsuperscript{150}

48 Limits on attachment follow the law of the place of intervention.\textsuperscript{151} In so far as rights to seek an attachment are dependent thereon, as is the case under Paragraph 400 of the German Civil Code (BGB), it must nonetheless be assumed that the right to seek attachment as such is a matter to be determined in accordance with the law applicable to the contract,\textsuperscript{152} whilst the extent to which it can be exercised will follow the law of the place of intervention.\textsuperscript{153}

\textsuperscript{146} Cf. Gamillscheg, IAR, p. 303 et seq. On developments in the USA, see Symeonides, paragraphs 593 et seq.
\textsuperscript{147} Gamillscheg, IAR, p. 318.
\textsuperscript{148} BSG NZS 2001, 370, 372; BAG (GS) AP No. 4 on § 288 BGB.
\textsuperscript{149} See in greater detail Straube, p. 154 et seq.
\textsuperscript{150} BAG AP No. 3 on §§ 394, 395 RVO (likewise DB 1978, 698).
\textsuperscript{151} MünchArbR-Oetker, Section 11 paragraph 73; Hönsch, NZA 1988, 113, 118; thus also Birk, RabelsZ 46 (1982), 384, 399; for another view, see Gamillscheg, IAR, p. 322; likewise AcP 155 (1956), 49, 69: employee’s place of residence.
\textsuperscript{152} Gamillscheg, IAR, p. 320.
\textsuperscript{153} But in principle for place of residence as the connecting rule, see Gamillscheg, IAR, p. 318.
In the event of the **insolvency** of the employer, the question arises as to the applicable insolvency law in regard to the employee’s claims. In regard to the effect of the insolvency proceedings on the employment relationship, the law applicable to the contract will under Article 10 of the European insolvency regulation\textsuperscript{154} be determinant\textsuperscript{155} and, if the latter regulation does not apply, then it will be Paragraph 337 of the German insolvency regulation (InsO). Of course, that concerns only the question of the effect of the initiation of insolvency proceedings on the employment relationship.\textsuperscript{156} However, the further insolvency law consequences will likewise be determined according to the law applicable to the contract.\textsuperscript{157} That does not, however, include the classification and conduct of the claim for the purposes of insolvency law, as is made clear in recital (28), second sentence, of the European insolvency regulation. Rather, under Article 4 of the European insolvency regulation, the insolvency law of the State in which proceedings are opened will be determinant. The same will apply outside the scope of application of the European insolvency regulation.\textsuperscript{158} The same conclusion was reached by the earlier case law of the Federal Employment Court in regard to the priority rights of employees in a bankruptcy by virtue of the fact that the court classified these provisions as overriding mandatory provisions of German law.\textsuperscript{159}

Directive 80/97/EEC\textsuperscript{160} provides to a certain extent for securing wages against the insolvency of the employer by the institution of a guarantee facility. In that connection in Germany Paragraphs 165 et seq. of Social Code III (SGB III) confirm the entitlement to payments of **insolvency money** as against the employment agency in so far as the employees were employed within the country (Paragraph 165 section 1 of Social Code III)\textsuperscript{161}. Extraterritorial effect may also be possible.\textsuperscript{162} In addition, Article 8a of this directive provides for the State of the place of employment to have competence in the case of undertakings engaged in cross-border activities. Where, however, the employer maintains no undertaking in the country in which the employee is employed and the employer makes social security contributions to the State in which he is established, the competent State will be that in which the judicial proceedings for inability to make payments are instituted.\textsuperscript{163}

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\textsuperscript{155} Hess. LAG 15.2.2011 – 13 Sa 767/10.
\textsuperscript{156} See in that connection BAG IPRax 2009, 343, 347.
\textsuperscript{157} MünchArbR–Oetker, Section 11 paragraph 75.
\textsuperscript{158} Zwanziger, Kommentar zum Arbeitsrecht der Insolvenzordnung, 4. Auflage, Frankfurt/M. 2010, Einführung, paragraph 52.
\textsuperscript{159} BAG AP No. 28 on Internationales Privatrecht Arbeitsrecht.
\textsuperscript{161} See in detail Eichenhofer, ISR and IPR, p. 193 et seq.
\textsuperscript{162} BSG ZIP 1984, 469 et seq.
51 **Declarations of guarantee** are not subsumed as an ancillary rule under the law applicable to the contract, but autonomously under Articles 3 and 4 of the Rome I Regulation. The same applies to guarantees by third parties in regard to remuneration.

IV. **Employer’s ancillary obligations**

1. **General**
   
a) **Substantive law**

52 German law is familiar with protective duties (duties of care) as **contractual ancillary obligations** under Paragraph 241 section 2 of the BGB (Civil Code) (in the same way as Austrian law). That will also include any duties of information and clarification. The courts have however held that the employer is not under a duty to inform the employee whom he employs abroad about the tax consequences of his employment abroad. That contrasts with the French case-law which proceeds on the basis of a duty on the part of the employer to his employee employed abroad in regard to social security protection during the employment abroad. In German law ancillary contractual duties are specified in Paragraph 618 of the Civil Code (BGB). In Austrian law, the duty to provide analogous protection is given statutory effect in Paragraph 1157 of the Austrian Civil Code (ABGB). The same applies to Swiss law under Article 328 of the law on obligations (OR) in regard to the protection of personal integrity, health and decency. Furthermore, Article 2087 of the Italian Civil Code (C.c.) also contains an analogous provision. Under the common law duties of care and precaution are inferred as **implied terms** (see Section 11 paragraph 2) from the employment contract. They may also include warnings of risks associated with employment abroad but do not require comprehensive protection against damage or injury resulting therefrom.

An ancillary duty worthy of note is contained in Article L. 1231 – 5 of the French Labour Code. Under that provision, a French parent company is under an obligation, where an employee is posted to a foreign subsidiary company with...
which the employee has entered into an employment contract, to take back and reintegrate the employee in the event of the employee’s dismissal by the subsidiary.\textsuperscript{173} The parent company must take the initiative in this regard, that is to say, entitlement is not dependent upon a request in that regard being made by the employee.\textsuperscript{174} The matter does not depend upon the continued existence of an agreement with the parent company.\textsuperscript{175} Even where the contract with the parent company was limited in time, the duty to reinstate will continue to subsist.\textsuperscript{176}

Alongside these provisions concerning the duty of protection, practically all countries are familiar with certain \textit{statutory provisions} which impose upon the employer obligations, in particular in the sector of safety at work and social employment protection (see paragraphs 59 et seq.).

\textit{b) Conflict of laws}

Likewise, the ancillary duties of the employer are determined as a matter of principle by the law applicable to the contract.\textsuperscript{177} In addition to the ancillary duties examined in more detail below, these include in particular the issue of a duty of employment with which not only German law\textsuperscript{178} is familiar, but also for example, Italian law\textsuperscript{179} or the issue of a duty to take care of items belonging to the employee. Also, the seafarer’s right to repatriation under German Paragraph 72 of the Seafarers’ Law (SeemG) is one of these duties.\textsuperscript{180} The ancillary duties are, however, subject to many special connecting rules by way of overriding mandatory law (see Section 10 paragraph 11).

The \textit{right to re-instatement} under Article L.1231 – 5 of the Labour Code (CT) (see paragraph 52) is ultimately to be subsumed as an ancillary duty under the law applicable to the contract. Conversely, it is immaterial whether the local employment relationship is subject to French or another law.\textsuperscript{181} From a French perspective, the right under Article L.1231 – 5 CT could be an overriding mandatory provision.\textsuperscript{182} However, application of the provision in earlier decisions was made dependent upon the applicability of French law\textsuperscript{183} which underpins classification under the law applicable to the contract. That would tend to mitigate against classification is overriding mandatory law.\textsuperscript{184} In terms of the

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\textsuperscript{173} For more detail on that, see \textit{Lokiec}, Dr.soc. 2012, 266 et seq.; see also \textit{Coursier}, Dr.soc. 1994, 19 et seq.; \textit{Gosselin}, RJS 2009, 19 et seq.; \textit{Lacoste-Mary}, DO 2011, 480 et seq.
\textsuperscript{174} Cass.soc. Recueil Dalloz 1983, 442 (annotations \textit{Frossard}).
\textsuperscript{176} Cass.soc. DO 2011, 480.
\textsuperscript{177} \textit{Birk}, RabelsZ 46 (1982), 384, 400.
\textsuperscript{178} Cf. with further references \textit{MünchArbR-Reichold}, Section 84 paragraphs 4 et seq.
\textsuperscript{179} \textit{ELL-Treu}, Italy, paragraph 139.
\textsuperscript{180} \textit{Mankowski}, IPRax 1996, 405, 409.
\textsuperscript{181} Cass.soc. DO 2011, 480.
\textsuperscript{182} \textit{Pataut}, RDT 2011, 14, 20 et seq.
\textsuperscript{184} \textit{Callsen}, EuZA 2012, 154, 159; otherwise however \textit{Coursier}, Dr.soc. 1994, 19 et seq.
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connecting factor, where the employment relationship with the parent company has come to an end, the law applicable to the contract, which previously subsisted, will be determinant because the contractual duty is one which continues to have effect after termination.

Fundamental rights do not operate directly as ancillary duties. They have effect indirectly in employment law in terms of the conflict of laws by way of the internationally binding implementation of such provisions which serve specifically to protect fundamental rights and also in the context of the application of the public-policy reservation under Article 21 of the Rome I Regulation. Where, conversely, fundamental rights have direct private-law effect under the law applicable to the contract, as is the case in regard to the right of personality under French Article 9 of the Civil Code, in regard to the fundamental rights under the ECHR in accordance with the case law of the French Court of Cassation and also in regard to fundamental rights in regard to the employment contract under Article L.1121 – 1 of the Labour code, that will have to be observed in the application of the substantive law.

Claims to reimbursement of expenditure are governed by the law applicable to the contract. The same applies to any non-fault-based liability on the part of the employer for injuries sustained by the employee.

In respect of data protection, the country of establishment will apply under Article 4 of Directive 95/46/EEC. Thus the obligations in terms of employee data protection of an employer established in Germany will stem from the Federal data protection legislation (BDSG), irrespective of the law applicable to the contract. By its nature data protection legislation therefore constitutes overriding mandatory law.

2. Working time and safety

a) Substantive law

The law on working time is harmonised under European law. As is the case with the working-time legislation of the other Member States, German legislation on working time likewise follows the European directive on working time.
Likewise the employee protection legislation is harmonised by the European directive on employee protection and the various individual directives issued in order to give concrete effect to it. German law has transposed the working-time directive in the law on working time, and the employee protection directives have likewise been transposed into employee protection legislation, as is the case with the individual directives issued in order to give effect to the main directive. In addition, there are provisions on safety at work in collective agreements as well as accident prevention provisions under Paragraph 15 of Social Code VII (SGB VII). In the event of accidents at work (Paragraph 8 SBG VII) and occupational diseases (Paragraph 9 of SGB VII) the protection afforded by the statutory accident insurance scheme comes into play. On the limitation of civil-law liability, see paragraph 118. Alongside State supervision of commerce and statutory accident insurance, a significant player in terms of safety law is the works council (Paragraph 80 section 1(1), Paragraph 87 section 1(7), Paragraph 89 of the Works Constitution Act – BetrVG).

In Austria, the working-time directive has been transposed by legislation bearing the same title. It is, at the same time, the maximum measure of what will under the circumstances constitute appropriate service, according to Paragraph 1153, second sentence, of the Austrian Civil Code (ABGB). The employer is required, as far as possible, to secure the safety and health of the employee under Paragraph 1157 section 1 ABGB and under Paragraph 18 of the Employee Statute (AngG). This duty of care is given specific effect by the technical law on employee protection that is laid down in the employee protection legislation and regulations implemented in order to give effect to it. In Switzerland public employee protection law becomes part of the private employment contract by way of the so-called reception clause in Article 342 section 2 of the law on obligations (OR) (see Section 10 paragraph 113). Employee protection law is provided for in the legislation on work – ArG. Under Article 6 of that legislation, the employer must take all measures, as far as is reasonably feasible, in order to protect the health and personal safety of the employee. The requisite measures are specified in Regulations 3 and 4 issued in implementation of the legislation on work (ArG). The same applies, by analogy,
to the prevention of accidents and occupational diseases under Article 81 of the Accident Prevention Law (UVG).

The permissible weekly maximum working time is 50 hours and, for employees in industry and offices as well as technical and other employees, including sales staff in large undertakings in the retail trade, 45 hours, under Article 9 of the work legislation. Overtime work is regulated under Article 12 ArG. Under Article 13 of the legislation, overtime attracts a 25% supplement, but for office staff and certain employees only for overtime worked in excess of 60 hours per annum. The daily working time is limited in two ways. Under Article 10 section 3 ArG, the employee may work for a maximum of 14 hours, including breaks and overtime. The plant operation working time is limited to 17 hours.

Under French law, the employer is required by Article L. 4121 – 1 of the Labour Code (CT) to take the necessary measures to protect the physical and mental health of the employee. Under the case-law the employer has an obligation in regard to health protection to obtain a secure outcome.201 He will therefore be liable to the employee at civil law for injuries to health occasioned by work, even if he can be accused of no fault and has also breached no rule.202 A significant role in implementing employee protection is played by the committee for health, safety and conditions of work in undertakings with more than 50 employees, as provided for in Articles L. 4611 – 1 et seq. CT whilst, in smaller undertakings, this task is entrusted to staff delegates (see Section 17 paragraph 4).203 In addition, supervision is conducted by an inspector of work under Articles L. 4711 – 1 et seq. CT. The law on safety at work is buttressed by a comprehensive range of penalties which do not, however, very frequently lead to convictions in the criminal courts.204 Following illness or an accident, the employee is entitled to work duties in keeping with the ill-health or injuries sustained, as provided for under Article L. 1226 – 2, and L. 1226 – 10 of the Labour Code.

The law on working time is laid down in Articles L.3121 – 1 et seq. CT. The 35-hour week under Article L.3121 – 10 of the Labour Code is well known. The limits on daily working time are provided for in compliance with the working-time directive in Article L.3121 – 3 of the Labour Code. In the event of overtime an overtime supplement of between 25% and 50% is provided for in Article L.3121 – 22 CT.

The Netherlands law on safety at work is to a large extent characterised by a kind of privatisation.205 Under the relevant legislation (Arbowet) a framework is laid down which has to be filled out by negotiations at undertaking level. The proper functioning of the system is intended to be guaranteed by the law on the

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204 Sachs-Durand, in: Ales (Ed.), Health and Safety at Work, H.
205 Jaspers/Pennings, in: Ales (Ed.), Health and Safety at Work, 3 and 11 under 1).
continued payment of remuneration. As a matter of principle, the employer under Article 7:629 section 1 of the Civil Code (BW) is obliged to continue payment of remuneration for 104 weeks in the event of an accident at work. If he fails to take adequate steps to reinstate the employee into the workforce, the period of continuance of payment of remuneration may be extended for a further period of up to 52 weeks under Article 7:629 section 11 of the Civil Code (BW) unless, for his part, the employee has not made sufficient efforts to secure reinstatement.206 In addition, the employee may seek damages for breach of the duty to ensure safety under Article 7:658 BW which, under Article 6:106 BW, may also include non-material damage.207

Article 2087 of the Civil Code (C.c.) is the central provision of the Italian employee protection. It requires the employer to take all necessary measures to protect the physical and mental integrity of the employee and is therefore an expression of the constitutional command under Article 32 section 1 of the Constitution to protect the health of persons.208 Effect is given to this duty by decree laws 626/1994 and 81/2008 transposing the framework directive. Under Article 13 of decree law 81/2008 safety at work is supervised by local health authorities.209 In certain sectors inspectors of the Ministry of Work and Social Security also, to an extent, have parallel responsibilities.210 An infringement of obligations on the part of the employer gives the employee civil-law remedies, such as an entitlement to claim performance or the right to refuse to work under Article 1453 section 1 C.c.211 There may also be a tortious claim for damages under Article 2043 C.c. That will also include non-material damage.212 Thus, damage levels not covered by the accident insurance may be paid (see also paragraph 122). Under Article 36 of the Italian Constitution, the maximum daily working time is to be determined by law.213 Initially, that was effected by law 196/1997. In the meantime, the working-time directive has been transposed by Regulation 66/2003.214

The law on safety at work in England is basically provided for in the Health and Safety at Work Act 1974 (HSWA) under which further regulations to transpose EU directives have been issued or are being issued. Under Section 2 (1) of the HSWA, the employer has a duty to the employee to ensure health and safety insofar as that is reasonably practicable. As a matter of principle, the employer must also ensure the safety and health of the worker where he is employed in plants of other undertakings. As a matter of practicability, these requirements

206 Cf. Waas, Modell Holland, p. 177 et seq.
207 Bakels, p. 122.
209 In general on supervision, see Ales, RIDL 2011, 57 et seq.
212 Ales/Giurini/Miranda, in: Ales (Ed.), Health and Safety at Work, 6.c).
213 On that, see Galantino, p. 249.
214 Irollo/Irollo, p. 154.
may, however, be reduced particularly in the case of work abroad.\footnote{Square D v. Cook [1992], IRLR 34 (CA).} In the event of an infringement, the employee may claim damages under the contract for breach of implied contractual duties.\footnote{Bell, in: Ales (Ed.), Health and Safety at Work, Introduction.} That is also the case where the employer has delegated his duties in the case of infringement of delegated duties by the person delegated.\footnote{McDermid v. Nash Dredging & Reclamation [1986], ICR 525 (CA).} Under Section 49 of the Employment Relations Act 1996, the Employment Tribunal may award the employee compensation and make a declaration of a breach of the duties incumbent on the employer. The employee may also bring a claim in tort.\footnote{Wilson and Others v. English [1938] A.C. 57 (H.L.); Bell, in: Ales (Ed.), Health and Safety at Work, 1; cf. Deakin/Morris, paragraph 4/95.} In regard to safety at work, the employer has duties of consultation. Where there are no union representatives of a trade union recognised in the plant, the employer must decide whether to give a hearing to the workers’ elected representatives or directly to the employees as a whole. In that connection, there are no genuine rights of codetermination.\footnote{Bell, in: Ales (Ed.), Health and Safety at Work, 4.} As far as the State is concerned, employers’ duties are enforced by the Health and Safety Executive under Section 33 of the Health and Safety at Work Act.

The working-time directive was transposed in the Working Time Regulations.\footnote{Cf. Petrovicki, p. 110.} The provisions concerning the average weekly maximum working time of 48 hours may, however, be derogated from under regulation 5 by a written agreement between employer and employee, although such agreement may be terminated at the behest of the employee.\footnote{Cf. Deakin/Morris, paragraphs 4/77 et seq.}

In the \textbf{United States}, the employer is obliged under the \textit{General Duty Clause} in Section 5 of the Occupational Safety and Health Act (29 U.S.C. Section 654) to guarantee safety at work for the employee and to observe the standards laid down in the statute.\footnote{On that, see ELL-Goldmann/Corraida, USA, paragraphs 278 et seq.} The statute is, however, applicable only in the context of interstate commerce.\footnote{On the generous interpretation, cf. ELL-Goldmann/Corraida, USA, paragraph 278.} The latter term is, however, construed very widely.\footnote{Cf. Wickard v. Filburne 317 U.S. 111; see also, however, National Federation of Independent Business v. Sibelius 567 U.S. 1.} There is specific legislation to cover mineworkers (30 U.S.C. Section 801 et seq.).Special provision for employers’ liability comes into play in the case of accidents at work in interstate railway transport under the Federal Employers’ Liability Act (45 U.S.C. Section 51).\footnote{Cf. Petrovicki, p. 110.} Moreover, insurance payments and regulation of employers’ liability for accidents at work are matters for legislation at state level.
b) Conflict of laws

Provisions on working time and safety at work are overriding mandatory provisions under Article 9 of the Rome I Regulation in accordance with Paragraphs 2 (3) and (5) of the German Act on the Posting of Workers (AEntG) which implements the European Posting Directive 1996/71/EC. That is true also of the law on working time under Paragraphs 84 et seq. of the legislation relating to seafarers (SeemG). In Switzerland as well the legislation on working time and safety at work is regarded as constituting overriding mandatory law where Article 1 section 3 of the legislation on work (ArG) directs it to apply to employees of foreign plants in so far as reasonably practicable in the circumstances.

The duration and location of working time are also covered by the law applicable to the contract. As the courts have hitherto focused on the territoriality principle, so public-law and private-law effects have not been clearly differentiated. However, as far as Swiss law is concerned, the maximum working time in the plant will not be a matter to be determined by the law applicable to the contract (see paragraph 62), but will be determined under the territorial connecting rule.

The statutory overtime supplement under Paragraph 90 of the German legislation relating to seafarers (SeemG) is intended to prevent overtime and, for this reason alone, must be regarded as constituting overriding mandatory law. Irrespective of that, the rates of overtime are however under Paragraph 2 (1) of the German AEntG, which also embraces Paragraph 90 of the seafarers’ legislation, deemed to constitute overriding mandatory law. Since this applies, however, only to statutory overtime rates it must further be presumed that wage supplements (see paragraph 31) or free-time compensation for overtime (see paragraph 4) are governed solely by the law applicable to the contract. As a rule, the internationally binding effect of the law on working time and safety at work extends to work within the country. The same applies to the extension of provisions governing accident prevention to foreign employers under Paragraph 16 section 2 of German Social Code VII (SGB VII).

225 Winkler v. Mohrenfels/Block, EAS B 3000, paragraph 210; MünchKomm-Martiny, Art. 8 Rom I -VO paragraph 127; C. Müller, p. 331. The same result would also be arrived at without the Law on the Posting of Workers, see Junker, JZ 2005, 481, 486; see on the earlier English practice (territoriality principle) Kahn-Freund, Rivista di diritto internazionale e comparato del lavoro 1960, 307, 319.

226 Cf. Franzen, observations on BAG EGBGB, Art. 30 (3).

227 Gamillscheg, IAR, p. 275, 277; Grillberger, FS Schwarz, 1991, p. 69, 81 et seq.; Geupert, DRdA 1970, 259, 269; in greater detail concerning the consequences, see Deinert, FS Winkler v. Mohrenfels, 2013, at IV. 3. See to this effect also Korkein oikeus, JDI 1998, 153. For a purely public-law view, see Franzen, AR-Blattei SD 920, paragraphs 137 et seq.; MünchArb-Oetker, Section 11 paragraph 88, proceeds on the basis of the applicability of the law on working time only in the event of work in Germany.

228 BAG AP No. 2 on § 4 TVG Arbeitszeit; see more recently Wiebauer, EuZA 2012, 485 et seq.

229 Cf. Franzen, observations on BAG EGBGB Art 30 (3); for another view see Mankowski, IPRax 1996, 405, 409.

230 C. Müller, p. 332 et seq.
The working-time regime as a part of the law applicable to the contract may, however, have superimposed on it, in the case of work abroad, an equivalent law of the place of employment or one that better protects the employee.\textsuperscript{232} In that connection, the provisions of that place will be implemented by way of Article 12 (2) of the Rome I Regulation.\textsuperscript{233} On the other hand, where German law is the law of the contract, it may require under Paragraph 618 of the BGB, depending on local conditions, for example, in the case of extreme heat, that the limits permissible under the law on working time are not reached.\textsuperscript{234} Austrian doctrine views this differently. The duty of care calls for observance of the Austrian legislation on working time only where the level of the protection abroad is below average.\textsuperscript{235}

The Safety at Work legislation will be transmuted into the employment relationship as part of the contractual duty of care where German law is the law of contract.\textsuperscript{236} However, under Article 12 section 2, local conditions and provisions are to be taken into consideration.\textsuperscript{237} Safety requirements under the local law which go further are amenable, as third-country overriding mandatory provisions, to a special connecting rule under Article 9 section 3 of the Rome I Regulation.

Accident prevention provisions are classified by the legislation on the posting of workers as safety law and thus constitute overriding mandatory rules.\textsuperscript{238} Likewise, they may be called upon to apply by the law applicable to the contract (see Section 9 paragraph 53). Even if the law applicable to the contract deems the legal consequences of infringements of safety provisions to be consequences of breaches of duty under Article 12 section 1(c) of the Rome I Regulation (see paragraph 127), the legal remedies under the safety law implemented as overriding mandatory law will, for their part, also constitute overriding mandatory law. This will, ultimately, assist in the implementation of the prohibition and thus in the attainment of its objective.\textsuperscript{239} For example, the rights of employees under Paragraph 17 of the employee protection legislation will be applicable in the case of work within the country, irrespective of the law applicable to the contract.

On the law relating to public holidays, see paragraph 38.

On entitlement to a reduction in working time, see Section 11 paragraph 8.

The law on shop closing, insofar as it addresses the employer, not in that capacity, but \textit{qua} entrepreneur and therefore only indirectly secures employee pro-

\textsuperscript{231} C. Müller, p. 334 et seq.
\textsuperscript{232} Gamillscheg, IAR, p. 277.
\textsuperscript{233} Ferrari-Staudinger, Art. 8 Rom I-VO paragraph 28; cf. on the earlier law, LAG München NZA 1987, 206.
\textsuperscript{234} Gamillscheg, IAR, p. 278.
\textsuperscript{235} See, with further references, Burger, ZAS 2012, 4.
\textsuperscript{236} Gamillscheg, IAR, p. 254.
\textsuperscript{237} Cf. on the earlier law Gamillscheg, IAR, p. 255.
\textsuperscript{238} MünchKomm-Martiny, Art. 8 Rom I-VO paragraph 127.
\textsuperscript{239} Gamillscheg, IAR, p. 253.
Entitlement to jobs in keeping with the degree of suffering sustained following an accident or illness, as provided for, for example, under French law in Article L. 1226 – 2 and L. 1226 – 10 of the Labour Code (CT) (paragraph 63), come under the law applicable to the contract. In view of the public interest thereby pursued, this must, from the perspective of French law, constitute overriding mandatory law. That will have to be taken into consideration by another country’s court from a substantive-law point of view, for example, in regard to the validity of a notice of termination or a claim for payment of wages during periods when the employer fails to provide work to a willing employee, in the case of a job in France.

3. Equal treatment

a) Substantive law

Article 157 TFEU requires the equal treatment of women and men in regard to remuneration. In addition, prohibitions on discrimination were harmonised in terms of Union law in Directives 2000/43/EC, 2000/78/EC and 2006/54/EC. They demand that the Member States make provision to counter disadvantages arising on the ground of gender, race, ethnic origin, disablement, age, religion, or sexually orientation.

The discrimination directives were transposed in Germany in the General Equality Act (AGG), at the same time harmonising the principle of equal treatment in Paragraph 75 of the Works Constitution Act (BetrVG). The equality legislation ranks after the law on protection against dismissal. Under Paragraph 2 section 4 AGG, “solely the provisions on the general and specific protection against dismissal” [translation from German] apply in respect of dismissals. Yet, under the case-law, the prohibitions on discrimination are to be brought into play in the context of the law on protection against dismissal (KSchG). The equality legislation prohibits indirect and direct disadvantages (Paragraph 3 AGG) arising out of race, ethnic origin, gender, religion, belief, disablement, age and sexual orientation (Paragraph 1 AGG). It lays down observance of the antidis-

240 See also ultimately Franzen, AR-Blattei SD 920, paragraph 138; MünchArbR-Oetker, Section 11 paragraph 87.
241 A succinct review of the legal situation in France, Belgium, England and Austria is to be found in Lüttringhaus, p. 13 et seq.
245 BAG AP No. 182 on § 1 KSchG 1969 Betriebsbedingte Kündigung. On the discrimination potential of dismissals under German law, see Wenckebach, p. 209 et seq.
crime law in Paragraph 7 section 3 as a contractual duty incumbent on employer and employee. Employers have a protective duty under Paragraph 12 AGG. Proof of a disadvantage is facilitated under Paragraph 22 AGG. In the event of a breach of the prohibition on being placed at a disadvantage, employees will specifically be entitled to claim damages and compensation for non-material damage (Paragraph 15 AGG). In addition, disadvantageous agreements are invalid under Paragraph 7 section 2 AGG. A prohibition on discrimination on the ground of genetic characteristics is contained in Paragraph 21 of the Act on Genetic Diagnostic (GenDG).

Irrespective of the prohibitions on discrimination, the employer has a contractual duty not to treat employees differently without objective reasons (principle of equal treatment in employment law). 246

Like German law, **Austrian** law likewise has a principle of equal treatment under employment law. 247 The European antidiscrimination directives were transposed in Paragraphs 3 et seq. of the Equal Treatment Act – GlbG (equal treatment of women and men) and Paragraphs 16 et seq. GlbG (other prohibitions on discrimination). 248

Under **Swiss law**, the command, in Article 8 section 3 of the Federal Constitution, that man and woman should be placed on an equal footing works its way into the employment relationship. 249 In that connection, Article 3 of the equality legislation (GlG) contains a prohibition on discrimination on the ground of gender and Article 4 thereof prohibits sexual harassment. Protection from sexual harassment is expressly made part of the employer’s duty of care by Article 328 section 1, second sentence, of the law on obligations. Article 5 GlG confers entitlement to claim injunctive relief for cessation and prohibition in the case of any discrimination, together with claims for compensation and to be placed on an equal footing in relation to remuneration. Article 6 GlG provides for facilitating proof along the same lines as Paragraph 22 of the German AGG. Applicants not considered also have entitlement to seek information under Article 8 section 1 GlG. Enforcement of the law is reinforced by the possibility of class actions under Article 7 of the law.

Furthermore, the general principle of equal treatment comes into play under the heading of prevention of misuse (Article 2 section 2 of the code of civil procedure – ZBG). 250 This, however, conflicts with freedom of contract. 251 As in German law, it will therefore be chiefly of significance in relation to generic forms of conduct.

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246 Kittner/Zwanziger/Deinert-Zwanziger, Section 92 paragraphs 23 et seq.
247 Jabornegg/Resch, paragraphs 533 et seq.; Löschnigg, paragraph 6/369 et seq.; Marhold/Friedrich, p. 247 et seq.
248 On recent changes in relation to transparency, see Hey/Feichtinger, RIW 2011, 525 et seq.
249 Rehbinder, paragraph 160; cf. Geiser/Müller, paragraph 266.
250 Rehbinder, paragraph 226.
251 Rehbinder, paragraph 226.
In **France**, the principle of non-discrimination is laid down at the very beginning of the Labour Code (CT) in Article L. 1132 – 1. It prohibits discriminatory measures taken on the ground of the criteria outlawed by the European directives, as well as many other criteria, such as family situation, political convictions, state of health, appearance, family name or trade union activities.\footnote{Pélissier/Auzero/Dockès, paragraphs 652 et seq.} In addition, employees enjoy protection under Article L. 1152 – 1 CT against bullying (moral harassment).\footnote{Teyssié, Code du travail, Art. L 1152-1, note 14.} Under Article L. 1152 – 4 CT, the employer is obliged to take all requisite preventive measures. The protection against bullying is inherent in the guarantee obligation to protect the health and safety of the employee (see on that point, paragraph 63).\footnote{Cf. Del Punta, p. 525 et seq.}

Employees posted abroad must be treated equally with persons employed within the country. Benefits paid by the local employer may however be taken into account by the parent undertaking.\footnote{Cass.soc. RJS 2008, 158.}

In **Italy**, Article 37 of the Constitution demands equal remuneration for men and women for the same work.\footnote{Cf. Del Punta, p. 525 et seq.} Furthermore, the equal treatment of women and men is transposed in decree law 198/2006, as amended by decree law 5/2010. In order to transpose Directive 2006/54/EC. The anti-racism directive was transposed by decree law 215/2003, and framework directive 2000/78/EC by decree law 216/2003. Discrimination on the ground of trade union membership, or activity for and on behalf of trade union, is prohibited under Article 15 of the workers’ statute.\footnote{See in that connection Igon v. Wong [2005] IRLR 258 (EAT.).}

In **English employment law** prohibitions on discrimination have a long tradition.\footnote{For an illustrative account of developments, see Wenckebach, p. 113 et seq.} Since 2010 they have been uniformly regulated by statute in Sections 39 et seq. of the Equality Act 2010 (EA 2010).\footnote{For a recent instructive overview, see Wenckebach, p. 121 et seq.} Employees are protected from discrimination on the grounds of age, disablement, sex change, marriage, civil partner, pregnancy, motherhood, race, religion, belief, gender and sexual orientation (Sections 4 and 39). Under Section 124 of the EA 2010, the employment tribunal may make a declaration concerning the rights of the person affected, issue a recommendation or award compensation. Section 136 operates to reverse the burden of proof: where the tribunal, on the facts before it and disregarding any other explanation, would be led to conclude that there has been an infringement of the law, the other party must prove the absence of any such infringement.\footnote{See in that connection Igon v. Wong [2005] IRLR 258 (EAT.).} In the event of less favourable contractual clauses in contrast to those applicable to the other gender, they will be transformed into the more favourable ones under Section 66 of the EA 2010.\footnote{See in that connection Igon v. Wong [2005] IRLR 258 (EAT.).}
US law likewise contains various prohibitions on discrimination.\textsuperscript{261} First of all, Section 206 (d) of the Fair Labor Standards Act prohibits discrimination on the ground of gender in regard to remuneration. The employer will be liable to pay damages under Section 216 (b) in the event of a breach of this provision. Protection against discrimination is granted, first of all, under Title VII of the Civil Rights Act 1964, which prohibits the employer from discriminating on the basis of race, colour, religion, gender or national origin. That specifically supplements the prohibitions on racial discrimination in regard to contractual rights as laid down in the Civil Rights Act 1866 (42 U.S.C. Section 1981, 1982). In addition there is the Pregnancy Discrimination Act 1978, which extends Title VII to discrimination on the grounds of pregnancy and motherhood. In addition, the Americans With Disabilities Act 1990 confers protection against discrimination on the ground of disability. The Civil Rights Act 1991 extends the legal remedies of Title VII (arrears of wages and continued employment) to compensation and penal damages.

American employees are also protected abroad.\textsuperscript{262} In addition, there is, finally, the Age Discrimination in Employment Act.\textsuperscript{263} Under 29 U.S.C. Section 631 (a) it is applicable to employees who are older than 40 years of age. The persons in comparison to whom the persons concerned were disadvantaged may, conversely, not be older than 40 years of age.\textsuperscript{264} The consequence in law of discrimination on the ground of age will, in accordance with Section 626, be damages or reinstatement. In addition to direct discrimination cases of indirect discrimination, or disparate impact, are also covered.\textsuperscript{265} Discrimination may also be justified under Section 623 (f) (1) by a \textit{bona fide} occupational qualification or by a reasonable factor other than age.\textsuperscript{266} Finally, since 2009 the Genetic Information Non-discrimination Act has been in operation which prohibits discrimination on the ground of genetic disposition.\textsuperscript{267}

The antidiscrimination legislation is not definitive and has been added to many respects at state level. In the result, practically every employee today enjoys protection against discrimination. This is particularly significant in the context of the law on protection against dismissal (see Section 13 paragraph 29). Of course, in overall terms, irrespective of far-reaching legislation, implementation

\textsuperscript{260} On the subtle distinguishing of such an equality clause from legal remedies against cases of unequal treatment under legally identical conditions (concerning the exercise of discretion by the employer), see Hosso v. European Credit Management [2011] IRLR 235 (CA).
\textsuperscript{261} Instructive exposition in ELL-Goldmann/Corrada, USA, paragraphs 306 et seq.; also in \textit{Thau}, paragraphs 215 et seq.; and Petrovicki, p. 113 et seq.
\textsuperscript{262} See specifically, Section 6, footnote 15. On that, in greater detail: \textit{Robinson/Canty/Mohamed}, J. Individual Employment Rights 1995/96, 277 et seq.
\textsuperscript{263} On that see \textit{Rasnic/Resch}, ZIAS 2010/11, 274; also \textit{Birk}, FS Siehr, 2000, p. 45, 48 et seq.
\textsuperscript{264} O’Connor vs. Consolidated Coin Caterers 517 U.S. 308.
\textsuperscript{265} Smith v. City of Jackson 544 U.S. 228.
\textsuperscript{266} Cf. Smith v. City of Jackson 544 U.S. 228.
\textsuperscript{267} On that see also \textit{Leder/Thüsing}, NZA 2011, 188, 191.
of antidiscrimination law seems in practice frequently to be hampered by the provability of discrimination.

b) Conflict of laws

As to the question of a general obligation on the part of the employer to accord equal treatment, it must be stated that it has a collective point of reference. Nonetheless, it specifically concerns the relationship of the individual employee to his employer. It is therefore a question of the balance of interests between the contracting parties which is a question to be determined by the law applicable to the contract. It is therefore not subject to a special connecting rule as overriding mandatory law. Nor, under the system of the Rome I Regulation, will the location of the plant fall to be considered as a connecting factor.

An additional point is the systematic consideration that, in this way, the conflict of laws would be eroded in many areas: if the local workforce could demand equal treatment with posted workers (or the other way around), they could seek entitlements specifically under the law that is not applicable to the contract at issue. In this connection, insofar as the system of connecting rules laid down in Article 8 of the Rome I Regulation may mean that employees of the same employer are subject to different laws applicable to the contract, the applicability of differing law will not infringe the principle of equal treatment. Conversely, the applicability of different law cannot in itself justify any unequal treatment. However, unequal treatment of employees subject to different laws applicable to the contract may be justified if local workforce and posted workers are in different situations. One should think, for example, of the payments in respect of additional expenses for posted workers which are not available to the local workforce.

The general principle of equal treatment is also not caught by German Paragraph 2 (7) of the legislation on the posting workers (AEntG) and the implemented clause of the Posting Directive 1996/71/EC. This is because that provision concerns only non-discrimination provisions.

Conversely, antidiscrimination law is enforced under German Paragraph 2 (7) AEntG and harmonized European law on posting of workers as overriding mandatory law.

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268 MünchKomm-Martiny, Art. 8 Rom I-VO paragraph 91; C. Müller, p. 389 et seq.; for another view, see Bittner, NZA 1993, 161, 165; also Winkler v. Mohrenfels/Block, EAS B 3000 paragraph 203; KR-Weigand, IPR paragraph 40.


270 Winkler v. Mohrenfels/Block, EAS B 3000 paragraph 203.

271 To that effect, the reasoning followed in C. Müller, p. 285, 390.


273 In detail on this issue, C. Müller, p. 291 et seq.; Däubler/Bertzbach-Däubler, Einl. paragraphs 256 et seq.; cf. also Mansel, FS Canaris, 2007, 809, 829 et seq.; Deinert, RdA 2009, 144, 152, footnote 142; also Lüttringhaus, p. 255 et seq.; cf. also BAG NZA 2016, 473, no. 96; for another view, Rauscher-v. Hein, Art. 8 Rom I-VO paragraph 28; Schrader/Streube, NZA 2007, 184 et seq.; but leaving out of account the Law on the Posting of Workers; also
Chapter 4: Scope of the law applicable to the employment contract

The provisions of the equality legislation are protective provisions as defined in Article 8 section 1 of the Rome I Regulation. On the basis of this conclusion, to make the location of the employer’s plant a connecting factor is precluded; it would in any event be inappropriate and not in keeping with the system of the Rome I Regulation. Implementation of German antidiscrimination law is subject to the reservation, in regard to its semi-mandatory nature, that the protection against discrimination under the law applicable to the contract is not more favourable to the employee. Pre-contractual claims to damages are to be dealt with as ancillary to the contract under Article 12 of the Rome II Regulation, whereas claims...
for damages on the ground of discrimination without reference to a contract fall to be determined by the *lex loci damni* under Article 4 of the Rome II Regulation.\(^{282}\)

On the **equal treatment of the local workforce employed in embassies** under antidiscrimination law, see section 9 Paragraph 179.

The prohibition on discrimination on the ground of the belonging to a trade union (Article 9 section 3, second sentence, of the German Constitution – Grundgesetz, GG) is already sufficiently secured by way of the public policy reservation.\(^{283}\) Conversely, the prohibition on disadvantaging persons employed for a fixed period and part-time employees, is defined under Paragraph 4 of the German Act in on Part-time and Fixed-term Work (TzBfG) as overriding mandatory law within the meaning of Paragraph 2 (7) AEntG.\(^{284}\) The provisions of the US Age Discrimination in Employment Act are amenable neither to implementation as protective rules or as overriding mandatory provisions; that is because the US Supreme Court as held that they may be departed from by means of contractual settlement clauses.\(^{285}\)

The prohibition on favouring and disadvantaging members of **works representative groups** (Paragraph 78 of the German Works Constitution Act – BetrVG) is subsumed not as overriding mandatory law, but under the law relating to works constitution.\(^{286}\)

With regard to **public policy** (Article 21 of the Rome I Regulation), the question may arise whether the grant of entitlement to claim damages of a penal nature should be avoided. However, that will only occur in exceptional cases since European antidiscrimination law also demands sanctions with a deterrent effect against discrimination.\(^{287}\) With regard to claims to damages under English law, the avoidance clause would be precluded from applying even in the case of *exemplary damages* because these will be granted only under very strict preconditions and within moderate limits.\(^{288}\)

### 4. Leave entitlement

**a) Substantive law**

Leave entitlement is harmonised at European level by Article 4 of the Working Time Directive,\(^{289}\) and under Article 7 is set at a minimum of four weeks.

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\(^{282}\) Lüttringhaus, p. 162 et seq.

\(^{283}\) C. Müller, p. 288 et seq.

\(^{284}\) Cf. C. Müller, p. 386.


\(^{286}\) Deinert, Internationales Arbeitsrecht, Section 17 paragraph 47.

\(^{287}\) See in that connection ECJ AP No. 13 on § 611a BGB – Draehmpaehl; cf. Däubler/Bertzbach-Deinert, Section 15 paragraph 4.

\(^{288}\) See in that connection, specifically, Steinhauser, Altersdiskriminierung in Großbritannien, Berlin 2012 (Halle, Univ., Diss. 2009/10), p. 273 et seq.

\(^{289}\) See footnote 194.
In German employment law employees enjoy leave amounting to 24 working days under Paragraph 3 of the relevant legislation (BUrlG). Paragraph 4 thereof lays down a qualifying period of six months. Where, within a period of one calendar year, no claim to leave entitlement can be acquired owing to the qualifying period there will be entitlement to partial leave under Paragraph 5 section 1(a) of the Annual Leave Act (BUrlG). Where a worker leaves before the qualifying period has been completed or in the first half of the year, there is likewise only entitlement to partial leave under Paragraph 5 section 1(b) and (c) BUrlG. For the duration of the leave, there is entitlement to holiday pay under Paragraph 11 BUrlG. Over and above this pay, which serves to maintain remuneration, any additional holiday pay will require a specific contractual provision or will need to be governed by the provision of a collective agreement. Under Paragraph 13 BUrlG the statutory leave entitlement cannot be departed from. It can be enhanced under the employment contract or by way of a collective agreement.

Under Paragraph 2 of the Austrian statute on leave entitlement, the employee will be entitled to annual leave of 30 working days and, after 25 years of service, to 36 working days. In the first six months of the employment relationship there will be entitlement only to partial leave and thereafter to full leave. Under Article 6 of the leave entitlement statute, the employee will retain entitlement to pay during leave periods. In building firms, the special legislation relating to building workers will apply (BUAG). In this case entitlement to holiday pay will be acquired, on the basis of qualifying periods against the paid holiday scheme fund to the financing of which employers pay contributions under Paragraph 21.

In Switzerland, the employee is entitled to 4 weeks holiday in each year of employment and until the end of the employee’s 20th year of age, to five weeks holiday per annum, in accordance with Article 329 a of the law on obligations (OR). During the holiday wages are to be continued to be paid under Article 329 d section 1 OR. During the currency of the employment relationship leave entitlement cannot be commuted by payment in lieu (Article 329 d section 2 OR).

French law contains, in addition to the classic paid holiday under Article L. 3141 – 1 of the Labour Code, further provisions on entitlement to unpaid leave, including in the case of marriage and birth (Article 3142 – 16 of the Labour Code).

Article 36 section 3 of the Italian Constitution provides that employees are to be entitled to paid leave. The manner in which that should be configured is determined by Article 2109 section 2 of the Civil Code (C.c.). The extent of the leave is generally laid down by collective agreement. Article 10 of law 66/2003 on working time requires a minimum leave entitlement of four weeks which the

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290  Galantino, p. 267.
employer cannot redeem from the employee except in the case of termination of
the contract.291

In **England** leave entitlement was transposed in the course of the transposi-
tion of the working time directive, in Regulations 13 et seq. of the Working
Time Regulations 1998. Most employers, however, grant leave beyond the mini-
imum statutory entitlement.292

b) **Conflict of laws**

The overwhelmingly prevalent view is that **leave entitlement** is governed by
the law applicable to the contract.293 In addition, the provisions of the German
BurlG form part of the protective provisions within the meaning of Article 8 of
the Rome I Regulation.294 The application of the law on leave entitlement as
overriding mandatory law is, however, rejected by some.295 Conversely, in
French legal circles it was in the view of many deemed possible to implement
leave entitlement as a matter of public policy.296 Even the Danish Supreme
Court considered it possible for there to be a special connecting rule for the Dan-
ish law on leave entitlement to apply as an overriding mandatory provision,
though in the specific case it did not apply it owing to the lack of a sufficient
connection with the country.297 The better view, in regard to German law, was in
the past to assume that leave entitlement could constitute overriding mandatory
law.298 For, inherent in leave entitlement is the socio-political objective of ensur-
ing the protection of health.299 That has henceforth been made clear in regard to
work within the country by Paragraph 2 (2) of the AEntG under which **minimum
annual paid leave** is deemed to have **internationally binding effect**.
That also includes holiday pay under Paragraph 11 of the legislation.300 Con-

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291 Cf. ELL-Treu, Italy, paragraph 165.
292 Henssler/Braun-Harth/Taggart, Großbritannien, paragraph 25.
293 BAG AP No. 23 on Internationales Privatrecht – Arbeitsrecht, with commentary by
Gamillscheg; Egger, DRdA 1999, 150, 153; Franzen, AR-Blattei SD 920, paragraph 133;
Honsch, NZA 1988, 113, 118; Ferrari-Staudinger, Art. 8 Rom I-VO paragraph 28;
MünchArb-Oetker, Section 11 paragraph 90; Winkler v. Mohrenfels/Block, EAS B 3000 para-
graph 199.
295 BAG AP No. 32 on Internationales Privatrecht – Arbeitsrecht; Gamillscheg, ZIA 1983, 307,
360; Birk, RabelsZ 46 (1983), 384, 397; likewise RdA 1984, 129, 134; Junker, JZ 2005, 481,
486; Müller, RdA 1973, 137, 143; Mankowski, IPRax 1996, 405, 409; Schmidt-Hermesdorf,
RIW 1988, 938, 941.
296 Cf. with further references, Gamillscheg, IAR, p. 292 et seq.; doubts as to provability in case-
law expressed by Callisen, p. 90.
297 Decision 78/1998 of 7.2.2000 reported by Luikkonen, p. 156 et seq.
298 Velikova, p. 43 et seq. In favour of internationally binding implementation by way of an inter-
pretation in conformity with the directive as against the law of a third country governing the
contract, C. Müller, p. 348 et seq.
299 Deinert, RdA 1996, 339, 342 et seq.; likewise RdA 2009, 144, 153; along the same lines also
Wiedenfels, IPRax 2003, 317, 319, who limits the overriding nature of the law to the princi-
ple of leave entitlement but rejects it in regard to amount, for another view, see Borgmann, p.
110, footnote 138.
300 Däubler, RIW 2000, 255, 258.
versely, more far-reaching contractual claims to leave entitlement will be solely subsumed under the law applicable to the contract. The same will often apply to more far-reaching claims to leave entitlement under collective agreements unless they are specifically and exceptionally intended to offset specific health problems. Moreover, claims under collective agreements to leave entitlement can apply as overriding mandatory provisions if the preconditions in that regard, as laid down by the law on the posting of workers, are met (Section 10 paragraph 71).

Paragraph 125 of German Social Code XI (SBG XI) on additional leave for seriously handicapped or severely handicapped employees constitute overriding mandatory law\(^{301}\) in the case of work within the country.\(^{302}\) Likewise, one will then have to opt for the supplementary leave under Paragraph 19 of the Act on Employment Protection for Young Persons and Children (JArbSchG).\(^{303}\)

Claims for entitlement to **additional holiday pay**, as provided for, inter alia, in Article 15 of the Netherlands Law on the Minimum Wage and the Minimum Holiday Supplement or, variously in collective agreements in the Federal Republic of Germany, are subject, as in the case of leave entitlement, to the law applicable to the contract.

From a substantive-law point of view employment periods completed under a foreign law applicable to the contract after a change in the applicable law are to be taken into consideration to their full extent.\(^{304}\)

5. Temporary hire of workers

a) Substantive law

The law on the hire of workers is harmonised by the European directive on temporary agency work.\(^{305}\) Key provisions are the removal of hindrances to temporary agency work, equal treatment of temporary agency workers with regular employees and specific rights of the temporary agency workers against agency employers and user undertakings.

The temporary hire of workers is provided for in Germany by the legislation on the temporary hire of workers (AÜG). By law of 28 April 2011\(^{306}\) it was amended to bring it into line with the directive on temporary agency work and, in addition to the demand for equal treatment, also makes provision for a minimum wage threshold which cannot be undercut where equal treatment is not observed (see Section 10 paragraph 71).


\(^{302}\) *MünchKomm-Martiny*, Art. 8 Rom I-VO paragraph 125; see also on the earlier law, *Birk*, RabelsZ 46 (1982), 384, 397.

\(^{303}\) Likewise *C. Müller*, p. 353 et seq.

\(^{304}\) *Schmidt-Hermesdorf*, RIW 1988, 938, 941.


\(^{306}\) BGBl. I 642.
In Austria, the temporary hire of workers is regulated by legislation of that name (AÜG). The temporary agency worker will be entitled as against the user undertaking to expect compliance with employment protection under Paragraph 6 AÜG. In the event of the commercial hire of workers authorisation will be required under Paragraph 94, point 72, of the Legislation on Trade. In that regard specific legal obligations on the employer apply. Under Paragraph 10 section 1 AÜG the temporary agency worker will be entitled to pay which is appropriate and in keeping with local usages whereby regard is to be had to the conditions prevailing in the plant operated by the user. Where, however, remuneration is higher in the undertaking hiring out the workers, then that will be the relevant remuneration.\footnote{OGH DRdA 2001, 40.} Under Paragraph 10 section 3 AÜG the provisions in regard to working time applicable in the user plant will have to be complied with. Moreover, the user undertaking will be liable as a guarantor in respect of claims by the employee and social security contributions. Certain contractual clauses are prohibited under Paragraph 11 section 2 AÜG in order to ensure that the employer as the temporary work agency does not shift the entrepreneurial risk on to the employee. Only exceptionally will there be a contractual relationship between the temporary agency worker and the user undertaking (dual employment relationship).\footnote{OGH Arb 12.738.} As a result of express provisions in Paragraph 1 section 5 AÜG, it is made clear that the legislation constitutes overriding mandatory law.\footnote{Kühteubel/Wieder, ZAS 2011, 208, 218.}

In Switzerland, the employer will require for temporary agency work (agreement for the individual engagement with a user undertaking and temporary agency work) authorisation under Paragraph 12 of the law on employment agencies (AVG). The requirements to be met by the employment contract as regards content are laid down in Paragraph 90 of the AVG. The conditions contained in a universally binding global employment contract in regard to the user undertaking must also be observed by the agency making the workers available under Article 20 of the legislation. The user undertaking will have the right to give instructions to the temporary agency worker, and will also be liable to him for the observance of employment and health protection (see also Article 10 of the accident prevention regulation (VUV)).\footnote{Geiser/Müller, paragraph 192 a.} The latter point is borne out by the consideration that the hire contract is a contract with protective effect towards third parties.\footnote{Rehbinder, paragraph 424.}

French law regulates temporary agency work in Article L.1251 – 1 et seq. of the Labour Code (CT). Temporary work agencies are supervised by the administrative authorities.\footnote{ELL-Despax/Rojot, France, paragraph 20.} The use of temporary agency workers is permitted only in the statutorily defined cases under Article 1251 – 6 et seq. of the Labour Code, which points up the exceptional nature of temporary agency work. Where those
preconditions are not satisfied the contract will be one for an indefinite period with the user undertaking under Article L.1251 – 39 et seq. of the Labour Code. Temporary agency workers are entitled to equal treatment under Article L.1251 – 18 of the Labour Code. The contract for temporary agency work may in fact be a disguised employment contract between the employee and the user undertaking.

In Italy temporary agency work is regulated by decree law 276/2003. Engagement for a fixed period is permissible for technical, organisational or plant-specific reasons or in the case of representation. The use for an unlimited period of temporary agency workers is permitted only in certain areas of activity and only when it is provided for by collective agreement. Article 23 of the decree law provides that temporary agency workers are to receive the same remuneration as the regular employees of the plant in which they are set to work.

In England, the temporary agency worker’s directive was transposed by the Agency Workers Regulations 2010. A key feature is the qualifying period, permitted by Article 5 section 4, second sentence, of the directive of 12 weeks under Regulation 5, during which the principle of equal treatment (Regulation 7) does not require to be applied. It is in principle possible for the temporary agency worker to have a contractual relationship with the user undertaking. In that connection, the courts will in the same way examine whether a mutuality of obligations subsist (on that see Section 4 paragraph 21).

b) Conflict of laws

The conditions governing the temporary hire of workers, including the principle of equal treatment in terms of the law relating to temporary agency work, as underpinned by the minimum wage threshold in Paragraph 3 a of the AÜG are overriding mandatory provisions under Paragraph 2 (4) of the AEntG which was implemented by way of Article 9 of the Rome I Regulation (see Section 10 paragraph 71). However, that has no effect on the law applicable to the contract binding the temporary agency worker. At the same time, however, the employee enjoys his rights specific to the contract under the legislation as part of the law applicable to the contract. What is thereby alluded to is the law applicable to the contract between the temporary agency worker and the temporary work agency (on the connecting rule, see Section 9 paragraph 110).

The requirement for authorisation to operate as a temporary work agency under Paragraph 1 of the legislation is thus likewise of an internationally binding
nature. Also, the **notional employment relationship** with the user undertaking in the absence of authorisation will constitute overriding mandatory law under Paragraph 10 section 1, and 9 section 1 of the AÜG (section 10 paragraph 71). The law applicable to this contract will again be ascertained in accordance with Article 8 of the Rome I Regulation (Section 9 paragraph 111). The question frequently arising under English law (see paragraph 108) as to the employment relationship with the user undertaking will be governed by the law applicable to the contract under Article 10 section 1 of the Rome I Regulation.

The restrictions on the hire of workers in the building sector also constitute overriding mandatory law under Paragraph 1 b of the German AÜG.

Under Paragraph 2 No. 4 of the German AEntG (4) of the legislation on the posting of workers, the hire of workers not covered by the relevant legislation will be governed by mandatory law. That will apply, for example, in the case of “genuine” temporary agency work (hiring only occasionally) under Paragraph 1 section 3, points 1 and 2 a of the AÜG.

In regard to the equal treatment of temporary agency workers, the free movement of workers may, as a matter of primary law under Article 45 TFEU, be **superimposed on the conflict of laws**. Where one proceeds on the assumption that such workers may seek access to the domestic employment market, application of the provisions on freedom of movement will commend itself even more than in the case of posted workers.\(^{321}\) That would create entitlement under primary law to equal treatment, irrespective of the law applicable to the contract.\(^{322}\)

As regards **the user undertaking as employer**, to the extent to which it may arise, the legal relationship between user undertaking and hired worker will not automatically be subsumed under the law applicable to the contract for temporary agency work,\(^{323}\) but will require its own connecting rule in which connection classification in terms of employment law will be necessary (Section 4 paragraph 34). That will certainly apply to self-standing claims by the hired worker against the user undertaking or indeed for claims directly under the employment contract (see, on the substantive law, paragraph 104). That will lead to a connecting rule pointing to the law of the place at which the work is performed (Section 9 paragraph 111). However, the provisions concerning this legal relationship will often prove to be overriding mandatory provisions in the context of the relevant domestic employment law, thus, for example, Paragraph 2 (4) of the German AEntG by which the directive on the posting of workers was transposed (see Section 10 paragraph 71). The implementation of such rules as overriding mandatory law against the user undertaking in the event of temporary agency work abroad, would seem doubtful since there will be no sufficient domestic connection. However, the Austrian Supreme Court has ruled otherwise in the case of liability as a guarantor of the user.\(^{324}\)

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322 Franzen, EuZA 2011, 451, 454.
323 Thus, however, Schnorr, ZfA 1975, 143, 164.
6. Occupational training

Where occupational training is pursued under the forms provided for under employment law, the occupational training relationship will be subsumed and governed under Article 8 of the Rome I Regulation. Thus, the contract-specific provisions of the legislation on occupational training will be governed by German law. The same applies to French law where the training contract is a special form of employment contract under Article L.6221 – 1 of the Labour Code (CT)\textsuperscript{325}; likewise for Austrian law\textsuperscript{326} and Swiss law (see Article 344 of the law on obligations (OR))\textsuperscript{327} under which the apprenticeship contract is likewise classified as an employment contract and, in the case of English law, where the legislation on employment protection will generally also cover trainees.\textsuperscript{328} The latter applies also to the USA where the apprenticeship contract must be compatible with employment legislation, in particular with the minimum wage legislation and with the prohibition on work carried out by children under the Fair Labour Standards Act (see paragraphs 27 and 113).\textsuperscript{329}

7. Special protection regimes

a) Substantive law

The employment-law protection of children and women has its starting point in the British Factory Act of 1833, and from that origin has spread far and wide.\textsuperscript{330} It was followed a short time later, by the Prussian regulation of 1839 on work by children.\textsuperscript{331} Special protection is conferred on expectant and young mothers under the relevant EU directive.\textsuperscript{332} This protection has been transposed, for instance, in Germany, in the legislation on the protection of mothers (MuSchG), in France in Article L.1225 – 1 of the Labour Code, in Austria in the legislation on the protection of mothers, and in England in Section 71 et seq. of the ERA 1996. In Switzerland, the employer must remunerate periods of work missed owing to pregnancy under Article 324 section 3 (OR) of the law on obligations; after delivery, the female worker will be entitled to 14 weeks exemption from work during which, in general, maternity pay will apply as an insurance benefit.\textsuperscript{333} For severely handicapped persons, not only in Germany is there a du-
ty of employment with a compulsory quota under Paragraph 71 Social Code IX, but also, for example, in France under Article L.5212 – 2 of the Labour Code\textsuperscript{334} and in Italy under Article 3 of law 68/1999.\textsuperscript{335} In addition, practically all legal orders contain provisions for the protection of children and young persons, for example, Italian law 977/67, which was fundamentally revised by law 345/99,\textsuperscript{336} Section 212 of the US Fair Labor Standards Act,\textsuperscript{337} the Austrian legislation on the employment of young persons and children, Article 29 et seq. of the Swiss legislation on work (ArG), together with the regulation on the employment protection of young persons or the German JArbSchG (see paragraph 99).

\begin{itemize}
\item \textit{Conflict of laws}
\end{itemize}

The provisions on the protection of pregnant women and nursing mothers constitute overriding mandatory law under Paragraph 2(6) of the AEntG and similar statutes implementing the Posting of Workers Directive 1996/71/EC. Thus, the German Maternity Protection Law will be applicable to work within the country.\textsuperscript{338} The prohibition on employment under Paragraph 3 of the maternity protection legislation will accordingly apply in the case of work within the country, irrespective of the law applicable to the contract.\textsuperscript{339} That also applies to the other prohibitions on employment,\textsuperscript{340} including the prohibitions on overtime, night and shift work. The claim against the employer for an advance on maternity day under Paragraph 14 section 1 Maternity Protection Law (MuSchG) will accordingly apply as overriding mandatory law.\textsuperscript{341} Similarly, further claims to remuneration will apply as overriding mandatory law on account of the close substantive connection.\textsuperscript{342} On the prohibition of dismissal, see Section 13 paragraph 48.

At the same time, the law applicable to the contract also covers the maternity protection legislation.\textsuperscript{343} However, it would appear to be doubtful whether a more far-reaching protection under the law at the place of employment is precluded, at least when Articles 9 section 3 and 12 section 2 of the Rome I Regulation apply.\textsuperscript{344}

\begin{itemize}
\item \textsuperscript{334} Cf. In that connection ELL-Despax/Rojot, France, paragraph 458.
\item \textsuperscript{335} Cf. In that connection Henssler/Braun-Radoccia, Italy, paragraph 164 et seq.
\item \textsuperscript{336} Vallebona, II, p. 267.
\item \textsuperscript{337} In view of an increasing number of infringements (cf. Casebeer/Minda, p. 242 et seq.) the effectiveness must however be doubted.
\item \textsuperscript{338} MünchArb-Oetker, Section 11 paragraph 92.
\item \textsuperscript{339} MünchKomm-Martiny, Art. 8 Rome I VO, paragraph 124; Deinert, RdA 1996, 339, 343. cf. BAG AP No 8 on Art. 27 EGBGB (new version).
\item \textsuperscript{340} MünchKomm-Martiny, Art. 8 Rom I-VO, paragraph 124.
\item \textsuperscript{341} Cf. BAG AP No 10 on Art. 30 EGBGB n.F.; MünchKomm-Martiny, Art. 8 Rom I-VO, paragraph 124; Birk, RabelsZ 46 (1982), 384, 398; Franzen, IPRax 2003, 239, 243.
\item \textsuperscript{342} Gamillscheg, IAR, p. 267; MünchKomm-Martiny, Art. 8 Rom I-VO, paragraph 17.
\item \textsuperscript{343} Cf. Heilmann, p. 128 et seq.
\item \textsuperscript{344} Thus, however, Gamillscheg, IAR, p. 268.
\end{itemize}
Nor will a higher level of protection under a foreign law applicable to the contract be precluded within the country by overriding mandatory law (see also Article 3 a section 7 of the directive on the posting of workers (Section 10 paragraph 57)). Nor, of course, does German PIL preclude recognition, in the case of work abroad, of more far-reaching maternity protection under the law applicable to the contract.

Moreover, notification duties, as laid down for example in the German legislation on maternity protection, are governed solely by the law applicable to the contract.

In regard to parental leave a question arises as to whether this constitute overriding mandatory law. The Hesse Regional Employment Court (LAG) affirmed this in view of the buttressing effect of the special protection against dismissal under Paragraph 18 of the legislation on parental leave (BEEG) (on that, see Section 13 paragraph 49). Ultimately, the special protection against dismissal is intended to ensure that employees do not forego the exercise of their rights for fear of being reprimanded. If this were taken to its logical conclusion, all employee rights protected by the prohibition on reprimands would, under Paragraph 612 a of the German Civil Code, have to be regarded as overriding mandatory provisions. It is indeed true that an express provision for special protection against dismissal can be an indication that the legislature attaches particular socio-political priority to the right which is thereby being substantively protected. However, ultimately, it is this view by the legislature which will determines whether the provisions have overriding mandatory character. In the light of Article 6 of the Constitution (GG- Grundgesetz) that may readily be presumed to be the view in the case of parental leave if the employee works within the country. Whether the legislature sought by implication to restrict implementation of parental leave to employees residing within the country would however appear to be doubtful.

Provisions for the protection of children and young persons constitute overriding mandatory law under Paragraph 2 (6) AEntG and similar laws on posting of workers. However, a precondition for the application of this specific connecting rule is employment within the country. The provisions concern prohibitions on employment and restrictions thereon, as well as the specific provisions concerning working time and employment protection. The leave entitlement under Paragraph 19 of the German JArbSchG is also to be classified as overriding

345 Gamillscheg, IAR, p. 264.
346 Gamillscheg, IAR, p. 269.
348 Hess. LAG NZA-RR 2000, 401, 406; Winkler v. Mohrenfels/Block, EAS B 3000 paragraph 103.
349 C. Müller, p. 359 et seq.
350 Thus, C. Müller, p. 359 et seq.
351 MünchArb-Oetker, Section 11 paragraph 91.
mandatory law. At the same time, that leave entitlement will be subsumed under the law applicable to the contract where that is German law.

In regard to the public-employment law protection of severely handicapped persons (part two, Paragraphs 68 et seq. of Social Code IX), Paragraph 2 section 2 Social Code IX contains a unilateral connecting rule based on the territoriality principle (see Section 10 paragraph 111). From the perspective of private international law, the provisions of Paragraphs 68 et seq. of Social Code IX constitute overriding mandatory provisions. At the same time they create contractual rights which will be subsumed under the law applicable to the contract with the result that they will also apply to work within the country, where German law is the law of the contract, unless precluded by administrative action, as is the case in regard to protection against dismissal. On supplementary leave, see Paragraph 99; on special protection against dismissal and minimum periods of notice, see Section 13 paragraph 47.

V. Consequences of breach of duty

1. Substantive law

The employee’s liability is not in itself restricted under the German Civil Code (BGB). He will be liable in contract and in tort for any negligence in accordance with Paragraphs 280 and 823 of the BGB. However, the courts in a line of authorities have laid down limits to the employee’s liability in the context of work on business premises. Under that principle, the culpability of the employee and the business risk incurred by the employer are to be weighed one against the other, having regard to all the circumstances, with the result that the employee will not be liable for cases of minor negligence; in the event of moderate negligence liability for injury will be apportioned, whereas the employee will be fully liable not only for intentional action but also in the event of gross negligence. Exceptionally, even in the case of gross negligence liability may be limited. In external relations liability is not limited, but the employee may request his employer to exempt him from external liability in proportion to his exemption from liability vis a vis the employer or to pay a proportionate amount of the sum for which he is liable.

353 Cf. Heilmann, p. 150 et seq.
355 BAG (GS) AP No 103 on § 611 BGB Haftung des Arbeitnehmers.
357 BGHZ 108, 305.
358 BAG (GS) AP No 4 on §§ 898, 899 RVO; BAG AP No 94 on § 611 BGB Haftung des Arbeitnehmers.
The liability of the employer for breaches of contractual duties or in tort is not limited. Employees amongst themselves and vis-a-vis the employer, as well as the employer vis-a-vis the employee, are, however, directed by Paragraphs 104 et seq. of Social Code VII to deal with accidents at work and occupational diseases as a matter of social law and are liable only in the event of a road accident or an intentional act. In the event of gross negligence, the insurance institution may exercise the right of recourse in respect of its expenses, under Paragraph 110 of Social Code VII.

Under Austrian law, the employee is liable to the employer for damages for breaches of obligations under Paragraphs 1295 et seq. of the Austrian Civil Code (ABGB). The employee’s liability to his employer may be limited under Paragraph 2 of the law on liability for persons providing services (DHG) and may no longer subsist in the event of a lesser degree of culpability.360

An employee who injures a third party in providing a service will, under Paragraph 3 of the law on the liability for persons providing services, incur liability to that person under Paragraph 1295 of the ABGB. The employee may request the employer to compensate him in part or, in the event of a lesser degree of culpability, wholly if the employer is likewise liable to pay compensation to the third party.

The employer’s liability for accidents at work is excluded under Paragraph 333 of the general law on social insurance (ASVG), except in the case of a deliberate act. That also includes liability for non-material damage.361 In addition, that will apply to employees of other undertakings which become active in the same sector as the plant of the employer inflicting the injury.362 In the event of intentional gross negligence, he will be liable to the insurance institution under Paragraph 334 of the ASVG. Liability amongst work colleagues differs on a technical level, but is essentially analogous to the situation under German law.363

In so far as the employee inflicting damage is not acting as a supervisor in such a way as to benefit from the exemption from liability provided for under Paragraph 333 section 4 ASVG, he may be liable in damages to the colleague. Material damage will be compensated by payments out of the accident insurance scheme and recourse by the accident insurance scheme to the employee causing the injury will be excluded under Paragraph 332 section 5 ASVG, where the employee causes injury whilst engaged in work in the same plant, except in the event of an intentional act or gross negligence or injury is occasioned by road traffic or other means of transport. Recourse by the employee liable to the insurance institution will be excluded under Paragraph 334 section 2 ASVG.

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359 On substantive-law questions of liability under German law in the case of spells of work abroad by the employee, see Krieger/Herzberg, BB 2012, 1089; Schliemann, BB 2001, 1302, 1307.
360 Marhold/Friedrich, p. 262 et seq.
361 OGH ZAS 1970, 220.
362 OGH SZ 75, 455, 460.
363 Cf. Marhold/Friedrich, p. 275 et seq.
364 On specific features in relation to non-material damage, see Löschnigg, paragraph 6/826.
rance institution against his employer is excluded because otherwise the employer’s exemption from liability would be undermined by Paragraph 333 ASVG.\textsuperscript{365}

Under Article 321 e of the Swiss law on obligations (OR), the employee will be liable, in the event of an intentional act or negligence. Payment of wages without reservation in knowledge of the claim to damages will of course lead to the claim being barred.\textsuperscript{366} However, the courts apply – except in the case of an intentional act\textsuperscript{367} – reductions under Article 43 section 1 and Article 44 of the law on obligations. As a rule of thumb, in the event of gross negligence, liability will be in respect of three months’ salary, in the event of moderate negligence, two months salary and in the event of minor negligence, up to the amount of one month’s salary.\textsuperscript{368} However, the court has a wide margin of discretion.\textsuperscript{369}

In respect of third parties, the employee will be liable in tort under Article 41 of the law on obligations. In respect of intra-plant compensation, the employee will have the same entitlement in regard to exemption or claims for damages\textsuperscript{370} as are available under German law.

Infringements of the duty of care will entitle the employee under Articles 47 and 49 of the law on obligations to compensation, in addition to damages in the form of payment for hurt feelings.

Under the French Article L 1221 – 1 of the Labour Code the employment contract is governed by the general law. In that connection liability in contract is not limited. However, the courts have ruled in their judicial law-making capacity that there are limits to that liability.\textsuperscript{371} Accordingly, the employee will be liable only in the event of a serious infringement of an obligation.\textsuperscript{372} It is true that that does not in itself apply to liability in tort. That liability will nonetheless be excluded in the case of a contractual relationship under the rule against overlapping. The employee will not be liable to third parties, so long as he is acting under the aegis of his instructions or unless he acted intentionally and criminally\textsuperscript{373} whilst he will otherwise be liable alongside the employer, in the context of his duties as an employee.

Deductions from wages owing to poor performance are statutorily forbidden under Article L 1331 – 2 of the Labour Code.

In Italy, the employee will generally be liable for damage arising out of breaches of ancillary obligations. Here too there is, in itself, no limitation on the general liability of the employee under Article 2043 of the Civil Code (C.c.).

\textsuperscript{365} Löschnigg, paragraph 6/826.
\textsuperscript{366} Rehbinder, paragraph 151.
\textsuperscript{367} Geiser/Müller, paragraph 471.
\textsuperscript{368} BGE 110 II 344.
\textsuperscript{369} BGE 110 II 344.
\textsuperscript{370} Rehbinder, paragraph 150.
\textsuperscript{371} Cass. Soc. D 1959 Jur 20, with observations by Lindon.
\textsuperscript{372} Mazeaud, paragraph 638.
Only damage in excess of the amounts paid under accident insurance will be liable to be paid.\textsuperscript{374} There will frequently be a limitation arising out of the conclusion of insurances by the employer, which is encouraged at State level.

In relation to third parties, the employee will be liable in tort under Article 2043 of the civil code.\textsuperscript{375} Under \textbf{English} law, the employee’s liability is not limited. The employee will therefore be liable generally for breach of contract or in tort. However, in the case of contractual liability, the damage must have been foreseeable as a consequence of a breach of contract when the contract was entered into. However, there is a gentleman’s agreement on the part of employers’ liability insurers whereby they will waive recourse to the employee.\textsuperscript{376} Employers also do not as a rule enforce claims for damages against their employees.\textsuperscript{377} This is however not legally enforceable. Wage reductions in the event of breaches of contractual obligations are frequently encountered but these will require a contractual basis.\textsuperscript{378}

In the event of a transgression by the employee, the employer will be liable for such damage as is not covered by the accident insurance.\textsuperscript{379} An agreement to exclude liability will be invalid under Section 2 paragraph 1 of the Unfair Contract Terms Act 1977.\textsuperscript{374}

In \textbf{US common law} enforcement of damages claims by employees on the ground of a breach of the duty to offer a safe place of work was not without its difficulties.\textsuperscript{380} The situation was improved by the OSH Act (see paragraph 67), because the breach of safety standards by the employer makes it possible to prove the employer’s liability for accidents at work.\textsuperscript{381}

In \textbf{Spanish} employment law, the employee’s liability can only be reduced in the court’s discretion, in accordance with Article 1103 of the Civil Code.\textsuperscript{382}

In other legal systems, that is to say, Poland, the Czech Republic and Hungary, it seems that the employee’s liability is limited in terms of the claim amount.\textsuperscript{383}

\begin{thebibliography}{99}
\bibitem{374} Cf. Ales/Giurini/Miranda, in: Ales (Ed.), Health and safety at Work, at 7(b).
\bibitem{375} Cf. ELL-Hardy, Great Britain, paragraph 183.
\bibitem{376} Pačić, EuZA 2009, 47, 62; ELL-Hardy, Great Britain, paragraph 184.
\bibitem{377} Henssler/Braun-Harth/Taggert, Great Britain, paragraph 51.
\bibitem{378} Deakin/Morris, paragraph 4.108.
\bibitem{379} ELL-Hardy, Great Britain, paragraph 186.
\bibitem{380} Cf. ELL-Goldmann/Corrada, USA, paragraph 231 et seq.; Berry and others in: Littler Mendelson Guide, United States-172 et seq.
\bibitem{381} ELL-Goldmann/Corrada, USA, paragraph 233.
\bibitem{382} See on that Finke, Die Minderung der Schadensersatzpflicht im Spanischen Recht, Ein Beitrag zur Vereinheitlichung des europäischen Schadensrechts, Göttingen 2005 (Göttingen, Univ., Diss. 2005), paragraph 238 et seq.
\bibitem{383} Cf. with further references Pačić, EuZA 2009, 47, 61; also Sieg/Prujszczyk, Arbeitsrecht in Polen, 2\textsuperscript{nd} Eds., Munich 2005, paragraph 230 et seq.
\end{thebibliography}
2. Conflict of laws

The consequences of breaches of obligations are determined under Article 12 section 1(c) of the Rome I Regulation in accordance with the law applicable to the contract.\textsuperscript{384} That also includes disciplinary powers, as provided for, for example, under Italian law on the basis of Article 2106 of the Civil Code.\textsuperscript{385} Where such disciplinary powers on the part of the employer require legitimacy through co-determination of the works council, as is provided for in German law,\textsuperscript{386} the law governing the works constitution will be applicable.

As to the legal consequences of safety contraventions, see, initially, paragraph 74.

Alongside questions as to the justification of termination of the contract, the problem arises, above all, as to liability. Thus, the law applicable to the contract will also determine whether the employee’s liability for breaches of obligations is limited.\textsuperscript{387} That therefore also covers restrictions relating not to the circumstances giving rise to liability, but rather to the extent of liability (limits as to amounts, for example, paragraph 126). Judicial possibilities of a reduction, as provided for under Spanish law (paragraph 125) will also be covered. Whether the employer enjoys the protection of an insurance, as is the case in Italy, will be determined by the relevant insurance cover whose applicable law will not, for instance, be that of the law applicable to the employment contract.

This extends also to extra-contractual liability. The ancillary connecting rule here will be Article 4 section 3 of the Rome II Regulation which is in line with earlier prevailing views\textsuperscript{388} and the subsequent provision in Article 41 section 2 No. 1 of the EGBGB (old version), as well as the provision in Article 133 section 3 of the Swiss PIL law, but departing from the earlier English case law.\textsuperscript{389} \textsuperscript{390}

Since the restriction on liability is mandatory under German law, it will be possible for there to be a special connecting rule as a protective provision under Article 8 section 1, second sentence of the Rome I Regulation, if another law is chosen.\textsuperscript{391} There can be no internationally binding implementation as overriding

\textsuperscript{384} In respect of liability for breach of contract pursuant to Paragraph 44 IPRG, see OGH ZfRV 1989, 219, with commentary by Schwind.
\textsuperscript{385}  See in detail ELL-Treu, Italy, paragraph 144; also Hofmann/Coslovich, paragraph 72 et seq.
\textsuperscript{386}  Cf. Kittner/Zwanziger/Deinert-Lakies, s. 61, paragraphs 2 et seq.
\textsuperscript{387}  Birk, RabelsZ 46 (1982), 384, 396; Franzen, AR-Blattei SD 920, paragraph 133; Ferrari-Staudinger, Art. 8 Rom I-VO, paragraph 28; Winkler v. Mohrenfels/Block, EAS B 3000 paragraph 204; MünchArb-Oetker; Section 11 paragraph 68; MünchKomm-Martiny, Art. 8 Rom I-VO, paragraph 90; for Paragraph 44 IPRG, see OGH Arb 10.502 (likewise ZfRV 1987, 147); OGH DRdA 1988, 341.
\textsuperscript{388}  Cf. with further references Looschelders, ZVglRWiss 95 (1996), 48, 83 et seq.
\textsuperscript{389}  Sayers v. International Drilling Co. [1971] 1 WLR 1176: contractual exclusion from liability invalid under the law applicable in matters of tort.
\textsuperscript{390}  Däubler, RIW 2000, 255, 256; MünchKomm-Martiny, Art. 8 Rom I-VO paragraph 90; thus even under the old law, Gamillscheg, IAR, p. 238.
\textsuperscript{391}  MünchArb-Oetker, Section 11 paragraph 69.
mandatory law of the right to claim compensation within the plant, nor in regard
to a claim to exemption or to recourse in the event of unlimited external liability
on the part of the employee. The reason is that employee protection takes pri-

Various legal systems provide for **exemption from liability**, at least on the
part of the employer, in the event of **accidents at work**. German law makes
alogous provision in the case of work colleagues (Paragraph 105 of Social
Code VII). These exemptions from liability are ultimately inseparably linked
with the law on accident insurance. They are founded on the notion that the em-
ployee can only be deprived of civil-law claims because he enjoys the protection
of insurance. That justifies the fact that a connecting rule ancillary to the social
insurance scheme will govern such liability exemptions. It already featured
under the earlier German PIL and ultimately was also acknowledged from a
comparative law point of view in the conflict of laws of other countries.

**The Hague Convention on the Law applicable to Traffic Accidents** takes
precedence under Article 25 of the Rome I Regulation. Thus, the Austrian
Supreme Court (OGH) also applied it in relation to the exemption from liability
under Paragraphs 636 and 637 of the Imperial Insurance Regulation, to which
the current Paragraphs 104 and 105 of Social Code VII correspond. It did not
consider the exclusion of application of Article 2 section 6 in respect of claims
and recourse claims by the social insurance institutions to be relevant because
those were claims as between private-law subjects. Whether that is correct is
open to doubt since the exclusion of application expressly also covers any exclu-
sion from liability which is provided for in the law relevant to the institutions
concerned, having specific regard to the close connection between exclusions
from liability and insurance payments. Ultimately, from a German perspec-
tive, it is immaterial since the convention has hitherto not been signed by the
Federal Republic and therefore cannot take any precedence.

The acknowledgement that there is a requirement for an ancillary connecting
rule grounded in social insurance law also underpins **Article 85 of Regulation**

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392 Gamillscheg, IAR, p. 239; C. Müller, p. 371; but it will be otherwise for the United King-
393 Gamillscheg, ZfA 1983, 307, 361; Junker, RdA 1990, 212, 216; Mummenhoff, IPRax 1988,
215; Winkler v. Mohrenfels/Block, EAS B 3000 paragraph 205; OLG Schleswig IPRax 1988,
230, 231; Eichenhofer, ISR und IPR, p. 100 et seq.; in the result also C. Müller, p. 372 et
seq.; see also Birk, RabelsZ 46 (1982), 384, 389; MünchArb-Oetker, Section 11 paragraph
69.
394 See the account by Gamillscheg, IAR, p. 257 et seq.; already tending in this direction Rabel,
Conflict of Laws III, p. 229 et seq.; opposing developments in the USA, cf. Michaelis, Das
internationale Recht des Arbeitsunfalls dargestellt an der amerikanischen Rechtsprechung
und Lehre, Diss., Göttingen 1980, p. 525 et seq. See also TSJ Galicia 18.3.2008 – 318/208;
and BAG AP No 8 on Internationales Privatrecht Arbeitsrecht, with observations by
Beitzke.
395 Printed in Jayme/Hausmann, No. 100.
396 OGH ZAS 1985, 67 (likewise Arb 10.249).
397 Cf. Schwimann, observations on OGH, ZAS 1985, 67; Schlemmer, IPRax 1984, 339 et seq.
The provision contains a priority conflict rule for cases in which a social insurance institution makes payments in respect of damage arising from events occurring in other EU Member States. Under subparagraph (2) thereof, the exemption from liability is determined in accordance with the law applicable to the social insurance scheme. Under the second paragraph of subparagraph (2) that will also apply to any recourse. Thus, in the event of an accident sustained by a German insured national abroad, Paragraph 104 et seq. of Social Code VII will be applicable. The exemption from liability in regard to the same operating plant under Paragraph 106 section 3 of Social Code VII will not, however, come into play in that connection. The requirement for it to involve the insured persons of several undertakings cannot solely be countered in foreign cases by the assertion that insured persons under the Social Code are the ones intended to be covered. It will have to be clarified whether in that connection substitution (see Section 16 paragraph 16) can be considered. However, that does not seem to be the case. The aspect of the community of risk primarily focused on by the courts affords to the person entitled exemption from liability in light of offsetting insurance payments, in order to allow that person to be exempt from liability. Protection by exemption from liability and protection by insurance are not both secured in the event of damage occasioned by a person insured under foreign social insurance scheme not guaranteed. There can, therefore, be no substitution.

Yet, cases in which Article 85 of Regulation (EC) No 883/2004 does not apply remain unresolved. Those are cases in which an injurious event does not occur in another Member State, yet occurring abroad; also the damage may occur in the country in which the employee is covered by a social insurance scheme. Thus, it is conceivable that an employee is employed permanently in Germany, a foreign law is the law applicable to the employment contract, but German social insurance law applies to him with the result that the preconditions for the application of Article 85 section 2 of Regulation (EC) No 883/2004 are not met. Nor would those preconditions be met e.g. where a German national insured under the German scheme suffers an accident in China. In the absence of an international agreement, the issue of exemption from liability must be resolved under the system laid down in the Rome I Regulation. That can be done if one construes the exemptions from liability as overriding mandatory rules.

Likewise, the Austrian courts construe the employers’ exemption from liability under Paragraph 333 ASVG (see paragraph 119) as an overriding mandatory rule.

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398 Cf. Eichenhofer, EuZA 2012, 140, 149 et seq.
399 BGHZ 177, 237 (likewise NJW 2009, 916); otherwise OGH 17.2.2011 – 2 Ob 216/10 v (cited in Pabst, ZESAR 2011, 423, footnote 1).
400 Cf. Pabst, ZESAR 2011, 423, 425; in more detail Straube, p. 131 et seq.
402 To similar effect (under the Rome Convention) Straube, p. 133 et seq.
Application of the exemption from liability as overriding mandatory law can come into play, according to its purpose, only subject to the precondition of inclusion of the person concerned under insurance protection. As far as German law is concerned that restriction is contained as a requirement in Paragraphs 104 and 105 of Social Code VII. The exceptional case in which the employer is not insured, but nonetheless has to accept a limitation on liability is covered by a compensating inclusion in the substantive insurance protection under Paragraph 105 section 2, second sentence, of Social Code VII. Exemptions from liability under a foreign legal system must be taken into consideration from a substantive law point of view.

In that connection, there is no ground for restrictions. If the employee enjoys insurance protection under the German law on accident insurance, that justifies acceptance of the exclusion of liability, even if the accident occurred in the course of work abroad. If, conversely the employee enjoys no insurance protection, for example, because the relevant law applicable to social insurance protection can confer no insurance protection, the employee does not have to accept any exclusion of liability. Nor can the employer rely on a ‘financing’ argument. That is because he will, in that connection, have financed nothing. Contributions to a foreign social insurance scheme which does not protect against the accident do not finance compensation for injury arising from the accident. Contributions to the domestic accident insurance scheme manifestly do not protect the employee and thus, similarly, do not serve to finance the injury arising out of the accident.

As regards, finally, the case where an employee is injured with German law being the law applicable to the contract, but with a foreign law being applicable to the social insurance cover, this may be resolved by taking into consideration a balance of advantage. The payments of the foreign insurance scheme will go to lessen the injury.

In regard to recourse to social insurance schemes, the law applicable in matters of tort under Article 19 of the Rome II Regulation will be determinant; owing to Article 4 section 3 of the Rome II Regulation, that will as a rule be identical with the law applicable to the contract. But in this case as well there will be a presumption in favour of an ancillary connecting rule as regards the social insurance aspects in regard to recourse as a matter of overriding mandatory law under Article 16 of the Rome II Regulation. In that connection, Article 85

403 OGH SZ 75, 455, 459.
404 Contrary to Gamillscheg, ZfA 1983, 307, 361 et seq.
405 What is meant is the argument that the employer called on to finance the insurance cannot be required ‘to pay out twice’ by additional having to pay damages in respect of which he made insurance contributions; see BGHZ 3, 298, 302; BGHZ 8, 330, 338; BGHZ 19, 114, 121; BAGE 5, 1, 9 (GS); in detail, Gitter, Schadensausgleich im Arbeitsunfallrecht, Tübingen 1969 (likewise Tübingen, Univ., Habil. 1968), p. 238 et seq; Deinert, Privatrechtsgestaltung durch Sozialrecht, p. 265 et seq.
section 1 of Regulation (EC) No. 883/2004, which makes recourse subject to the law applicable to the social insurance aspect, will likewise come into play as a matter of priority.

The **barring** of a claim for damages as provided for, for example, in Swiss law, owing to subsequent payment of remuneration (see paragraph 120) is likewise subsumed under the law applicable to the contract (Article 12 section 1 (d) of the Rome I Regulation).

**Contractual penalties** are subject to the law applicable to the contract. The validity of the contractual penalty will be determined according to the law applicable to the obligation whose performance is sought to be secured, thus in accordance with the law applicable to the contract. In that connection, a claim under a comprehensive employment contract of a joint facility to a contractual penalty for non-performance of minimum wage claims will be subject under the overall employment contract to the law applicable to the employment contract.

**Plant penalties** are subject to the regime provided for by them. That may follow the law applicable to the works constitution or the collective agreement called upon to apply under conflict of laws rules. Where an analogous disciplinary power on the part of the employer is statutorily provided for in a legal system, it is important to note that the employee is affected as part of the staff and not in his capacity as an employee. That justifies the connecting factor being the seat of the plant, as is also recognised under the under German PIL relating to works constitutions.

**VI. Deactivation of the employment relationship and of contractual obligations**

The contractual **deactivation** of the employment relationship is governed by the law applicable to the contract.

Any rights in favour of the employer to **suspend** the employee also follow the law applicable to the contract. The question of a suspension as a result of a labour dispute will, on the other hand, be determined by the law applicable to the labour dispute (Section 15 paragraph 39).

In other ways, also, the question of a temporary release from contractual obligations will be determined by the law applicable to the contract. In addition, the

408 See generally on connecting rules for prescription, MünchKomm-Spellenberg, Art. 12 Rom I-VO, paragraph 165.
409 Gamillscheg, IAR, p. 245.
410 Winkler v. Mohrenfels/Block, EAS B 3000 paragraph 217.
412 Gamillscheg, IAR, p. 245.
413 Gamillscheg, IAR, p. 246 et seq.
414 Cf. Deinert, Internationales Arbeitsrecht, Section 17 paragraph 19.
German Act on Workplace Protection provides for deactivation of the employment agreement in the event of military service. However, that retains only minor importance in view of the fact that compulsory military service has been put into abeyance. By its very nature, this is an overriding mandatory provision which, irrespective of the law applicable to the contract, comes into operation on a call-up to serve in the German military. This may be reformulated in terms of a unilateral conflict rule for the employment-law treatment of military service obligations. These are determined by the public law on military service. The law will however not come into play for the purposes of calling up foreign employees for foreign military service. The courts attempt to strike a balance of interests in the context of the applicable German substantive law.

Where there is, in the employee’s domestic law, a provision comparable to Paragraph 1 of the Act on Workplace Protection, it would be conceivable to apply that law under Article 9 section 3 of the Rome I Regulation. However, foreign military service would not render performance of the contract, that is to say, the performance of work, unlawful, but rather impossible. Therefore it appears preferable to continue to seek a substantive law solution as the German courts have hitherto done.

VII. Exclusion periods

Exclusion periods normally follow the law applicable to the contract under Article 12 section 1(d) of the Rome I Regulation. Paragraph 9, third sentence AEntG further states, in regard to exclusion periods relating to claims for minimum remuneration under Paragraph 8 of the legislation, that these matters can be provided for legitimately under the legislation only in an internationally binding collective agreement, or a legal regulation. This is the logical consequence of an equal treatment of all employees by the overriding mandatory law, but does not mean that exclusion periods should be deemed to be overriding mandatory rules. They cannot be, since they ultimately only serve the interests of the contracting parties in securing swift legal clarity.

Nor do short exclusion periods as a rule contravene public policy (see Section 5 paragraph 25).
13  Legal succession and termination of the employment relationship

I. Overview

In what follows, the scope of the law applicable to the contract and special connecting factors will be examined in so far as they affect legal succession (paragraphs 2 et seq.), in particular for the transfer of undertakings (paragraphs 4 et seq.). Attention will also be paid to the cross-border transfer of undertakings (paragraphs 10 et seq.). There will then be an examination of the termination of the contract, first the cancellation contract (paragraphs 17 et seq.) then the termination (paragraphs 21 et seq.). Individual specific problems will be dealt with, which may arise in particular, in view of the divergent foreign concepts (paragraphs 36 et seq.). Then, special protection against dismissal will be looked at (paragraphs 46 et seq.), and subsequently the law applicable to mass dismissals (paragraph 53), then periods of notice of termination (paragraph 54), and finally dismissal protection of employee representatives (paragraph 55). After that the right to set a fixed period will be looked at (paragraphs 56 et seq.), prior to an examination of the consequences of the insolvency of the employer as regards the maintenance of the employment relationship (paragraph 72). Finally, continued employment will be examined (paragraphs 73) as well as reinstatement (paragraphs 74).
II. Legal succession

1. Overall legal succession

   The question whether the employment relationship continues with the heirs in the event of succession is determined not by the law applicable to succession, but by the law applicable to the contract.\(^1\) From a substantive-law perspective any such continuation is precluded under English case law;\(^2\) it is otherwise, for example, under German\(^3\) or Austrian law.\(^4\) Likewise, under Swiss law express provision is made for this in Article 338a of the law on obligations and in French law under Article L 1224-1 of the Labour Code.

2. Individual legal succession

   a) Substantive law\(^6\)

   Legal succession in a given case is governed in the EU\(^7\) by the directive on the transfer of undertakings.\(^8\) This directive has been transposed by the Member States, for instance, in Germany, essentially, by means of Paragraph 613a of the Civil Code. In the United Kingdom transposition was effected by the Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE 2006).\(^9\) It is worthy of note, that there may also be a transfer of an undertaking in certain situations of outsourcing or insourcing of corporate activities (service provision change) under Regulation 3 (1) (b) TUPE 2006. In that connection, the regulations are more far-reaching than the guiding principles of the directive, as established in the decision in the Ayse Süzen\(^10\) case.\(^11\) In addition, there is Regulation 4 (9), TUPE under which, in the event of a substantial change in the employment conditions, the employee may treat the employer as if he has been dismissed by the employer. That is a case of constructive dismissal (see below, paragraph 28).\(^12\) As in the situation of a dismissal owing to a transfer of an un-

\(^1\) Gamillscheg, IAR, p. 330.
\(^3\) BAG AP No. 27 on § 59 KO.
\(^4\) Löschnigg, paragraph 6/009.
\(^5\) MünchArbR-Oetker, Section 11 paragraph 98.
\(^6\) Comparative-law presentation in Franzen, Betriebsinhaberwechsel, p. 11 et seq.; for a comparative-law presentation of the English and French laws on the transfer of undertakings, see Allenberg/Rauch, EuZA 2009, 257 et seq.
\(^7\) For the legal situation in Japan, Takahasht, RIW 2012, 112 et seq.
\(^9\) In detail on that, see McMullen, ILJ 2006, 113 et seq.
\(^10\) ECJ AP No. 14 on EWG-Richtlinie Nr. 77/187 (likewise NZA 1997, 433) – Ayse Süzen.
\(^11\) McMullen, ILJ 2006, 113, 115 et seq., 120; Deakin/Morris, paragraph 3.72.
dertaking by the seller or the purchaser (Regulation 7 TUPE) that will then be an unfair dismissal (see on that, paragraph 28).

In Austria transposition was effected by Paragraphs 3 et seq. of AVRAG. There is no general right to contest the transfer of the employment relationship. However, Paragraph 3 section 4 AVRAG confers a right of challenge in the event that the purchaser does not take over the protection of the status quo or pension entitlements agreed under collective agreements. The prohibition on dismissal on the ground of the transfer of an undertaking is not expressly provided for therein, but under the case law of the Supreme Court, will be inferred from failure to observe the duty in Paragraph 3 AVRAG to transfer the employment contract to the purchaser.

In France the transfer of undertakings is governed by Article L 1224–1 of the Labour Code. It is worthy of note, that there is no general right in favour of the employee to contest or otherwise challenge the transfer of the employment contract. The transfer of employment contracts extends also to local employment contracts of posted workers with the seller of the undertaking. Swiss law also contains, in Article 333 of the Law on obligations, provisions analogous with those in the German Paragraph 613 a BGB.

In Italy transposition was effected by Article 2112 of the Civil Code, whilst information and consultation rights in favour of employee representatives are provided for in Law 428/1990.

b) Connecting factors

An ancillary connecting factor for the law governing the transfer of the undertaking, namely the transfer agreement, has been rejected by prevailing doctrine on the basis of the consideration that the fate of the employment contract cannot be dependent on an applicable law determined by third parties. Nor has the view gained acceptance that the transfer of the undertaking must be connected with the place at which the plant is operated. Little conviction is carried by the objection of the Federal Employment Court that the rule in Article 43 EG-

12 McMullen, ILJ 2006, 113, 128 et seq.
13 OGH ZAS 2012, 269; Marhold/Friedrich, p. 284 et seq.
14 See on that Freuding, Das Widerspruchsrecht des Arbeitnehmers beim Betriebsübergang in Deutschland und Österreich, Franfurt/M. 1999 (likewise Frankfurt/M., Univ., Diss. 1999), p. 111 et seq.
15 OGH, 5.6.2002 – 9ObA97/02h; Marhold/Friedrich, p. 285 et seq.; cf. on this issue also Freuding (footnote 14), p. 79 et seq.
16 Pansier, paragraph 374; Allenberg/Rauch, EuZA 2009, 257, 270.
18 An overview is to be found in Vallebona, II, p. 409 et seq.; Henssler/Braun-Radoccia, Italien paragraph 137 et seq.
BGB on the *lex rei sitae* cannot apply on the ground that a transfer of an undertaking is not a real estate transaction.\(^{21}\) The connection to the place of business is not provided by the international law governing rights in rem, but derives from the conflict-of-laws interest in a uniform connecting rule.\(^{22}\) That cannot be countered by reference to the relative nature of the contractual relationship\(^{23}\) for these are two different things. There is, however, no such interest in a uniform connecting rule because questions of the *continuance of the employment contract* and *liability* do not need to be answered in a manner applicable to the overall operation of the plant. The same applies to the *prohibition on dismissal*, *information* concerning the transfer of the undertaking and the *right of challenge*. In that connection continuance, right of challenge and information as the basis on which it is founded, as well as the prohibition against dismissal, are questions as to the maintenance of the status quo. Therefore, one may concur with the prevailing opinion, which directs these matters to be governed by the *law applicable to the contract*\(^{24}\). The same applies to liability. Additional weight is carried by the consideration that the employer might be able to influence the connecting factor by his choice of the location of the plant.\(^{25}\) Against this background, the decisive factor is that there is no basis for any departure in terms of the development of the law away from the relevant provision in Article 8 of the Rome I Regulation.\(^{26}\) That is especially true because the solution concerning the law applicable to the contract will normally also give rise to the application of the same law.\(^{27}\) Ultimately, this view of the matter is also borne out by Article 14 section 2 of the Rome I Regulation concerning the assignment of claims. The change of creditor in the event of the transfer of the undertaking is not dissimilar to an assignment.\(^{28}\) Nor, on the other hand, can a uniform connection to the location of the plant prevail by reference to the fact that Article 1 section 2 of the directive on the transfer of undertakings relates the geographical scope of application to economic units in the EU.\(^{29}\) This provision is not a con-

\(^{21}\) BAG AP No. 409 on § 613 a BGB (likewise NZA 2011, 1143, 1147 = DB 2011, 2323); also BAG AP No. 31 on Internationales Privatrecht Arbeitsrecht.

\(^{22}\) Forst, SAE 2012, 18, 20.

\(^{23}\) But see Forst, SAE 2012, 18, 20.


\(^{25}\) Winkler v. Mohrenfels/Block, EAS B 3000, paragraph 213.

\(^{26}\) See also Forst, SAE 2012, 18, 20.

\(^{27}\) Cf. Mankowski, IPRax 1994, 88, 96.

\(^{28}\) See the comment in Mankowski, IPRax 1994, 88, 97; cf. also Richter, AuR 1992, 65, 69; Wollenschläger/Frölich, AuR 1990, 314, 316.

\(^{29}\) Reichold, FS Birk, 2008, p. 687, 697 et seq.
Conflict rule\textsuperscript{30}, with the result that it cannot derogate, by way of Article 23 of the Rome I Regulation, from Article 8 of the Rome I Regulation.

The question of the continued validity of provisions of collective bargaining agreements are ultimately also to be determined in accordance with the law applicable to the employment contract.\textsuperscript{31} For the question in that connection is as to the continued validity of such provisions as the applicable law. The manner in which such provisions then continue to have validity, is a question of the validity of provisions to be determined in accordance with the law applicable to the collective agreement. In regard to the plant agreement its validity is determined by the law applicable to the works constitution. Nonetheless, it must be assumed that the continued validity of a works agreement following a transfer of the undertaking will be determined by the law applicable to the contract since the law governing the transfer of undertakings is intended to protect the assets of the employee.\textsuperscript{32} That ought also to include the question whether the works agreement is to continue to be applicable merely as the contractual law or as the law applicable to the collective agreement. Continued validity in terms of a collective agreement will then for its part be determined by the law applicable to the works constitution.

In regard to the incorporation of the employee representatives, such as for example the comité d’entreprise under Article L 2323 – 19 of the French Labour Code or of the recognised trade union or representation chosen under Regulation 13 (2) and (3) of TUPE 2006,\textsuperscript{33} the law applicable to the works constitution will be determinant.

Likewise, the law applicable to the contract is not relevant to the question of the continued existence of the representation of interests at the plant. This question will also be determined by the law applicable to the works constitution (on the consequences of a cross-border transfer of an undertaking, see paragraph 16).

The law relating to the transfer of undertakings in Paragraph 613 a of the German Civil Code is a protective provision for the purposes of Article 8 section 1 of the Rome I Regulation.\textsuperscript{34} However, the prevailing opinion does not accept that Paragraph 613 a aforesaid should be applied as overriding mandatory law under Article 9 of the Rome I Regulation because the primary focus is on the protection of the individual employee.\textsuperscript{35} Another view emphasises that the directive on the transfer of undertakings is applicable in the case of the transfer of

\textsuperscript{30} Forst, SAE 2012, 18, 20; Gaul/Mückl, DB 2011, 2318; Deinert, RdA 2001, 368, 374, footnote 84.

\textsuperscript{31} C. Müller, p. 395 et seq.; Gaul/Mückl, DB 2011, 2318, 2321.

\textsuperscript{32} Deinert, observations on BAG AP No. 409 on § 613 a BGB. Also Gaul/Mückl, DB 2011, 2318, 2321.

\textsuperscript{33} According to German case-law transfer of an undertaking will not in itself trigger an alteration affecting co-determination under Paragraphs 111 BetrVG, see BAG AP No. 110 on § 112 BetrVG 1972.

\textsuperscript{34} Reichold, FS Birk, 2008, p. 687, 692; Forst, SAE 2012, 18, 20.
undertakings within the EU, as well as from the EU into third countries. Account is to be taken of that fact in regard to the substantive law or the conflict of laws. In that connection, there is a demand for Paragraph 613 a aforesaid to be classified as overriding mandatory law. Article 1 section 2 of the transfer of undertakings directive provides for the directive to be applicable where the unit to be taken over is located within the scope of application of the Treaty (now the TFEU). That is not a conflict rule, but a provision concerning the geographical scope of application (see paragraph 5). Nonetheless, that must be taken account of in terms of the conflict of laws because otherwise the transfer of undertakings directive would not be fully transposed. The question is only as to the consequences to be inferred therefrom. Since in the case of a European law applicable to the employment contract the transposition law of one or other Member State will apply to the transfer of the undertaking, a lacuna in protection may arise if the law of a Non-Member State applies to the employment contract and that law makes no provision for analogous protection in the event of the transfer of the undertaking. Since the transposition laws of the Member States will continue to be implemented as protective norms under Article 8 section 1 of the Rome I Regulation, where the law of a third country derives from a choice of law, the need will arise for intervention under the conflict of laws only if the law of a Non-Member State applies by way of an objective connection. In view of the normal connecting rule to the place of employment, this will occur only in the infrequent cases where the connection is provided by the place of business through which the employee was engaged or by application of the escape clause. In these infrequent cases European law on the transfer of undertakings will in fact have to be implemented. Accordingly, Paragraph 613 a of the German Civil Code is, on an interpretation in conformity with the directive, to be construed as overriding mandatory law provided that:

1. the transfer of an entity within the European Union is involved, and
2. the law of a Non-Member State is applicable to the employment contract.

10 Cross-border transfer of an undertaking

Where on a change of the owner of a plant, the transfer of the undertaking, the location is switched either out of the country or into the country, this process is described as a cross-border transfer of an undertaking. This is also covered by German Paragraph 613 a aforesaid, according to a ruling by the Federal Em-

36 Kребber, ZVglRWiss 97 (1998), 124, 139 et seq.
37 Kребber, p. 321 et seq.; Reithmann-Martiny-Freitag, paragraph 594; for another view, see Franzen, observations on BAG AR-Blattei ES 920 No. 3.
38 For another view, see Winkler v. Mohrenfels/Block, EAS B 3000, paragraph 215.
39 See also C. Müller, p. 396 et seq.
More precisely, there are two separate issues here, both of which are also dealt with by the court: a conflict-of-laws issue (paragraph 11) and a substantive-law issue (paragraph 12). Consequential problems can arise out of the interconnectedness of both (see paragraph 13).

From a **conflict-of-laws perspective**, the question arises as to the applicable law. This may possibly be affected by the change in location. If the employment contract contains a choice of law questions of legal succession, the prohibition on dismissal etc. will be determined by the chosen law. The transfer of the undertaking and the habitual place of employment – a separate issue in itself – do not alter that in any way. The choice of law will also continue to be determinant. In the case of an objective connection, there may be a change in the applicable law if work is henceforth carried on at the new place of business and the escape clause in Article 8 section 4 of the Rome I Regulation does not come into play. Determination of the law applicable to the legal consequences of the transfer of the undertaking will therefore depend on whether the change in the owner of the undertaking precedes the change in location, comes after it or occurs at the same time. In practical terms, the most varied configurations are conceivable. The purchaser will not always be able to determine the temporal sequence of events. It may, however, also be otherwise, for example, if the plant is first acquired and continued in business before subsequently being transferred to an organisation abroad in the context of a restructuring. If the transfer occurs before or at the same time as the change in location, the hitherto applicable law will continue to be applicable. In other cases there may be a change of the applicable law. These conflict of law implications may give rise to complications in substantive-law terms (paragraph 13). However, the question arises as to whether Paragraph 613 a BGB aforesaid, as a negative unilateral conflict rule, is only applicable to domestic situations. The Federal Employment Court is correct to point out that this cannot be justified under the territoriality principle, since in the private law sector the conflict rules of the PIL, rather than the territoriality principle, are relevant.

If one first proceeds on the basis of the previously applicable law, thus, in the case of a change in the owner of an undertaking from Germany, German law, the question arises in terms of substantive law whether a cross-border change

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40 BAG AP No. 409 on § 613 a BGB.
41 On the issue as to whether and under what manner the employee is obliged under German substantive law to work at the seat of the new undertaking, see Franzen, p. 147 et seq.; Forst, SAE 2012, 18, 23 et seq.; Wollenschläger/Frölich, AuR 1990, 314, 319.
42 BAG AP No. 409 on § 613 a BGB.
44 In detail on the possible coinciding of transfer of location with the change of ownership, see Bittner, Europäisches und internationales Betriebsrentenrecht, p. 487 et seq.
45 In this sense, see also ArbG Hamburg and LAG Hamburg, both AP No. 25 on § 613 a BGB; Loritz, RdA 1987, 65, 84.
46 BAG AP No. 409 on § 613 a BGB; also Forst, SAE 2012, 18, 20; see also Franzen, p. 60 et seq.; Richter, AuR 1992, 65, 67 et seq.
in the owner of an undertaking is possible, in the sense of being covered by the statutory provision. Irrespective of whether the change in location crosses borders or not, the courts previously held that the transfer of the undertaking was in that connection to be differentiated from a cessation. The change in owner with a shift in the location, across a significant distance, does not constitute a transfer of an undertaking, but a cessation followed in an appropriate case by a new establishment. Ultimately, however, it was not so much the distance from which the courts inferred a plant cessation and subsequent new establishment. Not even in the case of a change in location from Berlin to Lyon did they preclude the possibility of a transfer of an undertaking. Ultimately, what was decisive was always the more or less inevitable change in staff occasioned by a removal over a considerable distance. More recently, the courts have distanced themselves from this approach, though not completely, emphasising the correct method of approach: under Article 1 section 1(b) of the directive on the transfer of undertakings the decisive factor is whether the economic unit retains its identity. That may be answered very differently, depending on the distance and type of the undertaking. Thus, at any rate, a change in the location does not preclude the transfer of the undertaking. Shifting the location of the plant, even across borders will not necessarily constitute closure of a plant. The limitation to plant transfers at national level would be an unwarranted departure from the terms of the directive on the transfer of undertakings. Nor can that be countered by the assumption of an unreasonable relocation requirement, because it is not reflected in the directive on the transfer of undertakings. Account is taken of it much more by the fact that Paragraph 613 a section 6 BGB allows the employee a right of challenge. In the case of undertakings with small resources, the fact that essential parts of the plant staff are not relocated may preclude the presumption that the economic unit is being maintained. However, particularly in border areas, the integration of significant parts of the plant staff may be possible. It is sometimes asserted that the cross-border transfer of an un-

47 Hergenröder, observations on BAG AR-Blattei ES (D) Betriebsinhaberwechsel No. 82.
48 BAG AP No. 81 on § 613 a BGB (= AR-Blattei ES (D) Betriebsinhaberwechsel No. 82, with observations by Hergenröder).
49 BAG AP No. 67 on § 613 a BGB; BAG AP No. 81 on § 613 a BGB.
51 BAG AP No. 237 on § 613 a BGB; BAG AP No. 409 on § 613 a BGB; for a critical view see Junker, NZA Beilage 1/2012, 8, 14 et seq.
52 Forst, SAE 2012, 18, 22.
54 Cf. M. Kania, ZESAR 2010, 112, 114 et seq.; Deinert, observations on BAG AP No. 409 on § 613 a BGB.
56 Cf. Forst, SAE 2012, 18, 22.
57 Forst, SAE 2012, 18, 22; see also Cohnen, FS 25 Jahre ARGE Arbeitsrecht im DAV, 2006, p. 595, 610.
dertaking should be permitted only if such transfers are also recognised by the law of the transferee State.\textsuperscript{59} That does not, however, carry conviction. German substantive law is not familiar with any such restriction; nor can it be substantiated from a conflict-of-laws perspective because, in general, only one law can be applicable and not two at the same time.\textsuperscript{60} It would be artificial to accept an extended statutory requirement\textsuperscript{61} whereby first the one and then the other law is applicable. Nor, finally, can this view be upheld on the basis of the consideration that the employment relationship cannot have the same content at the new place of employment because, as a result of the change of location, other provisions become applicable.\textsuperscript{62} That would again be to confuse the conflict of laws and substantive law in a way which is not permissible. From the conflict of laws perspective, this change of applicable provisions is not unusual because, as a result of the change of place of employment, other overriding mandatory provisions will apply under Article 9 of the Rome I Regulation and, in the case of a choice of law, other protective provisions will come into play under Article 8 section 1 of the Rome I Regulation.\textsuperscript{63} Finally, it should be pointed out that even the courts of a transference State, which is not familiar with the cross-border transfer of undertakings, cannot refuse to recognise such where, under their conflict-of-law rules, German law is applicable. In no way, therefore, does the problem arise that, for instance, German law is stipulating something which, owing to a lack of recognition abroad, would have no practical effects. However, then the further substantive-law question arises as to whether Paragraph 613 a of the Civil Code only applies to domestic transactions. Does Paragraph 613 a in that connection therefore entail an implied self-limitation to transfers of undertakings at national level? The provision, however, provides no clue as to this.\textsuperscript{64} If the directive also includes cross-border transfers of undertakings within its scope of application and undertakes no substantive restrictions, it must be presumed, in my view, in compliance with the directive that Paragraph 613 a aforesaid also contains no such restriction.\textsuperscript{65} That corresponds also to English substantive law in accordance with Regulation 3 (4) (b) TUPE as well as the French law on the transfer of undertakings, as interpreted by the Court of Cassation.\textsuperscript{66}

Possible gaps in protection may arise on a change in the applicable law, that is to say where the objective connecting factor is altered.\textsuperscript{67} where there is a

\textsuperscript{59} Junker; Internationales Arbeitsrecht im Konzern, p. 239 et seq.; Leuchten, ZESAR 2012, 411, 414; for another view, see Bittner, Europäisches und internationales Betriebsrentenrecht, p. 485 et seq.
\textsuperscript{60} Cf. Franzen, p. 110 et seq.; see also Reichold, FS Birk,2008, p. 687, 698; also the objections raised by Forst, SAE 2012, 18, 24.
\textsuperscript{61} Mankowski, IPRax 1994, 88, 97 et seq.
\textsuperscript{62} Hergenröder; observations on BAG AR-Blattei ES (D) Betriebsinhaberwechsel No. 82
\textsuperscript{63} Cf. Franzen, p. 182 et seq.
\textsuperscript{64} Däubler, FS Kissel, 1994, p. 119, 126; Forst, SAE 2012, 18, 20.
\textsuperscript{65} Deinert, observations on BAG AP No. 409 on Paragraph 613 a BGB; also Internationales Arbeitsrecht, Section 13 paragraph 12.
transfer of an undertaking from Germany and there is an ensuing change in the applicable law, as a result of a change in the habitual place of employment (see Section 9 paragraph 146), the question arising, in light of the prohibition on dismissal on account of the transfer of an undertaking (Article 4 of the directive), is whether a transfer of an undertaking occurring before the change in the applicable law will also be regarded as such under the law applicable to the contract.\(^{68}\)

It is, of course, otherwise if, as in a case decided by the Federal Employment Court (BAG), dismissal has occurred already before the switch of location for then Paragraph 613 a of the Civil Code and, in particular, section 4 thereof, would be applicable.\(^{69}\) Conversely, the question may arise as to whether, following a change of owner and consequent change in the applicable law, there may be presumed to have been a transfer of an undertaking under Paragraph 613 a BGB aforesaid because that would have occurred under the umbrella of a foreign applicable law.\(^{70}\) The question, therefore, is whether there can in fact be a transfer of undertaking for the purposes of the statutory provision, if in point of time it preceded the applicability of the statutory provision. Within the scope of application of the directive on the transfer of undertakings, that is to say in the case of economic entities located in the EU (even if they are to be transferred out of the EU), it will be necessary to recognise that there is a substitution (on that Section 15 paragraph 18) by the foreign transfer of undertaking in a manner which is in conformity with the directive, where such recognition is not already afforded by the law. However, not all these problems will be able to be resolved by substitution. It will fail, for example, where the change in ownership of the undertaking to a Non-EU Member State occurs without there being any analogous provisions, or where the relevant substantive law is not amenable to substitution. In the case of Paragraph 613 a BGB aforesaid, however, there is no indication that substitution would be precluded. More specifically, however, in regard to substitution of a transfer of an undertaking at national level by a transfer of an undertaking abroad, the additional question arising is whether it makes any difference as regards application of the substantive law that the procedure to be classified as transfer of an undertaking occurs under the aegis of a foreign law applicable to the contract. The answer to that is that it does not. There is no reason, in regard to the prospective application of law, not to take into account matters dating from the period before the change in the applicable law.\(^{71}\) In the absence of substitution, it will be a matter of applying the relevant transposition provision of the forum as an overriding mandatory provision in a manner in conformity with the directive (indirect horizontal direct effect).\(^{72}\) It is true that, unlike in the cases described at the outset (Section 3 paragraphs 15 et seq.), there

\(^{67}\) However, not in the event of a choice of law, cf. Franzen, p. 125 et seq.

\(^{68}\) The issue is touched upon in BAG AP No. 409 on § 613 a BGB.

\(^{69}\) BAG AP No. 409 on § 613 a BGB. However, the decision related to an objection on social grounds to a dismissal, under Paragraph 1 KSchG.

\(^{70}\) Däubler, FS Kissel, 1994, p. 119, 135.

\(^{71}\) Cf. Franzen, p. 105 et seq.
is no lack of a provision as a result of a failure of transposition. Nonetheless, the will of the directive to apply to all transfers of undertakings in the EU (Article 1 section 2 of the directive) will assert itself.\textsuperscript{73}

For the purposes of Paragraph 613 a BGB aforesaid, \textbf{periods completed in the undertaking} with the transferor of the undertaking are to be taken into account by the transferee undertaking.\textsuperscript{74} In the case of a cross-border transfer of an undertaking, there is no reason for periods completed with the foreign transferor undertaking not to be taken into account. The Austrian courts proceed on the same basis. The Austrian Supreme Court will not take into account previous periods of employment, if they were not eligible to be taken into account by the transferor undertaking because it is not the purpose of the directive to confer rights on employees which they would not have been able to acquire from their previous employer.\textsuperscript{75} That is the line to be followed by German law because the German courts in domestic cases proceed on the same basis, for example, in the case of occupational pension provisions\textsuperscript{76} or a long-service premium, where such benefits were not provided by the transferor undertaking.\textsuperscript{77}

In the case of cross-border transfer of an undertaking, notwithstanding a change of applicable law, \textbf{the pre-existing collective agreement} under the law formally applicable to the employment contract may remain applicable in accordance with the relevant provision, such as for example, Paragraph 613 a BGB aforesaid.\textsuperscript{78}

The continuance of the \textbf{employee representation in the undertaking}, as required by Article 6 of the directive, is determined in accordance with the law applicable to the works constitution (paragraph 8) and thus by the law of the place where the plant is located. In the case of a cross-border undertaking transfer, this will have the effect of bringing about a change in the applicable law. That cannot simply be countered by asserting that the directive does not cover cross-border situations.\textsuperscript{79} In fact it is quite the opposite (see paragraph 12). However, Article 6 of the directive provides for generous exceptions from the requirement to maintain employee representation in favour of national provisions, with a view to employee representation in the undertaking. It must be correct for a transitional mandate to be recognised by analogy with Paragraph 21 a of the Works Constitution Act (BetrVG) where an undertaking is transferred out of the Federal Republic of Germany, at least until employee representation has been chosen under the new law applicable to the works constitution. Where there is no provi-

\textsuperscript{72} M. Kania, p. 193 et seq.; Däubler-Däubler, TVG Einl., paragraph 648; Deinert, Observations on BAG AP No. 409 on § 613 a BGB.
\textsuperscript{73} M. Kania, p. 193 et seq., 197 et seq.
\textsuperscript{74} Cf. with further observations ErfK-Preis, § 613 a BGB.
\textsuperscript{75} OGH WBI 2001, 581, 582.
\textsuperscript{76} BAG AP No. 409 on § 613 a BGB.
\textsuperscript{77} BAG NZA 2007, 1426.
\textsuperscript{78} Däubler-Däubler, TVG Einl., paragraph 649.
\textsuperscript{79} Gaul/Mückl, DB 2011, 2318, 2321.
sion for such representation at the new place of business of the undertaking, there must be presumed to be a residual mandate under Paragraph 21 b of the Works Constitution Act. These provisions are, by reference to Article 6 of the directive, to be regarded as overriding mandatory provisions which will prevail over a foreign law applicable to the works constitution if that law does not itself make provision for a transitional mandate. In the case of a transfer of an undertaking into Germany, those provisions will automatically be applied as part of the law applicable to the works constitution. Of course, here, a transitional mandate under Paragraph 21 a of the Works Constitution Act will generally only apply by analogy since at issue will not necessarily be splitting or merger but only a plant transfer.

III. Termination of employment

1. Cancellation contract

Termination of the contract by cancellation contract will not be dealt with as a matter of contract law as a self-standing contract. On the contrary, it is an actus contrarius to the employment contract, which justifies dealing with it, in the same way as with the employment contract. Specifically because the contract-terminating effect is governed by the law applicable to the contract under Article 12 section 1(d) of the Rome I Regulation, its focus is nonetheless to be found where, under the system of connecting rules laid down in Article 8 of the Rome I Regulation, the main focus of the employment contract is located. It is sometimes advocated that, specifically on account of this system, the central focus of the cancellation contract should be located in the place where a settlement payment is made and, in the absence thereof, should be freely determined. Yet in the process, one moves away from the subject-matter of the cancellation contract. For the object of that contract is, after all, to cancel the effects of the employment contract. The cancellation contract will therefore be governed by the law applicable to the employment contract.

Of course, the contracting parties may agree a self-standing choice of law for the cancellation contract with the result that there may be a departure from the law applicable to the contract. It cannot be objected that, owing to the lack of a self-standing status as a contract in view of its being in the nature of an actus

80 Winkler v. Mohrenfels/Block, EAS B 3000, paragraph 226; Staudinger-Magnus, Art. 8 Rom I-VO paragraph 240; similarly (where substitution of dismissal function is determinant), Bamberger/Roth-Spickhoff, Art. 8 Rom I-VO paragraph 11.
82 See also MünchArb-Oetker, Section 11 paragraph 113; MünchKomm-Martiny, Art. 8 Rom I-VO paragraph 100; Rauscher-vz: Hein, Art. 8 Rom-VO, paragraph 69; ErfK-Schlachter, Rom I-VO, paragraph 27; Ferrari-Staudinger, Art. 8 Rom I-VO, paragraph 28; Hanau/Steinmeyer/Wank-Wank, Section 31 paragraph 174; Hönsch, NZA 1988, 113, 119; Deinert, RdA 2009, 144, 153.
83 Winkler v. Mohrenfels/Block, EAS B 3000, paragraph 226; Rauscher-vz: Hein, Art. 8 Rom I-VO paragraph 69.
contrarius (see paragraph 17), the choice of law is not possible. By its nature
this will be a partial choice of law (see Section 9 paragraph 32). In view of the
ensuing terminating effect as regards the employment contract and in regard to
the further consequences of contract termination on the employment relationship
(for instance, in regard to occupational pension provision), the law applicable to
the employment contract will continue to be determinant (Article 12 section 1(d)
of the Rome I Regulation). 84

Again, questions that relate to the ability to challenge or rescind the cancel-
lation contract will also be determined by the law applicable to the cancellation
contract.

In regard to the form of the cancellation contract, the law applicable to for-
mal requirements will apply (see Section 8).

2. Termination

a) Substantive law 85

Neither termination nor protection against dismissal are harmonised under
European law. Only the directive on mass dismissals 86 provides for procedural
protections in the event of mass dismissals, as defined therein.

In German law an employment relationship for a fixed period cannot ordi-
narily be terminated under Paragraph 15 section 3 of the Act on Part-time and
Fixed-term Contracts (TzBfG). Other prohibitions on dismissal also apply, such
as for members of the works council under Paragraph 103 of the Works Consti-
tution Act (BetrVG) or for expectant mothers under Paragraph 9 of the law on
the protection of mothers (MuSchG). Moreover, any employment relationship
can be terminated for a serious reason under Paragraph 626 of the Civil Code.
Under Paragraph 1 of the law on protection against dismissal (KSchG) ordinary
dismissal requires a social justification on personal, occupational grounds or
grounds related to conduct. The law is applicable in undertakings having more
than 10 employees to employees whose employment contract is for a period of
more than six months (Paragraphs 1 and 23 KSchG). A dismissal which is not
socially justified will be invalid. Neither in the case of an invalid or valid dis-
missal is there entitlement to a compensatory settlement (exception: Paragraph 9
KSchG; on that, see below). Instead, unemployment insurance will generally ap-
ply. Paragraph 1a KSchG will only exceptionally provide for settlement instead
of protection against dismissal where the employer so offers in the case of dis-

84 Winkler v. Mohrenfels/Block, EAS B 3000, paragraph 226.
85 Zachert, Beendigungsstatbestände; Amlang, Die unternehmerische Entscheidungsfreiheit bei
‘betriebsbedingten Kündigungen’ im europäischen Rechtsvergleich, Frankfurt/M. 2005 (also
Berlin, Humboldt-Univ., Diss. 2004/05), p. 55 et seq.; Krebber, p. 31 et seq.; Rehbahn, RdA
Adomeit, 2008, p. 319 et seq.; also Mozer, NZA 1998, 128 et seq.; Tödtmann/Schauer, NZA
2003, 1187 et seq.
States relating to collective redundancies, OJ L 225/16.
missal in connection with grounds connected to the undertaking and the employee allows the period for lodging a claim under Paragraph 4 of the law to expire. Conversely, it is not open to the employer to ‘redeem’ from the employee against his will the protection he enjoys against dismissal. In other cases, under Paragraph 9 of the law, there may (in rare cases) be a court order terminating the employment relationship in exchange for a compensatory settlement. In the case of collective dismissals settlements may, under Paragraph 112 of the Works Constitution Act, be arrived at under works constitution law by means of a social plan. Periods of notice of termination are determined under Paragraph 622 of the Civil Code. During a probationary period of up to six months duration, the employment relationship may be terminated on the giving of a reduced notice of two weeks. Otherwise the applicable period of notice will be four weeks expiring on the 15th or at the end of the calendar month. The periods are extended in line with the increasing duration of the employment relationship. To be valid under Paragraph 102 of the Works Constitution Act notice of dismissal requires, first, that the works council has been given an opportunity to voice its opinion. An objection by the works council does not, however, preclude the validity of the notice of dismissal, but may trigger a claim to continuance of employment under Paragraph 102 section 5 BetrVG. The extraordinary dismissal of a board member of the works council will only be permissible with the approval of the works council under Paragraph 103 of the law. In the case of mass dismissals Paragraphs 17 et seq. KSchG lay down the procedure required by the directive on mass dismissals (cf. paragraph 21). The invalidity of the dismissal must be raised by way of an action under Paragraphs 4, 13 section 1 and 3 KSchG within a period of three weeks. Otherwise, the dismissal will be deemed to be valid in accordance with Paragraph 7 of the law.

In Austria protection against dismissal is formulated in terms of works constitution law.\textsuperscript{87} The employer is obliged to give a hearing to the works council under Paragraph 105 section 1 of the Austrian Works Constitution Act (ArbVG) concerning the intended dismissal. The dismissal will be invalid if it is issued within a week and the works council has not yet formed a view on it. Paragraph 105 section 3 No. 1 ArbVG contains a list of grounds on which dismissal may be challenged, which essentially concern trade union, works council and honorary activities, as well as a prohibition on reprimands. These are therefore dismissals for an impermissible reason. In addition, dismissal under Paragraph 105 section 3 No. 2 ArbVG is amenable to judicial review if it is socially unjustified and the employee has been employed for at least six months. The dismissal will be socially unjustified if it adversely affects the interests of the employee. However, the employer may encounter that with its own interests for the purpose of justification. What may be considered here is a subjective operational factor oc-

\begin{itemize}
\item \textsuperscript{87} In detail, \textit{Marhold}, NZA Sonderbeilage zu Heft (special supplement to vol.) 21/2003, 22; \textit{Zeibig}, Allgemeiner Kündigungsschutz und Abfertigungszahlungen bei der Beendigung von Arbeitsverhältnissen in Österreich, Baden-Baden 2013, p. 58 et seq.
\end{itemize}
occasioned by reasons to be found in the person or the conduct of the employee or an objective operational factor caused by grounds relating to operating conditions. A defective social comparison (social selection) may be alleged under Paragraph 105 section 3 c Works Constitution Act, if the works council has expressly objected to it. In the event of an objection, the works council may, at the request of the employee, challenge the dismissal before the courts, otherwise the employee may do so under Paragraph 105 section 4 ArbVG. A court decision in favour has the effect, under Paragraph 105 section 7 ArbVG, of rendering the dismissal unlawful. If, however, the works council has consented to the dismissal, the employee is no longer entitled, under Paragraph 105 section 6 Works Constitution Act, to seek review of social justification. Nor is the consent of the works council as such amenable to judicial review. This provision, which has been described as a ‘shameful part of the Austrian legal system’ may be accounted for, according to the ruling of the Constitutional Court, by the collective law construction of dismissal against protection. Protection against dismissal is specifically not at the disposal of the individual, but inures to the benefit of the staff as a whole. The possibility of giving notice of dismissal, together with the offer of a different job is generally recognised. Unlike under German law (Paragraph 2 KSchG), there is, however, no opportunity for the employee to lodge a claim for protection against the alteration. He is in a position, therefore, of having to accept the dismissal, subject to the offer of the different job or challenging it before the courts with the consequence that if he is unsuccessful, he will lose his job. Dismissal without notice on a serious ground is to be distinguished from notice of dismissal in accordance with the ordinary requirements of German law. Even the former is only possible under Paragraph 106 Works Constitution Act after the works council has been consulted. The dismissal may be challenged before the courts under Paragraph 106 section 2 Works Constitution Act. That presupposes substantively that the employee has given no grounds for dismissal. The possibility of dismissal is therefore determined under Paragraphs 25, 27 of the law on employees (AngG) and Paragraph 82 of the 1859 regulation of trade (GewO). In that connection, the grounds of dismissal under the 1859 regulation constitute an exhaustive list, whilst the enumeration in Paragraph 27 of the law on employees is illustrative. In addition to the lack of a ground for dismissal, the dismissal must also be socially unjustified or have been ordered on one of the impermissible grounds mentioned above. In regard to the manner in which it is to be challenged ordinary provisions governing dis-

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88 In detail on the exceptions see Weiss, DRdA 2011, 569 et seq.  
89 Marhold, NZA Sonderbeilage zu Heft (special supplement to vol.) 21/2003, 22, 26.  
91 Cf. OGH IPRax 2009, 89, 90.  
92 Cf. Löschnigg, paragraph 7/046.  
93 Marhold, NZA Sonderbeilage zu Heft (special supplement to vol.) 21/2003, 22, 24.  
94 Löschnigg, paragraph 7/225; Marhold, NZA Sonderbeilage zu Heft (special supplement to vol.) 21/2003, 22, 24.

13 Legal succession and termination of the employment relationship
Chapter 4: Scope of the law applicable to the employment contract

Dismissal will apply by analogy. Extraordinary notice given by the employee is possible for a serious reason under Paragraphs 82a of the 1859 GewO and Paragraph 26 AngG. Since protection against dismissal is guaranteed as a matter of works constitution law, its scope is that covered by the works constitution. The plant must therefore be capable of having a works council as defined by Paragraph 40 Works Constitution Act, that is to say must have at least five employees entitled to vote. Whether a works council has been voted in is not however decisive. Otherwise the employee may himself directly challenge the dismissal under Paragraph 107 Works Constitution Act. There is a specific and special protection against dismissal in respect of certain groups of employees that are to be found in various different laws. Under certain conditions, the employee may demand a settlement benefit under Paragraph 23 AngG and Paragraph 2 of the law on settlement benefits in regard to employees.

In the event of death, the statutory heir for whose maintenance the deceased was responsible will receive one half of the settlement amount as determined under Paragraph 23 section 6 AngG. Whether a person is a member of the deceased’s family in this connection is, of course, not a preliminary question to be dealt with independently but, in light of the purpose of the provision, is to be determined in accordance with Austrian substantive law. In the case of posting abroad within a group of companies where a local contract is entered into and remuneration is split between the central employer on the one hand and the local employer, on the other, the determination will relate only to the remuneration in regard to the central employment relationship. In respect of contracts entered into from 2003 this determination model has been replaced by the law on plant provision for workers, henceforth known as the law on provision at plant level for employees and self-employed persons (BMSVG). Under Paragraph 6 of that law, the employer is required to make contributions to the fund and the employee will receive the settlement amount determined, in accordance with Paragraph 14 of the law, from the occupational provision fund.

The periods of notice for termination are differently formulated in Paragraphs 1158 et seq. of the Austrian Civil Code (ABGB), Paragraph 20 AngG, Paragraph 77 of the 1859 GewO and range from one day to six months. Any period of notice agreed must be of equal duration for both parties; in the case of unequal periods, the longer period shall apply to both parties (Paragraph 1159 c ABGB). This provision is, however, only unilaterally mandatory with the consequence that a shorter period of notice may be agreed for the employee. The constitutionality of unequal periods of not-

95 Marhold, NZA Sonderbeilage zu Heft (special supplement to vol.) 21/2003, 22, 22 et seq.
96 Marhold/Friedrich, p. 370 et seq.; Marhold, NZA Sonderbeilage zu Heft (special supplement to vol.) 21/2003, 22, 24.
97 Cf. in detail and on comparison with German law, Zeibig, (footnote 89), p. 113 et seq.
98 Gamillscheg, IAR p. 339.
99 OGH DRdA 2012, 33, with observations by Burger.
100 On the details and differences see Marhold/Friedrich, p. 142 et seq.
101 OGH DRdA 1993, 117, 118, 119 with critical observations by Grillberger.
tice for workers and employees is however not free from doubt. The procedure in the case of mass dismissals is laid down in Paragraph 45 a of the law on the promotion of the employment market. In plants with at least 20 employees, the works council, under Paragraph 109 section 3 Works Constitution Act can demand a social plan.

In Switzerland termination of the employment relationship is precluded under certain circumstances and will be invalid, for example, if occurring during military or civil service, during pregnancy and for 16 weeks thereafter, or for certain periods of illness (Article 336 c of the law on obligations – OR). This is termed temporary protection against dismissal by means of blocking periods. Otherwise, ordinary dismissal under Article 335 OR is possible. There is freedom in regard to termination, that is to say termination requires no substantiation.

Only in certain cases will determination be precluded, that is to say in cases of misuse, such as in the event of revenge (Article 336 section 1(d) OR). Under that provision termination will be an abuse inter alia, if it is to frustrate entitlements or where the person concerned is an employee representative. Abusive termination will give rise to entitlement to compensation under Article 336 a of the law on obligations.

During the probationary period, there is a seven-day period of notice of termination, rising thereafter to one month which increases with the increasing duration of the employment relationship (Article 335 b and 335 c OR).

The procedure in respect of mass dismissals is laid down in Articles 335 d et seq. of the law on obligations and provides for information to be provided to the employee representatives and the employment office.

Protection against dismissals which discriminate on the ground of gender is afforded by Article 9 of the law on equal treatment (GlG) and protection against disciplinary dismissals owing to the praying in aid of the prohibition on discrimination on the ground of sex is afforded by Article 10 GlG.

Immediate dismissal for a serious cause is possible under Article 337 of the law on obligations.

Employees who are at least 50 years of age are entitled, after belonging to the undertaking for a period exceeding 20 years, to departure compensation in the amount of at least two months’ salaries (Articles 339 b et seq. of the law of on obligations).

Swiss law allows for notice of termination to be given together with an offer of employment in a different post, provided that it is not used in an abusive manner. This will be the case where it seeks to bring about an unfair deterioration in the contractual situation of the employee.

102 Löschnigg, paragraph 7/020; Marhold, NZA Sonderbeilage zu Heft (special supplement to vol.) 21/2003, 22, 23.
103 Geiser/Müller, paragraphs 612 et seq.
104 Geiser/Müller, paragraph 624.
105 BGE 123 III 243; Rehbinder, paragraph 329.
106 Geiser/Müller, paragraph 671.
Under French law, the employee may, at any time, give notice (Article L. 1231 – 1 of the Labour Code). In addition, pleading breaches of contract by the employer, the employee may unilaterally rescind the employment contract. Depending on the actual circumstances, this solution is to be treated as a termination by the employer, with or without cause or as a termination by the employee.\(^{107}\) Ordinary dismissal by the employer requires justification under Article L. 1232 – 1 of the Labour Code for a real and genuine cause.\(^{108}\) In the case of termination on economic grounds, the cause must be one that falls within the terms of Article L. 1233 – 3 of the Labour Code. In that connection there must be a social selection within the meaning of Articles L. 1233 – 5 et seq. of the Labour Code\(^{109}\) whereby the selection criteria are, as a matter of priority, to be negotiated with the works council or, in the alternative, with the staff delegates. In addition, a termination for personal grounds may be justified under Article L. 1232 – 1 of the Labour Code. That may also concern grounds to do with the employee’s conduct.\(^{110}\) An unjustified dismissal will be invalid if it is challenged before the courts. The employer and employee both have the right to decline continuance of the employment. Under Article L 1235 – 3 and 1235 – 5 of the Labour Code, the employee is entitled to compensation owing to the dismissal, provided that he has been working for two years in an undertaking having at least 11 employees.\(^{111}\) Settlement is precluded in the event of a serious fault. In smaller undertakings the employee may request only payment of the actual damage (Article L 1235 – 5 of the Labour Code). In any event, there is in addition, both for justified and for unjustified dismissal is compensation for dismissal, which is provided for under Article L 1234 – 9 of the Labour Code. Compensation will amount to at least six months’ salaries, but may also be greater.\(^{112}\) In addition, there are statutory criteria concerning dismissal in special cases, which in each case will oppose termination and breach of which will compulsorily entail reinstatement.\(^{113}\) The prevailing view, however, is that the employee cannot be compelled to accept this legal consequence, but can allow the dismissal to stand and claim compensation.\(^{114}\) For example, dismissal of a trade union delegate under Article L 2411 – 3 of the Labour Code requires the approval of the Inspector of Employment.\(^{115}\) There is a prohibition on the dismissal of pregnant women in Article L 1225 – 4. The prohibition against discrimination also refers expressly under Article L 1132 – 1 of the Labour Code to dismissals.\(^{116}\) Under Article L 1234 – 1 of the Labour Code, the period of notice will, after six months em-

\(^{107}\) In detail see Pélissier/Auzéro/Dockèes, paragraphs 380 et seq.
\(^{108}\) Cf. Kребber, p. 73 et seq.
\(^{109}\) Cf. Aldea, p. 120 et seq.
\(^{110}\) See the evidence in Teyssié, Articles L 1232-1 No. 29 et seq.; with further references, Kребber, p. 75 et seq.; Aldea, p. 83 et seq.
\(^{111}\) Further details see Aldea, p. 147 et seq.
\(^{112}\) Cf. with further references, Kребber, p. 109 et seq.
\(^{113}\) Cf. with further references, Aldea, p. 265 et seq.
\(^{114}\) Cf. with further detail. Kollerbaur, p. 135 et seq.
\(^{115}\) Cf. in detail. Aldea, p. 233 et seq.
Dismissal must in any event be preceded by a preliminary discussion under Articles L 1232 – 2 et seq. of the Labour Code and may only be served two working days later. This task cannot be delegated by the employer to persons unconnected with the undertaking. In the case of collective dismissals (as from ten employees) on economic grounds subsequent notification to the employment inspectorate is required under Article L 1233 – 19 of the Labour Code. But a breach of this duty will have no effect on the legality of the notice of dismissal. In undertakings with at least 50 employees, in which at least ten employees are to be given notice of dismissal within 30 days, the employer must previously under Article 1233 – 8 of the Labour Code give a hearing to the employee representatives. In addition, he will have to establish a job safeguarding plan under Article L 1233 – 61 of the Labour Code. The procedure is strictly formalised. Incorporation of the employment administration is provided for in Articles L 1233 – 46 et seq. of the Labour Code. Following a notice of dismissal for reasons specific to the plant, the employee will have entitlement under Article L 1233 – 45 of the Labour Code to priority reinstatement if the employer again recruits staff. In that connection, the employer is free to choose his contractual partner from among several persons entitled. The Netherlands law on dismissal contains a special provision. Here the consent of the authority is required under Article 6 of the decree on labour relations 1945 (BBA). The authority has, however, as a rule to issue the authorisation if there are objective grounds. In reality, permission is granted in about 85% of cases. Dismissals effected without authorisation may be set aside at the behest of the employee under Article 9 of the decree. They will be invalid. The employee may instead claim damages under Article 7:681 of the Civil Code (BW). The employer may be instead of applying to the authority applied to the courts for dissolution of the employment relationship for serious cause. The serious cause may be substantiated by an alteration in circumstances. The court may, in connection with dissolution, order that there be a settlement. This is what occurs in the majority of cases. The period of notice is determined under Article 7:672 of the Civil Code. Thereunder, it is one month which may be extended after five years to two months, after ten years, to three months and, after 15 years, to four months. Extended periods of notice may however be reduced, by agreement under Article 7:672 section 4 of the Civil Code and Article 6 of

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116 There is no minimum notice period where the person has a shorter length of service, cf. Teyssié, Code du Travail, Article L. 1234-1, commentary, p. 132 et seq.
117 Details in Aldea, p. 67 et seq.; Bonnemye, RPDS 2012, 263 et seq.
118 Cass.soc. RPDS 2012, 114.
119 Kollerbaur, p. 74.
120 Cf. Henssler/Braun-Welter/Caron, Frankreich, paragraphs 145 et seq.
121 For further detail, see Kollerbaur; EuZA 2011, 188, 197 et seq.
122 Mazeaud, paragraph 590.
123 Cf. Waas, Modell Holland, p. 47 et seq.
124 Zachert, Beendigungstatbestände, p. 29.
the decree, by one month per year of employment up to a maximum of 13 weeks. As from the age of 45 years a further week will accrue, likewise subject to a maximum of 13 weeks. Disregard of the period of notice will give rise to liability to pay compensation for lost remuneration under Article 7:677, and Article 7:680 of the Civil Code; it will continue to be possible to claim further damages under Article 7:677 section 4 of the Civil Code.\footnote{Article 7:770 of the Civil Code contains certain prohibitions on dismissal, \textit{inter alia}, in the case of illness, pregnancy or for membership of the \textit{ondernemingsraad} (works council). A breach of this requirement will result in the invalidity of the notice of dismissal. There are only limited exceptions, such as, for example, on cessation of the plant or during the probationary period. Social plans are not compulsory by statute, but are frequently negotiated under collective agreements.}

Under \textbf{Italian} law ordinary termination (resignation) is possible, subject to observance of the period of notice provided for in Article 2118 of the Civil Code (C.c.). Since the 2012 reform of the employment market the employer is required to provide a statement of reasons with the written notice of dismissal.\footnote{How detailed it must be is determined by the relevant collective agreement or, in the alternative, in accordance with ordinary practice. Non-observance of the notice period will give entitlement to compensation determined as to amount under Article 2118 section 2 C.c. to the extent of the lost remuneration. Setting off the notice period against leave entitlement is not permitted under Article 2109 section 3, second sentence of the Civil Code. The lawfulness of the notice of dismissal by the employer is, however, circumscribed. Under Law 604/1966 (law on protection against dismissal) dismissal will be lawful for a justified reason owing to non-fulfilment of the work requirement (subjective) or for reasons to do with the organisation of work (objective). An unjustified dismissal will give rise to entitlement to a compensatory settlement, but leaves the validity of the dismissal unaffected (mandatory dismissal protection). However, the employer may instead reinstate the employee. On the other hand, a discriminatory dismissal will in any event be invalid and will confer on the employee a claim to reinstatement. In plants having in excess of 15 employees the mandatory protection against dismissal was until recently overlaid by “actual dismissal protection" under the law applicable to the employee, where the employer employs more than 60 employees.\footnote{Discriminatory dismissals continue to be governed by the previously applicable law. Under that provision, the employee was entitled under Article 18 of the Statute of workers (\textit{Statuto dei Lavoratori}) to seek a judicial declaration of an unjustified dismissal and require reinstatement; section 5 permitted the employee instead to claim compensation amounting to 15 months’ salary. The legislation was amended in 2012 under the Monti government.}\footnote{The lawfulness of the notice of dismissal by the employer is, however, circumscribed. Under Law 604/1966 (law on protection against dismissal) dismissal will be lawful for a justified reason owing to non-fulfilment of the work requirement (subjective) or for reasons to do with the organisation of work (objective). An unjustified dismissal will give rise to entitlement to a compensatory settlement, but leaves the validity of the dismissal unaffected (mandatory dismissal protection). However, the employer may instead reinstate the employee. On the other hand, a discriminatory dismissal will in any event be invalid and will confer on the employee a claim to reinstatement. In plants having in excess of 15 employees the mandatory protection against dismissal was until recently overlaid by “actual dismissal protection" under the law applicable to the employee, where the employer employs more than 60 employees. Under that provision, the employee was entitled under Article 18 of the Statute of workers (\textit{Statuto dei Lavoratori}) to seek a judicial declaration of an unjustified dismissal and require reinstatement; section 5 permitted the employee instead to claim compensation amounting to 15 months’ salary. The legislation was amended in 2012 under the Monti government.}}
provisions. In the case of conduct-related dismissals, reinstatement can be sought, and there is entitlement to compensation for the period between dismissal and reinstatement, up to a maximum amount of 12 months’ salary. For less serious circumstances only compensatory settlements of between 12 and 20 months’ salary can be considered. In the case of infringement of merely procedural provisions, the employee may only claim compensation of between six and 12 months’ salary. Where dismissal is on economic grounds, the employee may only claim a compensatory settlement of between 12 and 14 months’ salary. Only if the court establishes that there is manifestly no ground for dismissal may it order reinstatement, in addition to compensation of up to a maximum of 12 months’ salary for the period of unemployment. In regard to an intended dismissal on economic or other objective grounds a mandatory mediation procedure exists. There is special protection against dismissal in the case of pregnancy and motherhood until the child’s first birthday and, in the case of the parental period under Article 54 of decree law 151/2001. Dismissal without notice will be possible for a serious cause in accordance with Article 2119 of the Civil Code. During a probationary period, the employment relationship may be terminated without any requirement for there to be a cause and without observance of any period of notice at any time under Article 2096 of the Civil Code. On any termination of the employment contract, there will in any event be a settlement (trattamento di fine rapporto) under Article 2120 of the Civil Code. It will also come into play in the event of termination by the employee or on termination through effluxion of time. It is a payment of remuneration by way of compensation at the end of the employment relationship. Compensation for non-observance of the period of notice, together with compensatory settlement, will, in the event of termination of the employment relationship as a result of the death of the employee, be payable under Article 2122 of the Civil Code to the family members more particularly defined therein. In the case of mass dismissals, the procedure under Law 223/90 will apply; that law has likewise been revised by the 2012 legislation on the promotion of employment growth. It provides for negotiations by the employee with the trade union. The State fund will pay to the employee mobility assistance financed by employers. These provisions will be repealed as from 2014 and replaced by another system of payments in the context of the general reform of unemployment insurance under Law 92/2012. The employee can, however, seek judicial review of the dismissal.

The English common law affords protection from dismissals only by claims to damages on account of loss of earnings. The precondition is a wrongful dismissal owing to non-observance of the period of notice. Conversely, Section 94 ERA 1996 grants statutory protection against unfair dismissal after one year of employment (Section 108 ERA 1996). Under Section 95 (1) ERA 1996, in

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129 Cf. Bovenberg, p. 173 et seq.
130 For further detail, see Ales, ELLJ 2012, 70, 77 et seq.
addition, termination of a fixed-term agreement or causing the employee to give immediate notice will be deemed to be dismissal (so-called constructive dismissal). The notice of dismissal must be reasonable in the sense that a reasonable employer would have given notice. Under such circumstances, 

grounds of dismissal under Section 98 (2) ERA 1996 are the capability of the employee, redundancy, conduct or a ban on employment of the employee. In this regard the system shows a certain similarity with the German law on protection against dismissal. However, here also is a possibility of claiming compensation under Sections 112 (4), 118 et seq. ERA 1996. Compensation is set off against unemployment pay. Reinstatement may also be claimed under Sections 112 (3) and 113 et seq. ERA 1996. That includes reinstatement to the former post and re-engagement (in another post). In relation to selection in the case of plant-specific dismissals (redundancies) there are no statutory guidelines in regard to the selection criteria. These will frequently be negotiated on a collective basis, often on the agreed basis of the ‘last in, first out’ principle. In relation to the agreement of the selection criteria, the law on non-discrimination plays a significant role. Where a notice of dismissal is not unlawful as being an unfair dismissal, it can nonetheless be discriminatory and unlawful on that ground. In this connection, specifically worthy of note are dismissals which are indirectly discriminatory. But directly discriminatory dismissals, for example, on the ground of age, are also conceivable. Also, where a dismissal is not invalid a redundancy payment under Sections 135 et seq. and 155 ERA 1996 can be considered in the event of redundancy provided that the employee has already been employed for two years. This will, however, in part, have to be set off (in relation to a basic award) against compensation for unfair dismissal in accordance with Section 122 (4) ERA 1996. The period of notice is statutorily laid down in Section 86 (1) ERA 1996 as being between one week (after one month’s employment) and 12 weeks (after 12 years’ employment). The directive on mass dismissals has been transposed in Section 188 TULR(C)A. Under that provision, the employer has to consult the employee representatives and notify the Secretary of State. If the employer is in breach of his duty of consultation, the trades union may apply to the employment tribunal for a protective award under Section 189 TULRA by way

133 In that connection procedural considerations are also relevant. What is decisive is not whether the employee would have been dismissed if the correct procedure had been observed but whether a reasonable employer would have acted in the same way under those circumstances; Polkey v. Dayton Services [1988] ICR 142 (H.L).
134 Cf. Wenkebach, p. 100 et seq.
135 See Deinert, Internationales Arbeitsrecht, Section 12 paragraph 85.
136 In further detail, Wenkebach, p. 127 et seq.; cf. also Kallos, p. 87 et seq.
139 Comparative-law account and comparison with German law in Scharff, Schutz und Ausgleich bei wirtschaftlich bedingten Arbeitsplatzverlusten im deutschen und englischen Recht, Berlin 2011 (also Heidelberg, Univ., Diss. 2010), p. 25 et seq.
of additional compensation. This gives entitlement to employees who are dismissed to the continued payment of remuneration for up to 90 days under Section 190 TULR(C)A. The contract may however automatically come to an end without notice by frustration where the employee, for example, has not worked for a long time, for instance, owing to illness.\textsuperscript{140} The ERA 1996 no longer contains a self-restricting clause.\textsuperscript{141} Nonetheless, the courts proceed on the basis that Parliament did not intend to enact a law governing work having no relationship with the United Kingdom. Therefore, a sufficient connection to the United Kingdom and to English law will be required, which has to be all the greater where the work is performed outside British territory.\textsuperscript{142} The question answered here in regard to protection against dismissal must be examined separately in regard to the assessment of the various other employee rights.\textsuperscript{143}

The law on dismissal is not centrally regulated in the USA, but is within the remit of the Federal States. Where there is no statutory provision or no provision under any collective agreement, recourse will be had to the laws of contract under the common law of the individual states. These are characterised by the employment-at-will doctrine.\textsuperscript{144} Under that doctrine, the employer may terminate the employment relationship at will, so long as the dismissal does not offend against public interests or public policy, does not renege on an express or tacit promise of permanent employment, in particular in a handbook (analogous to general terms and conditions) or contravenes the requirement of good faith.\textsuperscript{145} Only to some extent are there substantive limits to be found in isolated statutes of the Federal States. In addition, most collective agreements contain a just-cause clause under which the dismissal of the employee is possible only for good cause.\textsuperscript{146} Insofar as a trade union accepts the argument of the employee that he was not dismissed for good cause, it may assert his right in complaints and subsequent arbitration proceedings.\textsuperscript{147} From the perspective of public policy, whistle-blower laws (e.g. the Sarbanes-Oxley-Act, see Section 12 paragraph 16) can confer partial protection against dismissal.\textsuperscript{148} In addition, dismissal may be open to challenge if it turns out to be discriminatory (on discrimination, see Section 12 paragraph 86), or contrary to the NLRA and the LMRA is directed

\begin{footnotesize}
\begin{enumerate}
\item Cf. ELL-Hardy, Great Britain, paragraph 262 et seq., 309.
\item Cf. on this and the consequences Deakin/Morris, paragraph 2.47.
\item Cf. Morse, FS Gaudemet-Tallon, 2008, p. 763, 772 et seq.; Dicey, Morris & Collins, paragraph 33-092 et seq.
\item Cf. Payne v. Western & Atlantic Railroad Co. 82 Tenn. 507; ELL-Goldmann/Corrada, USA paragraph 148 et seq.
\item Casebeer/Minda, p. 333 et seq.; Kittner/Kohler, BB 2000, Beilage 4, p. 6, 10 et seq.; Kriebber, p.119 et seq.; cf. Jander/Lorenz, RIW 1988, 25 et seq.
\item Kittner/Kohler, BB 2000, Beilage 4, p. 6; Jander/Lorenz, RIW 1988, 25, 26.
\item Kittner/Kohler, BB 2000, Beilage 4, p. 6 et seq.
\item Casebeer/Minda, p. 361 et seq.
\end{enumerate}
\end{footnotesize}
against freedom of association.¹⁴⁹ Even if there are no empirical data on the preventive effect of this protection against discrimination, it may be stated that an employer, in order to avoid an action founded on discrimination, will prefer to rely on good cause¹⁵⁰ than on the employment-at-will doctrine with the result that protection against discrimination is to an extent functionally analogous to protection against dismissal under German law.¹⁵¹ Dismissal will normally lead, irrespective of its legality, to termination of the contract; claims to reinstatement are in practice precluded.¹⁵² Dismissal contrary to the terms of the contract will entitle the employee to damages.¹⁵³ In case of a dismissal offending against public policy the employee may pursue an action in tort. There are no statutory notice periods. In case of mass dismissals of a certain dimension the Workers Adjustment and Retraining Notification Act (29 U. S. C. Section 2101 et seq.) provides, however, for a 60 day period of notice to be given to employees and State authorities (Section 2102). In the event of contravention, the employee shall be entitled to payment of remuneration and compensation under Section 2104. Following the Americans with Disabilities Act, the dismissal of handicapped employees will only be permissible if employment is not possible even after a reasonable alteration in the conditions of employment.¹⁵⁴ Employment contracts, in order to evade the danger of a claim for damages, are increasingly terminated contractually on the basis of terms of settlement. There is no statutory entitlement to a settlement or provisions regarding social plans.

From a comparative point of view it should be stated that each of the legal systems included for consideration contains provisions on dismissal and periods of notice. The substantive protection against dismissal in relation to the validity of termination, such as exists in Germany, cannot be found in all countries. In part, this is functionally offset by antidiscrimination legislation. Provisions under which, instead of a review of validity, provision is made for compensatory settlements are more and more widespread.¹⁵⁵ To some extent, there is also a right to choose, for example, under Spanish law (see paragraph 39 below). Moreover, there are also settlement procedures, which in general, provide for compensatory settlements in the event of dismissal, irrespective of whether there is a justifying cause.¹⁵⁶ The specific details of these arrangements are tied up with the existence and configuration of unemployment insurance, which is not being inquired into for present purposes.¹⁵⁷

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¹⁵⁰ Cf. in detail Krebber, p. 137 et seq.
¹⁵² Cf. ELL-Goldmann/Corrada, USA paragraph 187 et seq.; Krebber, p. 144 et seq.
¹⁵³ ELL-Goldmann/Corrada, USA paragraph 184.
¹⁵⁴ Cf. ELL-Goldmann/Corrada, USA paragraph 174.
¹⁵⁵ Cf. the comparison in Rebhahn, ZfA 2003, 163, 214 et seq.
¹⁵⁶ Comparative observations in Rebhahn, RdA 2002, 272, 280 et seq.
¹⁵⁷ Cf. also Rebhahn, RdA 2002, 272, 282; in further detail ZfA 2003, 163, 206.
representatives to be informed and consulted and the employment authority to be notified.

b) Conflict of laws

(1) PIL concerning protection against dismissal

Termination of the contract as a result of notice of dismissal is also governed by the law applicable to the contract under Article 12 section 1(d) of the Rome I Regulation. That was the general consensus from a comparative-law perspective even prior to the Rome Convention. In regard to the formal requirements concerning dismissal, see, however, Section 8 paragraph 8 et seq. and also paragraph 38 below.

Specifically, the general protection against dismissal will be determined by the law applicable to the contract; in the event of a temporary posting abroad the law on protection against dismissal will therefore continue to be applicable. That will apply irrespective of certain overlapping with procedural law and works constitution law and also irrespective of plant-specific configurations. Under the legislation the plant cannot be the connecting factor.

Protection of dismissal under Paragraph 1 of the German KSchG further serves the purpose of ensuring a reasonable balance of interests, as between the employee’s interest in maintaining the status quo and the employer’s interest in terminating the contract, but does not pursue any further reaching State interests. There can therefore be no connecting rule enabling it to apply as overriding mandatory law.

The law on protection against dismissal lays down protective provisions within the meaning of Article 8 section 1 of the Rome I Regulation which will be enforceable as against a chosen law falling short of those provisions. That also accords with the French perspective under which protection against dismissal is indeed governed by the law applicable to the contract but is not deemed to be an overriding mandatory provision and, moreover, is deemed to be one of the

158 Gamillscheg, IAR, p. 349 et seq.
159 BAG AP No. 30 on Internationales Privatrecht – Arbeitsrecht; BAG AP No. 18 on § 18 GVG; BAG EZA EGBGB Article 30 No. 11; Gamillscheg, IAR, p. 342; MünchArb-Oetker, Section 11 paragraph 111; MünchKomm-Martiny, Art. 8 Rom I-VO paragraph 100; KR-Weigand, IPR paragraph 85; Franzen, AR-Blattei SD 920 paragraph 136; Hönsch, NZA 1988, 113, 119; Mauer, FS Leinemann, 2006, p. 733; Reiserer, NZA 1994, 673, 676; Schmidt-Hermesdorf, RIW 1988, 938, 941; Deinert, RdA 2009, 144, 153.
161 For further detail, see C. Müller, p. 409 et seq.
162 BAG AP No. 30 on Internationales Privatrecht – Arbeitsrecht; BAG AP No. 5 on Article 25 GG; Heilmann, p. 121 et seq.; C. Müller, p. 414 et seq.; Staudinger-Magnus, Article 8 Rom I-VO, paragraph 202; MünchKomm-Martiny, Article 8 Rom I-VO, paragraph 100; ErfK-Schlachter, Rom I-VO, paragraph 23; Winkler v. Mohrenfels/Block, EAS B 3000 paragraph 219; Reiserer, NZA 1994, 673, 677 et seq.; for another view, see Birk, RdA 1989, 201, 207; Krebber, p. 306 et seq.
163 BAG AP No. 1 on § 18 GVG; Block, p. 80; MünchArb-Oetker, Section 11 paragraph 112; MünchKomm-Martiny, Art. 8 Rom I-VO, paragraph 100; KR-Weigand, IPR paragraph 74, 85.
protective provisions to be included in the favourability comparison. Overall, it should also be emphasised that, according to a comparative law investigation which appeared in 1997, a special connecting rule for protection against dismissal has nowhere been so strictly and clearly rejected as it has been in Germany. The preceding account will apply by analogy to termination of a seafarer’s contract under Paragraphs 62 et seq. of the German law on seafarers – SeemG. Also, insofar as protection against dismissal, for example, in Denmark is predominantly guaranteed by collective agreement, it is called upon to apply with the collective agreement by the law applicable to the employment contract.

Protection against dismissal by an official requirement for authorisation under Netherlands law constitutes, from the perspective of Netherlands law, overriding mandatory law compelling the employer to continue to employ the employee. For that purpose, Netherlands law applicable to the contract is neither necessary nor sufficient. The Netherlands Supreme Court considers that the decree on employment conditions may also be applied even though a foreign law is applicable to the contract. There is a widespread view, in light of employment-market policy, that the legislation is restricted to employment in the Netherlands. However, the Netherlands courts focus on whether the socio-economic conditions in Holland and the interests of the Netherlands employment market are affected by the dismissal. It does not restrict application of the decree to employment in Holland. However, where a foreign law is the law applicable to the contract, it requires a very close connection with the Netherlands employment market which cannot in every case be substantiated by there being a place of employment in the Netherlands. In addition, it is necessary for there to have a plan that the employee in the case of unemployment will look for work on the Netherlands employment market. From the perspective of another then Dutch forum there can be no special connecting factor based on

166 Krebber, p. 218 et seq.
167 BAG AP No. 30 on Internationales Privatrecht – Arbeitsrecht.
168 Cf. Hasselbalch, Labour Law in Denmark, paragraph 474 et seq; Kristiansen, ZVgIRWiss 107 (2008), 362, 379 et seq.; Zachert, Beendigungstatbestände, p. 51; see, however, on compensatory settlements as protection against dismissal for employees (officials), Giesen/Erikseen, EuZA 2009, 1 et seq.
170 HR NJ 1953, 1087, 1088.
171 HR NJ 1988, 2824, 2837.
173 HR JAR 2012, 93.
174 HR NJ 1953, 1087.
175 HR NJ 1988, 2824, 2824; Sauveplanne, IPRax 1989, 119.
176 Krebber, p. 220.
the requirement for authorisation either under Article 9 section 3 or under Article 12 section 2 of the Rome I Regulation.

The problem is posed, however, by the classification of the protection against dismissal under Austrian law, which is configured as a matter of works constitution law (on that, see paragraph 23). A connecting rule based solely on the law applicable to the works constitution would tend to neglect employee protection at a conflict-of-laws level, contrary to the objectives of the Rome I Regulation (see recital 23). If one were, for example, to imagine an employee governed by Austrian law in his contractual relations who is employed in a German undertaking: he would, in that case, enjoy protection against dismissal only under Paragraph 102 of the law on the works constitution – BetrVG. That would result in a legislative lacuna (Section 15 paragraph 17). For both German and Austrian law require a social justification. Yet Austrian law would not be applicable on account of the German law applicable to the works constitution. Nor would the German be, owing to the Austrian law applicable to the contract. The correct solution is therefore a classification on the basis of the law applicable to the individual situation (see Section 4 paragraph 38). Even if in Austria the question is discussed as to whether protection against dismissal is to be deemed to constitute overriding mandatory law, the correct solution must lie in a separation of substantive and procedural protection against dismissal. Accordingly, where Austrian law is the law applicable to the contract, the employee will have the opportunity of challenging the dismissal under Paragraph 105 section 3 of the Works Constitution Act (ArbVG). Substantive protection against dismissal can be achieved under the law applicable to the works constitution only by a challenge to the social selection if there is an objection by the works council (Paragraph 105 section 3 c and 4, fourth sentence, Works Constitution Act); thus, it may be possible to contemplate a substitution. Conversely, there must be an adjustment made on the procedural front. The German works council cannot challenge the dismissal before the courts. Instead, the employee may do so under analogous application of Paragraph 107 Works Constitution Act (the provision presupposing the absence of a works council is not immediately applicable because, of course, there is a works council). From an Austrian perspective, this will amount to an overlapping of provisions (Section 15 Paragraph 17) if, in addition to the works constitution law to which a territorial connecting rule applies, protection against dismissal is also afforded under the law applicable to the contract. However, in the area of the law on international jurisdiction, the Austrian Supreme Court has classified protection against dismissal as a matter of individual contract, thus backing up in terms of the jurisdictional law the protection intended by protection against dismissal of the individual employee.\textsuperscript{178} If

\textsuperscript{177} Cf. with further observations, \textit{Kallab}, DRdA 2011, 463, 466 et seq. On the connecting rule under works constitution law, see \textit{Gamillscheg}, KAR, II p. 209.
\textsuperscript{178} OGH IPRax 2009, 89; \textit{Mankowski}, IPRax 2011, 93 et seq.; leaving open the conflict of laws question, OGH DRdA 2013, 35, 38.
that were taken forward, in terms of the conflict of laws, on the basis of the view here advocated, the problem would be resolved.

The absence of protection against dismissal under the law applicable to the contract may be offset by virtue of the fact that the employee, whilst accepting a dismissal in accordance with the *lex causae*, but nonetheless may receive a settlement. If both are absent, that would appear to constitute a possible breach of public policy. That is in line, for example, with the Italian case law which will regard as a contravention of public policy acquiescence in dismissal without cause under the applicable law, such as, for example, US law (employment at will, see paragraph 29). Where there is no protection against dismissal at the commencement of the employment relationship, the German courts have held there not to be a public policy contravention (section 5, Paragraph 10). Since for there to be a finding of a public policy contravention, it is the result of the application of the law that is important (Section 5 paragraph 10), there will in such a case be no public policy contravention where the legal system, taken as a whole, makes no provision for protection against dismissal. The fact that the employee hypothetically would have enjoyed no protection even where the employment relationship had been one of long-standing does not affect the outcome. In the case of an employment relationship of long-standing, from the point of view from a German forum, regard must be had to the constitutional requirement of a minimum degree of protection under the employment relationship, even in cases of non-application of the KSchG, by application of the public policy reservation. Likewise, the Italian courts will regard as possible public policy contraventions arising out of an absence of protection against dismissal, in an individual case, only if there was in fact no cause for dismissal. Overall, it must be borne in mind, in regard to public policy, that account may already have been taken, under the applicable substantive law, of deficiencies in protection against dismissal by the payment of higher remuneration or by the provision of supplementary old-age pension provision. It is questionable, however, whether by reference to the assessment under Paragraph 14 section 2 of the German TzBfG, it may be assumed, even after the employment relationship has been on foot for six months, that an absence of protection against dismissal and a lack of provision for settlement may not contravene public policy because even under German law there is no such protection for this period. In light of the provision in Paragraph 15 section 3 of that law, Paragraph 14 section 2 ordinarily precludes

180 Cf. BVerfGE 97, 169, 177 et seq. (likewise JZ 1998, 848, with observations by Otto).
181 Cf. C. Müller, p. 416 et seq.
184 Gamillscheg, IAR, p. 345.
termination during the period of fixed term employment contract. That distin-
guishes the fixed-term contract and the concepts underpinning German law on
protection of the status quo significantly from an employment relationship under
the employment at will doctrine.

(2) Foreign situations and application of dismissal protection law

The German KSchG contains no unilateral negative conflict rule in the sense
that it would refrain itself from applying to foreign factual situations. From a
substantive-law perspective, the question that arises, however, is whether
Paragraph 23 of the law is a self-restricting substantive provision under
which the undertakings covered by the law must be situated within national
territory. This is the view of the German labour courts on the KSchG.

(3) Individual problems

In regard to the treatment of a unilateral connecting rule in terms of a substan-
tive-law restriction to employment within the country, reference is made to
the general solution, in so far as there is one, in the account of renvoi (Section 6
paragraph 6). In that connection, it is possible that a dismissal under the ERA
1996, English law being applicable to the contract, is to be assessed in the light
of that statute, although the English courts would not themselves apply the law
(see paragraph 28). It is no solution to say that English law already itself con-
tains a solution for these cases inasmuch as the employee will have resort to the
common law. Such a solution is not in keeping with the ideas underpinning
the United Kingdom legislation and case law which specifically do not presume
to create laws to cover work which is performed without any sufficient or ade-
quate connection with the United Kingdom. Nor, at the same time, does that
mean that in such cases the common law is to apply. For foreign courts, the
same treatment would be available as the German KSchG restricted, as interpret-
ed by the Federal Employment Court, to domestic situations. In the view of
that court, this is a case of self-restraint in regard to the substantive provisions
which, however, benefits from the adjunct of conflict-of-laws considerations.

One could conceive of the notion that the mandatory prior discussion before
termination under French or Norwegian law should be classified as a for-

186 Junker, FS Konzern, 2006, p. 367, 372 et seq.; on further substantive-law issues of the German
law on protection against dismissal in the case of posting abroad, see Grosjean, DB 2004, 2422, 2422 et seq.; on substantive-law issues of the German law on protection against dismissal in the case of foreign workers, see Gutmann, AiB 2009, 631 et seq.
187 On the analogous issue in English law which, however, presupposes employment within the jurisdiction, see, Cox v. E.L.G. Metals [1984] ICR 1 (EAT).
188 See also Stone, p. 359.
189 But see also Magnus, IPRax 1991, 382, 386; Staudinger-Magnus Article 8 Rom I-VO para-
graph 71.
190 Deinert, Internationales Arbeitsrecht, Section 13 paragraph 36.
191 Cf. Lassmann, p. 195 et seq.
mal requirement\textsuperscript{192} with the result that, under the principle of favor nego-
tii, it could be superseded by local law or the law applicable to the contract. It naturally
seems more appropriate to classify the prior discussion as a procedural device and to allocate it to the substantive protection against dismissal and thus to make it subject to the law applicable to the contract.\textsuperscript{193} That also records manifestly
with the rulings of the French case-law which includes a preliminary discussion amongst the protective provisions within the meaning of Article 8 section 1 of the Rome I Regulation.\textsuperscript{194}

Where protection against dismissal is secured, not by a review of validity, but
by statutory settlement claims if the notice of termination is valid, such claims
will also be governed by the law applicable to the contract.\textsuperscript{195} They arise out of
the employment relationship, even if only on its termination.\textsuperscript{196} In addition, the
consequences of the termination of the contract can be governed by no other law
than the law of the contract itself.\textsuperscript{197} Even where a settlement payment may be
opted for by the employer, instead of reinstatement, as has recently been seen to
be the case in Spain\textsuperscript{198} this is a question concerning termination and is governed,
therefore, by the law applicable to the contract. Classification in terms of con-
tract law (and not, for instance, under the law of succession) must apply also to
settlement and compensation claims brought by survivors, as is provided for ex-
ample under Italian law (paragraph 27). The same applies, moreover, to settle-
ment claims which apply in addition to protection against dismissal or to claims
for settlement payments owing to non-observance of the period of notice. That
will apply also where the settlement claim is construed on termination of the
contract in part as deferred entitlement to remuneration, as is the case in
Italy.\textsuperscript{199} Where compensation, ultimately, is to offset lost earnings, as in the case
of the non-observance of the period of notice under Netherlands law (see para-
graph 26), this claim is also governed by the law applicable to the contract be-
cause it arises out of the employment relationship. That is especially the case
where the claim is construed as a kind of continued remuneration. That is why
the compensatory settlement payable under Italian law in any event on termina-
tion of the contract (paragraph 27), which is more in the nature of remunera-
tion,\textsuperscript{200} will be governed by the law applicable to the contract. According to the
view here propounded (see Section 10 paragraph 31) possible classification as

\textsuperscript{192} See also Gamillscheg, ZfA 1983, 307, 355.
\textsuperscript{193} Krebber, p. 343 et seq.
\textsuperscript{194} Cass.soc., Dr.soc. 2003, 339, with observations by Moreau.
\textsuperscript{195} Gamillscheg, IAR, p. 342; Ferrari-Staudinger, Art. 8 Rom I-VO paragraph 28; also Cass.soc.,
Dr.soc. 2003, 339.
\textsuperscript{196} Winkler v. Mohrenfels/Block, EAS B 3000 paragraph 228.
\textsuperscript{197} Winkler v. Mohrenfels/Block, EAS B 3000 paragraph 228.
\textsuperscript{198} Cf. Selenkewitsch, ZIAS 2005, 23, 33, 45; Rebhahn, RdA 2002, 272, 277; Adomeit/
\textsuperscript{199} Cf. with further references Kindler, Jahrbuch für italienisches Recht 4 (1991), 49, 66.
\textsuperscript{200} Birk, EuZA 2008, 297, 305.
overriding mandatory law (on that see paragraph 40) does not preclude classification under the law applicable to the contract.

Provisions concerning compensatory settlements may, in particular, in legal systems influenced by Roman law be classified as **overriding mandatory provisions**. The nature of the provision as an overriding mandatory provision may be restricted to work within the country. Where provisions as to settlement are to be classified under the law applicable to the contract, they will not then be restricted only in respect of work within the country. From the perspective of German conflict of laws, it does not have to be determined whether settlement claims under another legal system constitute overriding mandatory provisions since in any event, these would not be applicable under Article 9 section 3 and 12 section 2 of the Rome I Regulation. In the case of settlement claims under Paragraphs 1 a and 9 of the German KSchG, this question must be answered in the negative because, from a functional point of view, they supersede the ordinary protection against dismissal. No other inference may be drawn from the decision of the ECJ in the **Ingmar case** (see Section 3 paragraph 5). The ECJ based on international will to assert the claim for settlement by a commercial agent on the objectives underpinning the directive; that does not permit to simply ascribe the same objectives to claims for settlement under employment law at national level.

In regard to contribution claims and payment claims as between an **employee fund scheme** and employer or employee under the Austrian law (see paragraph 23) self-standing connecting rules must be elaborated since those are not claims arising from an employment relationship. In that connection, it would appear appropriate for contributions to be connected to the habitual place of employment within the country, including temporary postings, and for there to be a subsidiary rule connecting the payment claims to the law governing the contribution relationship.

Article L 1235 – 4 of the French Labour Code concerning the **reimbursement of unemployment support** in the event of a dismissal without cause under French law is applied by the courts in the case of work within the country, even in the event of the choice of a different law. That can be construed as a connecting rule based on social insurance law. Against that it may be argued that it is in the nature of a penalty having regard to a matter relating to unfair dismissal. In the result, the legal basis may, from a private international law point of view, be Article 15 of the Rome I Regulation as well as Article 9 of the Rome I Regulation.

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201 **Toubiana**, Le domaine de la loi du contrat en droit international privé (contrats internationaux et dirigisme étatique), Paris 1972, p. 278 et seq.
202 For another view see **Birk**, EuZA 2008, 297, 311.
203 But see also **Birk**, EuZA 2008, 297, 312 et seq.
204 **Birk**, EuZA 2008, 297, 310 et seq.
The exclusion of dismissal opportunities is a matter to be made subject to the law applicable to the contract. The same applies to the complete exclusion of the possibility of terminating a contract for a fixed period or for life. Such provisions, for instance, the prior exclusion of termination under Article L 1231 – 4 of the Labour Code in French law or the ability to terminate the agreement after five years under German law in accordance with Paragraph 624 of the Civil Code (likewise, Paragraph 1158 section 3 of the Austrian ABGB) or even after ten years under Article 334 section 3 of the Swiss law on obligations, are covered by the law applicable to the contract. Under a foreign law applicable to the contract a German national may not therefore rely on Paragraph 624 of the German Civil Code. In regard to the employee’s freedom of occupation an excessive contractual tie must be countered by means of the public-policy reservation (Article 21 of the Rome I Regulation). In that connection, Paragraph 624 of the German Civil Code gives an indication which, for example, is also used as an indication in regard to the maximum permissible duration of the obligation in the case of contractual repayment clauses. The German (and also the Austrian) legislature has expressed the view that it regards contractual ties on the employee that exceed five years as incompatible with the employee’s freedom of contract. That ought also to be taken account of in connection with public policy. Conversely, there is no need for any further implementation of Paragraph 626 of the German Civil Code (right to dismiss for extraordinary reasons without notice period) as an overriding mandatory provision where foreign law is the law applicable to the contract.

Specific provisions on termination in respect of probationary employment are governed by the law applicable to the contract. These include, for example, the reduced notice period under Paragraph 623 section 3 of the German Civil Code, termination at any time during the first month in accordance with Paragraphs 1158 section 2 of the Austrian ABGB, 19 section 2 of Austrian AngG, possibility of termination at any time subject to seven-day period of notice during the one-month probationary period, extendable to three months, under Article 335 b of the Swiss law on obligations; possibility of terminating at any time without consent – subject to a reservation in order to prevent misuse – during the two-month probationary period under Articles 7:652, 7:676 section 1 of the Netherlands Civil Code, Article 6 section 2 (b) of the Dutch employment decree. For them too are provisions concerning the various ways of extinguishing obligations, as provided for under Article 12 section 1(d) of the Rome I Regulation.

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207 For the latter see Callsen, EuZA 2012, 154, 157 et seq.
208 Gamillscheg, IAR, p. 233.
209 Gamillscheg, AcP155 (1956), 49, 62; C. Müller, p. 405 et seq.
211 C. Müller, p. 406.
212 Cf. Bakels, p. 160, with further references.
On protection against alteration, see Section 11 paragraph 7.

(4) Special protection against dismissal

Provisions concerning special protection against dismissal for certain groups of employees are often in the nature of overriding mandatory law (see Paragraph 37). That is true not only of German provisions; the French Conseil d’État, for example, applies special protection against dismissal to employees, not having official status, but employed in the civil service, irrespective of the law applicable to the contract in the case of employment carried on in France. 213

The special protection against dismissal in favour of severely handicapped persons by way of a requirement for official authorisation for dismissal according to Paragraph 85 of the German Social Code IX – SGB IX is rightly deemed by the prevailing view – against a younger judgment of the Federal Labour Court 214 – to constitute overriding mandatory law 215 which will always apply where severely handicapped employees are involved who reside in Germany, have their lawful residence in Germany or are lawfully employed in that country (Paragraph 2 section 2 Social Code IX). 216 At the same time, the special protection against dismissal could be made subject to the law applicable to the contract. In view of the fact that the special protection against the dismissal of severely handicapped persons expressly follows the territoriality principle (see Section 12 paragraph 117; in general, Section 10 paragraph 111), the special protection against dismissal will, however, not apply (even in the context of the law applicable to the contract) when work abroad is involved 217 or more specifically work which is not attributable to an undertaking within the country. 218 An exception is only recognised in the case of extraterritorial effect. 219 There can be no extension of the special protection against dismissal to employment abroad where a person is resident within the country by having recourse to Paragraph 30 Social Code I since the requirement of a domestic connection is to be more narrowly construed, in light of the more specific evaluation required under Paragraph 2 section 2 Social Code IX and employment specifically related to national territory will be required. There is a difference here from the special protection against dismissal under the law on the protection of motherhood (see paragraph 48), which in that connection is subject to no express territorial restrictions. A

213 Conseil d’État Rev.crit.DIP 1985, 316.
214 BAG NZA 2016, 473, no. 60 et seq.
216 MünchKomm-Martiny, Art. 8 Rom I-VO paragraph 125; Heilmann, p. 133; cf. also KR-Weigand, IPR paragraph 93 et seq. Cf. BAG AP No. 4 on § 1 SchwBeschG: Territorialitätprinzip (territoriality principle).
217 MünchKomm-Martiny, Art. 8 Rom I-VO, paragraph 125; also E. Lorenz, RdA 1989, 220, 220, 227; C. Müller, p. 418; for another view, see Winkler v. Mohrenfels/Block, EAS B 3000 paragraph 224.
218 BAG AP No. 15 on § 12 SchwBG (also SAE 1989, 326); clearly: Junker, Anm. BAG SAE 1989, 326, 333.
219 Reiter, NZA 2004, 1246, 1253; cf. also BAG AP No. 15 on § 12 SchwBG.
more far-reaching restriction to the effect that the special protection against dismissal will only come into play if the plant is situated within the country cannot be justified.\textsuperscript{220} Conversely, the courts have assigned a \textbf{minimum notice period} under Paragraph 86 Social Code IX to the law applicable to the contract without recognising any special connecting factor as overriding mandatory law.\textsuperscript{221} Ultimately, the integrationist concern underpinning the Social Code IX forms the basis of this and justifies the special connecting factor as overriding mandatory law under the prevailing view.\textsuperscript{222}

The special protection against dismissal under Paragraph 9 of the law protecting \textbf{motherhood} is to be classified as overriding mandatory law in accordance with Paragraph 2 section 6 of the Posting of Workers Act (AEntG).\textsuperscript{223} This appraisal is shared by the analogous Austrian provisions.\textsuperscript{224} At the same time, however, it balances the interests, as between the employee’s interest in maintaining the status quo and the employer’s interest in termination, with the result that it is likewise covered by the law applicable to the contract.\textsuperscript{225} In that connection, there are no objections to applying the prohibition on dismissal where German law is the law applicable to the contract, even where the employment is performed abroad.\textsuperscript{226} Official authorisation will then as a rule not be necessary.\textsuperscript{227} Save in an exceptional case with extraterritorial effect, because the law is of a public-law nature, it will not be applicable in the case of employment abroad (see, in general, Section 10 paragraph 111). In the result, this amounts to an inability to dismiss the pregnant woman.\textsuperscript{228} That has to be tolerated, as Gamillscheg states "every pregnancy comes to an end and exceptions from protection against dismissal are rarely authorised".\textsuperscript{229}

The special protection against dismissal under Paragraph 18 of the German Federal Act on Paid Parental Leave (BEEG) must also be regarded as overriding mandatory law having internationally binding effect.\textsuperscript{230} That is ultimately founded on the value judgment coming from the human right in Article 6 section 1 and 2 of the Constitution (Grundgesetz). Enforcement as an overriding mandatory provision may, however, only be considered in the case of employment within

\begin{itemize}
\item \textsuperscript{220} But see also \textit{Heilmann}, p. 133.
\item \textsuperscript{221} Cf. BAG AP No. 15 on § 12 Schwbg.
\item \textsuperscript{222} MünchKomm-Martiny, Art. 8 Rom I-VO paragraph 125; \textit{Gamillscheg}, AeP 155 (1956), 49, 67; for another view see \textit{C. Müller}, p. 418 et seq.
\item \textsuperscript{224} \textit{Kallab}, DRdA 2011, 463, 467.
\item \textsuperscript{225} Cf. (before the AEntG) \textit{Heilmann}, p. 129; \textit{Gamillscheg}, IAR, p. 346; \textit{Reiter}, NZA 2004, 1246, 1253.
\item \textsuperscript{226} For another view see \textit{Reiter}, NZA 2004, 1246, 1253.
\item \textsuperscript{227} \textit{Gamillscheg}, IAR, p. 347.
\item \textsuperscript{228} For another view see \textit{Winkler v. Mohrenfels/Block}, EAS B 3000 paragraph 224.
\item \textsuperscript{229} \textit{Gamillscheg}, IAR, p. 347.
\item \textsuperscript{230} Hess. LAG IPRax, 2001, 461, 468.
\end{itemize}
the country.\textsuperscript{231} The analogous protection against dismissal under Austrian law in the event of parental leave is deemed to constitute overriding mandatory law.\textsuperscript{232} The same applies under Paragraph 2 (6) AEntG in regard to special protection against dismissal of \textit{trainees} under Paragraph 22 of the law on occupational training.

The prohibition on \textit{dismissal on account of the transfer of an undertaking} under Paragraph 613 section 4 of the German Civil Code is a protective provision within the meaning of Article 8 of the Rome I Regulation (paragraph 5). In addition, the provision will come into play as an overriding mandatory provision in the event of a transfer of an undertaking within the European Union where a foreign law is the law applicable to the contract (see paragraph 9).

Special protection against dismissal in respect of \textit{works constitution bodies} according to German law is governed by the law applicable to the works constitution\textsuperscript{233} because it serves to ensure continuity of the body. The same view is taken in regard to Austrian law.\textsuperscript{234} Accordingly, the representatives affected by the relevant provisions (in German law, Paragraphs 103 Works Constitution Act (BetrVG), and Paragraph 15 KSchG) enjoy special protection against dismissal irrespective of the law applicable to the contract. A similar result is reached where the Federal Labour Court expresses the view that special protection against dismissal in favour of the works constitution bodies is amenable to a special connecting rule as constituting overriding mandatory law.\textsuperscript{235} The same result is reached by French case law where it grants special protection against dismissal to employee representatives of the French subsidiary of a foreign aviation company in that capacity.\textsuperscript{236} The French courts emphasise that special protection against dismissal was also introduced in the interests of the employees represented by the official bodies.\textsuperscript{237}

\textit{(5) Mass dismissals}

\textbf{Protection against mass dismissals} under the German Paragraph 17 KSchG constitutes overriding mandatory law owing to the employment-market policy objective and will thus be compulsorily applicable to employment relationships within the country, irrespective of the law applicable to the contract.\textsuperscript{238} Con-

\begin{itemize}
\item \textsuperscript{231} Also \textit{C. Müller}, p. 420.
\item \textsuperscript{232} \textit{Kallab}, DRdA 2011, 463, 467.
\item \textsuperscript{233} \textit{Gamillscheg}, IAR, p. 348; \textit{Krebber}, p. 325; \textit{MünchKomm-Martiny}, Article 8 Rom I-VO, paragraph 101; \textit{Winkler v. Mohrenfels/Block}, EAS B 3000 paragraph 225; \textit{Rauscher-v. Hein}, Art. 8 Rom I-VO paragraph 69; \textit{C. Müller}, p. 419.
\item \textsuperscript{234} \textit{Kirschbaum}, p. 118.
\item \textsuperscript{235} BAG AP No. 23 on Internationales Privatrecht – Arbeitsrecht; for another view see KR-\textit{Weigand}, IPR paragraph 35.
\item \textsuperscript{236} Cass.soc. Dr.soc. 1993, 78.
\item \textsuperscript{238} BAG AP No. 30 on Internationales Privatrecht – Arbeitsrecht; \textit{Gamillscheg}, ZfA 1983, 307, 363; \textit{C. Müller}, p. 415 et seq.; \textit{MünchKomm-Martiny}, Art. 8 Rom I-VO paragraph 126;
\end{itemize}
versely, those provisions will not apply in the case of employment abroad because, in that connection, the employment-market policy interests underpinning the provisions are not affected,\textsuperscript{239} whilst the foreign mass dismissal protection rules which protect local labour market could be applicable as internationally mandatory provisions. Against that background, it is understandable that the French courts also make the duty to draw up an employment safeguard plan, under Article L 1233 – 61 of the Labour Code, subject to the territoriality principle\textsuperscript{240} which naturally cannot be construed as the implementation of overriding mandatory law within the country\textsuperscript{241}, but in the sense of a substantive-law self-restriction to fulfilment of threshold values within the country.\textsuperscript{242} Entitlement to continued payment of remuneration under Section 190 TULR(C)A on the basis of a protective award (see paragraph 28) partakes of the overriding mandatory nature of the law governing mass dismissals.

(6) Periods of notice

Periods of notice are determined by the law applicable to the contract.\textsuperscript{243} The German provisions concerning notice periods in Paragraph 622 of the Civil Code are similarly protective provisions within the meaning of Article 8 section 1 of the Rome I Regulation, with the result that they will oust shorter periods under a chosen law.\textsuperscript{244} They do not constitute overriding mandatory law.\textsuperscript{245} The prohibition on setting off against holiday entitlement, as provided for in Italian law (paragraph 27), is to be classified as a matter of the law relating to leave entitlement, but in that connection will also be governed by the law applicable to the contract.

(7) Participation of plant representation

Insofar as protection against dismissal is buttressed by rights of participation by employee representatives, the existence and scope of rights of participation are determined by the law applicable to the works constitution.\textsuperscript{246} Whilst co-determination also guarantees individual rights, it exists above all in the in-

\textsuperscript{239} See also Krebber, p. 324; also Heilmann, p. 123, who pleads for an exception for the case that German employees abroad would possibly come back to the internal labour market.
\textsuperscript{241} The question is also unanswered by Cass.Ass.plén. Bull.civ. No. 8, p. 15 (also Recueil Dalloz, 1992, 214).
\textsuperscript{242} Cf. Callsen, EuZA 2012, 154, 158.
\textsuperscript{243} Gamillscheg, IAR, p. 342; C. Müller, p. 400.
\textsuperscript{244} MünchArb-Oetker, Section 11 paragraph 111; MünchKomm-Martiny, Art. 8 Rom I-VO paragraph 100.
\textsuperscript{245} But Belgian Courts take a different view on Belgian law: Cour de Cassation Belgique, Journal des tribunaux de travail 1986, 505.
\textsuperscript{246} C. Müller, p. 159 et seq.; cf. also (with reference to Paragraph 102 BetrVG – Works Constitution Act) BAG AP No. 30 on Internationales Privatrecht – Arbeitsrecht; Rauscher-v.Hein,
terests of the staff. Conversely, the question of the effect on the individual employment contract will be governed by the law applicable to the contract. This is also the view taken in Austria. This issue is more correctly determined by classification as a matter of works constitution law. Ultimately, what is important is giving efficacy to co-determination rights and providing for penalties for any contravention in that regard. What we are dealing with, therefore, is a self-standing prior question concerning participation of employee representatives in the termination of the employment relationship. The question as to which employees are covered by the right of co-determination will be determined by the relevant law applicable to co-determination. Thus, the Court of Cassation held that the works committee of a French subsidiary was not to be involved in the dismissal of technical flight staff. Likewise, the further rights of the employee, as provided for in the German Paragraph 102 Works Constitution Act are to be classified as a matter of works constitution law. Similarly, the law of the location of the plant will be relevant to the question whether the trade union section in the plant, as for example in Poland, should be consulted about the dismissal. On the special protection against dismissal enjoyed by members of the statutory bodies of the works constitution, see paragraph 52.

3. Fixed terms

a) Substantive law

In the law of the European Union, the law on fixed-term contracts is harmonised by directive 1999/70/EEC. Under that instrument, it is required to combat abusive fixed terms by the adoption of one of three measures: maximum duration of fixed term, requirements as to the reason for the fixed term or a maximum number of permissible renewals of a fixed-term employment contract. In addition, discrimination against employees employed under fixed-term contracts is prohibited.

In the Federal Republic of Germany, the directive was transposed in the context of the Act on part-time and fixed-term contracts (TzBfG). Paragraph 4 thereof contains the prohibition on discrimination. Fixed term contracts are permissible on objective grounds in accordance with Paragraph 14 section 1 of the law. If there is no objective ground, a fixed-term contract will be permissible up to a maximum duration of two years under Paragraph 14 section 2, first sentence, of the law. Renewals will be possible on a maximum of three occasions.
up to an overall duration of two years. A fixed term period without objective ground will only be permissible where there has been no previous employment contract with the employee. Under Paragraph 14 section 4TzBfG a fixed term must be agreed on in a written assignment in order to be a valid. An unlawful fixed term must be challenged before the courts within a period of three weeks in accordance with Paragraph 17 of the law. Otherwise it will be deemed to be lawful. Under Paragraph 16 TzBfG an unlawful fixed term will be deemed to be an employment contract for an indefinite period.

58 In Austrian law one proceeds on the basis of the principle of an employment contract entered into for an indefinite period.253 In accordance with the case law, serial fixed terms constitute unlawful circumvention of employee protection, which means that the agreement for a fixed term period, in the event of reliance being placed upon it by the employee, will be unlawful if there are no specific economic or social grounds for the fixed term.254 In the case of frequent fixed term periods stricter yardsticks are to be applied.255

59 Swiss law proceeds on the basis of the possibility in principle of a fixed term employment contract; on expiry the employment contract will come to an end in accordance with Article 334 section 1 of the law on obligations (OR). There is no specific review of fixed term periods. However, in the case of repeated fixed term periods (serial contracts), there will be a presumption of an unlawful setting of a fixed term period in order to circumvent protection against dismissal, provided that there is no objective ground for the fixed term period.256 Moreover, that will also apply on the initial fixed term employment contract.257 An employment contract unlawfully set for a fixed term will be converted into a contract for an indefinite period.258

60 French law requires a cause for the fixed-term period of the contract (Article L 1242 – 2 of the Labour Code).259 The principle of the employment contract for an unlimited period applies under Article L 1221 – 2 of the Labour Code. Moreover, an employment contract can be fixed for a maximum period of 18 months (Article L 1248 – 8 of the Labour Code). Furthermore, on termination of the contract, there will be entitlement to a precariousness premium (contractual termination premium) in the amount of 10% of gross remuneration during the currency of the contract under Article L 1243 – 8 of the Labour Code. Under Article L 1243 – 10, point 3 of the Labour Code that premium will not be payable if

253 Jabornegg/Resch, paragraph 554 et seq.
254 OGH ZAS 1974, 57.
255 Löschnigg, paragraph 5/126.
256 Geiser/Müller, paragraph 547.
257 Rehbinder; paragraph 299.
258 Rehbinder; paragraph 299.
259 For an overview see Henssler/Braun-Welter/Caron, Frankreich paragraph 27; ELL-Despax/Rojot, France paragraph 158; on the historical development Kröger, Die Befristung von Arbeitsverträgen in Frankreich, Großbritannien und Deutschland, Ein Systemvergleich nach der Richtlinie 99/70/EG, Hamburg 2008 (also Rostock, Univ., Diss. 2007), p. 153 et seq.
the contract comes to an end and the employee has rejected an offer of an employment contract for an indefinite period.

**Italian** decree law 368/2001\(^{260}\) permitted an employment contract to be for a fixed period only on objective technical, organisational or plant-specific grounds or for the purpose of representation. The provision was amended in the wake of the employment-market reform of 2012.\(^{261}\) Thereunder, the initial fixed-term period of unemployment contracts up to a duration of 12 months requires no cause. Beyond that, the fixed term period of an employment contract may be based on grounds other than the statutory ones if such grounds are provided for by collective agreement. The conclusion of a new fixed term contract will be possible 60 days after expiry of the existing one. If the existing contract was for a duration of six months, the qualifying period will be 90 days. Under Article 4 of decree-law 368/2001 the fixed-term period must be for a maximum period of three years and during that period may only be renewed once. In computing the three-year period, all previous relations between the parties, temporary agency work, must be taken into consideration.\(^{262}\) If the employer permits the employee to continue working after the expiry of the fixed term period, the wages will be increased by an additional amount of 20% and after 10 days by 40% under Article 5 section 1. After 30 days (in the case of a fixed term contract of up to six months) or after 50 days the contract will be converted into an employment contract for an indefinite period in accordance with Article 5 section 2. Invalidity of the fixed-term period will result in the employment contract being of an indefinite duration and will confer on the employee a right to compensation ranging from 2.5 to 12 months’ salary.\(^{263}\)

In England the right under Section 94 ERA 1996 not to be unfairly dismissed (paragraph 28) will apply, even on expiry of a fixed-term employment contract.\(^{264}\) The same will apply to the right to a redundancy payment. Accordingly, under English law, the grounds for setting the fixed-term period are not reviewed in advance; circumvention of the right to protection against dismissal is guarded against by examining, at the end of the contract, failure to renew it.\(^{265}\) Moreover, a renewed contract of employment for a fixed term (serial fixed term contracts), which has lasted for more than four years will, under Regulation 8 (2) of the Fixed Term Employees (Prevention of Less Favourable Treatment) Regulations 2002, be converted into an employment contract for an indefinite period, provided that there was no objective reason for having a fixed-term period.\(^{266}\)

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260 See Fuchs, NZA 2004, 956, 958 et seq.
261 Ales, ELLJ 2012, 70, 71 et seq.
262 Ales, ELLJ 2012, 70, 72.
263 Ales, ELLJ 2012, 70, 72.
264 On the historical development, see Kröger, (see footnote 315), p. 157 et seq.
265 Hoffmann, Befristungsrecht in Großbritannien und Deutschland – eine rechtsvergleichende Analyse –, Berlin 2012 (also Hagen, Fernuniv., Diss. 2011), p. 112 et seq., 191.
The problem of the fixed-term period arises also in the USA, but not to the same extent as in Europe because, under the employment-at-will doctrine, there is no protection against dismissal that needs to be circumvented by setting a fixed-term period to a contract. On the other hand, the setting of a fixed-term period affords protection from termination of the contract at any time (see paragraph 29).

It should finally be pointed out that, for example, in Norway after the contract has been in existence for longer than a year there is a statutory requirement for a prior warning, allowing a specified period before the end of the fixed-term period. If that requirement is not observed the employment contract will not have come to an end until the warning has been repeated and that period has expired.

Finally, the Japanese legal situation deserves mention. There is statutory provision to ensure that the maximum fixed-term period is one year and, in special cases, three years. There is no statutory provision for repeated fixed-term periods. However, the assumption is made that the employee, in the case of serial fixed-term periods can expect the employment contract to be continued with the result that termination will be permissible only under the application by analogy of the principles relating to protection against dismissal.

The limits in regard to permissible fixed-term contractual periods also concern termination of the contract and, thus, the extinguishment of the obligations under the contract, although contained in an agreement entered into on conclusion of the contract. Thus, under Article 12 section 1(d) of the Rome I Regulation, they are likewise determined by the law applicable to the contract. That is particularly noticeable where, as in Japan (paragraph 65), the limits on the fixed-term period are inferred from the limits on dismissal. As in the case of maintenance of the status quo by means of general protection against dismissal (see paragraph 32), there can be no special connecting rule for the law providing protection against fixed-term periods. The same conclusion is reached under French law. Of course, unlimited opportunities to lay down fixed-term periods under the law applicable to the contract will be tantamount to excluding any protection against dismissal. If they are not accompanied by other compensatory provisions, such as in regard to compensatory settlements, there will like-

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266 On that, see Deakin/Morris, paragraphs 5.75 et seq.; cf. also Hoffmann (footnote 321,) p. 106 et seq., 231 et seq. For a similar rule in Sweden (following 24-month fixed term), cf. Inghammer, EuZA 2009, 421, 422.
268 Cf. Lassmann, p. 146 et seq.
269 Nishitani, p. 161.
270 Cf. C. Müller, p. 316 et seq.; ultimately, also BAG AP No. 1 on § 18 GVG.
271 Similarly, Winkler v. Mohrenfels/Block, EAS B 3000 paragraph 151; C. Müller, p. 316 et seq.
ly be a contravention of public policy (see in relation to protection against dismissal, paragraph 35). As against other Member State legal systems, this will not be a consideration in light of the transposition obligations arising out of the directive on fixed-term contracts. Moreover, the provisions in Paragraph 14 TzBfG constitute protective provisions within the meaning of Article 8 section 1 of the Rome I Regulation cannot be circumvented by a choice of law.

On the other hand, it is contradictory if fixed-term contracts based on no cause are justified as overriding mandatory law on the ground that the provision is dictated by employment-market policy. Those policy motives are not limiting the right to set fixed-term contracts without objective cause, but relax the restrictions in regard to fixed-term contracts, thus departing from the usual requirement that there should be an objective reason for the setting of a fixed term to the contract. Nor does the legislature seek, with internationally binding validity, to enforce a minimum level of deregulation of the status quo in regard to the employment contract. Yet that would be the precondition for accepting that Paragraph 14 section 2 TzBfG should be applied irrespective of the law applicable to the contract. See generally on this problem, Section 10 paragraphs 21 et seq.

Where, however, the permissibility of a fixed-term contract is dependent on a quota of fixed term contracts at plant level, as is the case, for example, under Lithuanian law that will nonetheless be subject, in order to justify a fixed-term contract, to the law applicable to the contract. Whether persons employed abroad or their employees employed under a contract governed by a foreign law are to be included in the computation of the quota is a problem of a substantive-law nature and cannot in this context be answered in regard to Lithuanian law. Likewise, the issue whether prior employment outside Spain and/or under non-Spanish law applicable to the contract that is prejudicial in terms of the law relating to fixed term contracts can be taken into account under Article 15 section 5 of the Spanish workers statute (ET) is of a substantive-law nature. The same is true, ultimately, of the prohibition on prior employment under Paragraph 14 section 2, second sentence, of the German TzBfG. With regard to the aim of the provision of excluding fixed terms where the employer has already been able to

273 Thus also, ultimately, CA d’Angers, JDI 1990, 616 (with dissenting observations by Fieschi-Vivet (= Dr.soc. 1991, 28 and Rev.crt.DIP 1990, 501, with commentary by Heuzé); also Vettor, RIDL 1996 II, 503, 507.
275 According to ECJ NZA 2008, 865, 869 – Commission/Luxembourg – one Member State’s law on fixed-term contracts may not be extended to other Member States.
277 Heilmann, p. 134 et seq.; MünchArb-Oetker, Section 11 paragraph 63; KR-Weigand, IPR paragraph 79; in the final analysis, also Staudinger-Magnus, Art. 8 Rom I-VO paragraph 217.
278 For another view, see Heilmann, p. 135.
279 Davulis, EuZA 2011, 427, 432.
form an adequate impression of the employee, the matter can no longer ultimately depend either on an earlier law applicable to the contract or on the country in which the contract was performed.

69 The **legal consequences** of lawful and unlawful fixed terms are similarly to be determined by the law applicable to the contract. The question of an increase in pay where employment is continued after the end of the contract (see paragraph 51) goes to the essence of the employer’s duties under the employment contract and will therefore be governed by the law applicable to the contract.

70 A **duty to notify** prior to expiry of the time-limited employment contract, as exists for example in Spain under Article 49 section 1(c) EC, will, since it is a rule concerning termination, come under the law applicable to the contract.

71 In regard to formal requirements concerning the fixed-term agreement, the law governing formal requirements will apply (see Section 8).

4. **Insolvency**

72 The effect of insolvency proceedings on the existence of the employment contract will be governed under Paragraph 337 of the German insolvency rules (InsO) in accordance with the law applicable to the contract. The institution of foreign bankruptcy proceedings will have no effect on the existence of the employment contract where German law is the law of the contract.

5. **Continued employment**

73 Whether entitlement to continued employment will subsist beyond the expiry of the notice period will be determined by the law applicable to the contract. In any event, **general entitlement to continued employment** under German law is rooted in the contractual relationship between employer and employee and is intended to reconcile their interests. It is therefore to be classified as falling under the law applicable to the contract. On the same ground, a claim to continued employment under Norwegian law will be governed by the law applicable to the contract. The judicial release provided for the employer from the duty of continued employment may also be sought from a German court in the context of a dismissal-protection procedure.

6. **Reinstatement**

74 Claims to reinstatement concern either a **reversal** of the extinguishment of contractual obligations and, thus, are likewise governed by the law applicable to
the contract or (for example, in the case of claims to reinstatement under a plant-specific dismissal under French law, see paragraph 25) involve claims to a new employment contract which, in the same way as other obligations to enter into contracts, are subject to the law applicable to the contract (see Section 11 paragraphs 11 et seq.). The same applies to claims to preferential consideration of former employees.\textsuperscript{286}

An exception must be made for claims to reinstatement after a labour dispute, as in Germany, for example, in the case of a suspensive lockout\textsuperscript{287}. These will be governed by the law applicable to labour disputes (Section 15 paragraph 39).

\textsuperscript{286} Cf. for the case of an employment relationship terminated by incapacity to work under Article 30 section 8 of the Turkish Labour Code, \textit{Hekimler}, NZA 2004, 642, 643.

\textsuperscript{287} BAG (GS) AP No. 43, on Article 9 GG – Arbeitskampf.
14 Post-termination effects of the employment contract

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1 Duties that continue to apply after termination of the employment contract, such as continuing duties of confidentiality, or duties to provide information, are governed by the law applicable to the contract.¹

I. Prohibitions on competition

2 Prohibitions on competition are familiar to various legal systems. As a general rule, the limits to permissible agreements are statutorily provided for, for instance, in Germany under Paragraphs 74 et seq. of the Commercial Code (HGB), and Paragraph 110 of the Trade Regulation (GewO).² Under the case law, a prohibition on competition relating to abroad will only be binding if it concerns an activity not prohibited there.³ Such limits are also to be found in Austrian law in Paragraph 36 of the law on employees (AngG).⁴ Thus, a competition clause can only be agreed with persons who have reached the age of majority for a period of one year after termination and only as from a certain minimum income level. It must not entail any unreasonable hindrance on the progression of the employee. Only exceptionally can its scope be extended beyond Austria.⁵ Under Swiss law similar provision is made by Article 340 a of the law on obligations (OR) which precludes any unreasonable hindrance to career progression and, as a rule, will permit prohibitions on competition only for a period of up to 3 years. Italian law recognises, in the same way as German law (Paragraph 74 section 2 of the Commercial Code), prohibitions on competition only if they are associated with compensation (Article 2125 of the Civil Code). It will moreover only be permissible for a period of up to three years and, in the case of senior employees, five years. In French law, the limits imposed on prohibitions on competition are hammered out by the courts. What is unlawful, in any event, is a prohibition without compensation.⁶ In England prohibitions on competition may be agreed under the common law. They are, however, only lawful as restraints on trade to the extent of what is necessary and insofar as the employer can prove a justifiable business interest in them.⁷ Overall, the requirement of compensation for a restraint is, from a comparative-law perspective, quite

¹ Winkler v. Mohrenfels/Block, EAS B 3000 paragraph 229; MünchArb-Oetker, Section 11 paragraph 114.
² On the substantive-law appraisal of cross-border prohibitions on competition under German law, see Brendel, p. 40 et seq.
³ BAG AP No. 1 on § 74a HGB.
⁴ Cf. Jabornegg/Resch, paragraph 288 et seq.
⁵ OGH DRdA 1986, 335.
⁶ Cass.soc, D 2002, 2491, with observations by Serra; Mazeaud, paragraph 611.
widespread but not universally acknowledged. Likewise, temporal and objective limits are very differently configured from one State to another.  

Post-contractual prohibitions on competition are governed by the law applicable to the contract. Where they are contained in a share-option plan, they will be governed by the law applicable to the plan (on the designation of that law, see Section 12 paragraph 34). In that connection, the regulation of competition gives way to employee protection. The statutory provisions limiting prohibitions on competition detrimental to the employee may be enforced, under the most favourable principle, as protective provisions within the meaning of Article 8 section 1 of the Rome I Regulation, as against a different choice of law. Nor, for that reason, is there any objection to a partial choice of law for prohibitions on competition (see, in general, on the lawfulness of a partial choice of law on this ground, Section 9 paragraph 33). Paragraphs 74 et seq. of the German Commercial Code are not, however, to be classified as overriding mandatory provisions because they are primarily addressed to ensuring a reasonable balance of interests as between the contracting parties. A prohibition on competition unlimited in time or in space, or a prohibition without compensation will be likely to contravene public policy. That accords with the American tendency to enforce laws against prohibitions on competition, notwithstanding the law applicable to the contract (see Section 10 paragraph 89). However, circumspection is called for, as always. For the employer may, in reliance on a prohibition on competition lawful under the law applicable to the contract, have granted access to business secrets which he would not otherwise have granted.

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8 Brendel, p. 174 et seq.; 184 et seq., 189 et seq.
9 Gamillscheg, IAR, p. 243; MünchArb-Oetker, Section 11 paragraph 114; Winkler v. Mohrenfels/Block, EAS B 3000 paragraph 230; Ferrari-Staudinger, Art. 8 Rom I-VO paragraph 28; Palandt-Thorn, Art. 8 Rom I-VO paragraph 4; Brendel, p. 101; Däubler, RfIw 1987, 249, 254; Deinert, RdA 2009, 144, 153. But on the other hand see Hartley, Rec. 1997, 341, 418: law of the future contract. That would however function only if the prohibition on competition is broken.
10 Hess. LAG IPRspr. 2000, 82, 83.
11 C. Müller, p. 367.
12 Hess. LAG IPRspr. 2000, 82, 86; Brendel, p.102.
14 Brendel, p. 104; for another view see Staudinger-Magnus, Art. 8 Rom I-VO paragraph 245.
15 Gamillscheg, IAR, p. 243.
16 Duarte v Black & Decker [2008] 1 AllER (Comm) 401 (Q.B.).
17 MünchKomm-Martiny Art. 8 Art. 8 Rom I-VO paragraph 102; further see Winkler v. Mohrenfels/Block, EAS B 3000 paragraph 230, who take the view that paragraphs 74 et seq. of the Commercial Code constitute overriding mandatory provisions; for a concurring view, MünchArb-Oetker, Section 11 paragraph 91.
19 Cf. Gamillscheg, IAR, p. 244.
in relation to compensation as a substitute law of the forum where a restraint on trade has been imposed without compensation (Section 5 paragraph 27).  

II. Pensions schemes

4 Certain insurance contracts, including those regarding corporate old-age provision, are excluded from the scope of the Rome I Regulation under Article 1 (2) (j) thereof (see paragraph 12 below). Of course, that concerns only the insurance contract and not the arrangements for benefits and the rules on which they are based.

5 The law on corporate pensions as a private means of providing old-age pensions has a specific tradition in the Anglo-Saxon countries through the widespread use of investment trusts. The creation of the German law on old-age provision and, with it, its non-forfeitability provisions, was influenced by American preparatory documents. The permissibility of the direct award under German law is to be described as rather unusual from a comparative-law perspective.

6 In regard to the company old-age pension provision, the pension award is governed by the law applicable to the contract. That will also be the case where there is no express award but only one that may be inferred from general principles of contract law (for instance, the employment law principle of equal treatment or company practice). It is true that there is no specific self-standing connecting rule (see paragraph 8). However, a partial choice of law for the conferral of pension provision will be possible (see Section 9 paragraph 33). That will be the case, in particular, where there is uniform provision throughout the concern. It seems doubtful whether otherwise there can be a uniform connecting rule for pension provision arrangements (possibly, at most by way of the escape clause in Article 8 section 4 of the Rome I Regulation). Insofar as the pension provision award is under company rules, the law applicable to the works constitution (Section 15 paragraph 1) will apply. A pension award founded on

20 Gamillscheg, IAR, p. 245.
21 For a comparison of laws see Roth, Private Altersvorsorge, p. 255; for Great Britain see Tolley’s Employment Handbook, p. 939 et seq.
23 Cf. Bittner, Europäisches und internationales Betriebsrentenrecht, p. 257 et seq. There also is an (albeit now older) comparative law overview in Birk, ZfA 1988, 105 et seq.
24 BAG AP No. 4 on Internationales Privatrecht- Arbeitsrecht; Birk, RabelsZ 46 (1982), 384, 403; Junker, RIW 2001, 94, 103; Bohne, p. 53 et seq.; in favour of an independent connecting rule ancillary to the contract, see Bittner, Europäisches und internationales Betriebsrentenrecht, p. 261; for another view see Schmidt-Hermesdorf, RIW 1988, 938, 942: central focus as the connecting factor.
25 Otherwise in regard to corporate practice (in regard to the earlier law in any event), Eichenhofer, ISR and IPR, p. 105.
26 For another view (plant as the connecting factor) Birk, FS G. Müller, 1981, p. 31, 38 et seq., 43 et seq.
27 Cf. BAG AP No. 21 on § 38 ZPO Internationale Zuständigkeit; Winkler v. Mohrenfels/Block, EAS B 3000 paragraph 229; Junker, IPRax 1993, 1, 6.
28 See Däubler, RIW 1987, 249, 255.
a collective agreement will be applicable if the collective agreement is applicable to the employment contract (in that connection, see section 15 paragraph 1).

Conversely, it is considered possible for the pension award to be dealt with as contractual matter under a self-standing rule. The freedom of choice of law, thereby triggered (now Article 3 of the Rome I Regulation) would then not be subject to restriction under the ‘most favourable’ principle (Article 8 section 1 of the Rome I Regulation). One would have in that connection to trust in a choice of law which does not place the employee at a disadvantage, since a choice of law as a rule will be made in the interests of stable provisional arrangements. To rely on the good intentions of the contractual parties is justified only seldom. That is why Article 8 section 1 of the Rome I Regulation makes provision for restricting the freedom to choose the applicable law. It will therefore be preferable to opt for the none the less obvious classification as an obligation under the employment contract which would render it subject to the law applicable to the contract. Of course, in the case of company pension schemes departing from German law, there can be a strong need for an ancillary social insurance connecting rule, for instance, because the company pension replaces the State pension provision. Ultimately, in that connection, there will be a presumption in favour of a partial choice of law. Where the parties wish the pension award to replace the State pension, the choice of law must be clearly demonstrated by the circumstances, as required by Article 3 section 1, first sentence, of the Rome I Regulation. In contradistinction to that is a passive unilateral conflict rule. Such a rule is to be found, for example, in Article 5 section 1 of the Swiss Federal law concerning occupational old-age, survivors’ and invalidity pensions. This law on mandatory old-age pension provision will therefore be applicable only to those who are subject to the Swiss social insurance system.

Claims arising out of the pension award likewise fall to be assessed under this law (law applicable to the contract). That will also be true where implementation is by an independent institution or body. The relationship between that body and the employee will likewise be normally determined by the law applicable to the contract. The place of employment relevant for ascertaining the law applicable to the contract for the purposes of Article 8 section 2 of the Rome I Regulation is the place at which the employee has habitually worked.

30 Bittner, Europäisches und internationales Betriebsrentenrecht, p. 434 et seq.
31 Eichenhofer, IPRax 1992, 74, 75 et seq.
32 Bittner, Europäisches und internationales Betriebsrentenrecht, p. 271.
33 Bittner, Europäisches und internationales Betriebsrentenrecht, p. 271.
35 Däubler, RfW 1987, 249, 254.
36 Cf. – also in respect of possible exceptions – Birk, FS G. Müller, 1981, p. 31, 40; for a different view see Bittner, Europäisches und internationales Betriebsrentenrecht, p. 315; Bohne, p. 153 et seq.
37 MünchKomm-Martiny, Art. 8 Rom I-VO paragraph 103.
According to a divergent view, several provisions of the German law on company pensions (BetrAVG), such as non-forfeitability under Paragraph 1, the prohibition on diminution under Paragraph 5, and the adjustment obligation under Paragraph 16, should be unilaterally connected to a company within the country.\(^{38}\) That does not carry conviction. It must be acknowledged that the company pension provision, as a rule, does have a collective point of reference. In the same way, however, as in the case of the employer’s duties in regard to equal treatment, this point of reference does not alter the fact that the rights of the individual are enjoyed by him as an employee and not only as a member collectively of the personnel. Since the law on company pension provision, however, contains provisions that are mandatory, these are protective provisions which under Article 8 section 1 of the Rome I Regulation cannot be circumvented.\(^{39}\) These provisions cannot however be implemented as overriding mandatory provisions\(^{40}\) because they ultimately serve to balance the contractual interests of employee and employer in regard to the value of the pension award.

Insofar as the claim to pension provision is addressed, not to the contractual employer but to another group company, the pension award and pension entitlement will not fall under the law applicable to the contract, but will be subsumed under a self-standing connecting rule. That will, as a rule, occur on an ancillary basis by means of a connection to the residual employment contract that will mostly subsist with the other group undertaking.\(^{41}\)

Rules concerning insolvency insurance are dealt with autonomously under Paragraph 7 of the German law on company pensions.\(^{42}\) That constitutes overriding mandatory law\(^{43}\) which is applicable to national plants or undertakings.\(^{44}\) From a substantive-law point of view insolvency protection will also subsist in regard to a continued pension award from an earlier employment contract with a group company, if the employee henceforth is employed by another group undertaking abroad and the latter undertaking is not subrogated to the employer in regard to the pension provision obligation. These employment periods abroad can be taken into account in terms of the non-forfeitability.\(^{45}\)

\(^{38}\) Birk, RabelsZ 46 (1982), 384, 404.
\(^{39}\) Cf. Winkler v. Mohrenfels/Block, EAS B 3000 paragraph 229.
\(^{40}\) But in this sense see Birk, FS G. Müller, 1981, p. 31, 47; likewise GS Blomeyer, 2004, p. 43, 47 et seq.; see as here Bittner, Europäisches und internationales Betriebsrentenrecht, p. 304 et seq.; Eichenhofer; IPRax 1992, 74, 76 et seq.
\(^{41}\) Cf. BAG AP No. 24 on § 7 BetrAVG; BAG AP No. 46 on § 7 BetrAVG; Junker, FS Kropholler, 2008, p. 481, 490 et seq.
\(^{42}\) Junker, IPRax 1993 1, 6; Bohne, p. 92 et seq.; essentially also to this effect without however so stating, LAG Köln IPRax 1984, 150.
\(^{43}\) C. Müller, p. 421.
\(^{45}\) BAG AP No. 24 on § 7 BetrAVG; BAG AP No. 46 on § 7 BetrAVG; Bittner, Europäisches und internationales Betriebsrentenrecht, p. 350 et seq.; for a concurring view see Bohne, p.
Just as insolvency insurance (paragraph 10 above), non-forfeitability (e.g. Paragraph 1 b of the German law on company pensions (BetrAVG)) owes its existence to a public social-policy interest and therefore is to be deemed to be internationally binding.\(^{46}\)

Under Article 1 (2)(j) of the Rome I Regulation, that instrument does not apply to insurance contracts in regard to company pension provision.\(^{47}\) Thus, generally, the connection rule will be under the autonomous law. Insofar as insurance is provided for under collective agreements, the law applicable in that connection will be determined by the law applicable to the collective agreements (on the international law governing collective agreements, see Section 15 paragraph 1).\(^{48}\)

### III. Miscellaneous

The right to obtain a reference is provided for in the different legal systems, thus, for instance in Germany under Paragraph 109 of the Trade Regulation, in Austria under Paragraph 1163 of the Austrian Civil Code, and Paragraph 39 of the law on employees, or in Italy under Article 2124 of the Civil Code. They are governed by the law applicable to the contract.\(^{49}\) Under English law, the employer is under no duty to provide a reference. If the employer does, however, give a reference, he is under a duty of care in the sense that the reference must be true, accurate and fair.\(^{50}\) This obligation is also governed by the law applicable to the contract.

Sometimes, also, there will be entitlement to release for the purpose of a job search. Thus in Germany under Paragraph 629 of the Civil Code or in Austria under Paragraph 1160 of the Austrian Civil Code, and Paragraph 22 of the law on employees. Such claims will also be subject to the law applicable to the contract.\(^{51}\)

On reinstatement after dismissal, see Section 13 paragraph 74.

On the post-contractual reinstatement liability of a French parent company, see Section 12 paragraph 55.

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187 et seq.; for another view Schwerdtner, ZfA 1987, 163, 170 et seq., who regards insolvency protection as being maintained only in the case of extra-territorial configurations.

46 Birk, FS G. Müller, 1981, p. 31, 47; for another view see Bittner, Europäisches und internationales Betriebsrentenrecht, p. 309.


48 Martiny, RIW 2009,737, 749; Rauscher/v. Hein, Art. 8 Rom I-VO paragraph 59.

49 Gamillscheg, IAR, p. 354.


51 Gamillscheg, IAR, p. 354.
15 Industrial action

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1. Overview

Collective labour law is not covered by the Rome I Regulation. Therefore, national legislation or case law have to solve collective labour law questions in private international. Although the collective agreement, as far as it is a contract between the collective parties, is covered by Articles 3 and 4 Rome I Regulation, the private international law questions of the normative part of the collective agreement are not addressed to by the regulation. They are left to national solutions. In German law, according to academic writers, the contracting parties can choose the applicable law; otherwise, the connecting factor is to be seen in the place (country) where most labour contracts that are covered by the agreement have to be fulfilled. But with concern to the individual employee the application of the collective agreement depends on the precondition that the labour contract is governed by the same law as the collective agreement because the agreement has to be applicable as part of the lex causae or as mandatorily legislation, especially under the law on posted workers (cf. Section 10 paragraph 65).

No connecting rule exists at European level for the works constitution. According to the German courts, the principle of territoriality applies in this field whilst the majority of academic writers come to the same result under a connecting rule that refers to the local situation of the plant.

There exists no European connecting rule for employee representation at board level either. It seems that a majority of academic writers plead for an ac-

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1 Plender/Wilderspin, Paragraph 11-003.
2 Cf. Deinert, Internationales Arbeitsrecht, Section 15 paragraphs 36 et seq. with further references.
3 Cf. Deinert, Internationales Arbeitsrecht, Section 15 paragraphs 50 et seq. with further references.
4 Cf. Deinert, Internationales Arbeitsrecht, Section 17 paragraphs 10 et seq. with further references.
cessory connection to the personal statute of the company in German private international law although, in my view, strong reasons strike for categorising the statutes on employee representation at board level as internationally mandatory rules.⁵

Accordingly, it is justified to summarise, that most subjects of collective labour law and not covered by European PIL rules. Only the field of industrial action is partly covered by a European connecting rule in Article 9 of the Rome II Regulation.

In respect of liability for measures taken in connection with industrial action Article 9 of the Rome II Regulation contains a self-standing system of connecting rules (see on the system, paragraph 3, and on the details, paragraph 13 et seq.). In that connection, the Rome II Regulation (printed in Annex, p. 439) proceeds, in regard to measures in connection with industrial action, on the basis of a classificatory referral (paragraph 4). The connecting rules under the Rome II Regulation merely cover liability for measures in connection with industrial action. The autonomous conflict of laws in respect of industrial action is governed, at least from a German view, by the same connecting rules (paragraph 21). Following a presentation of the connecting rules, the scope of the law applicable to industrial action of the law applicable to the tortious liability of employment authorities will be examined (paragraph 20). Illustrations and specific features of the foreign legal systems will additionally afford an insight into the substantive law (paragraph 6). The assessment of the lawfulness of industrial action should be uniform for all legal issues flowing from it and will be determined by the law applicable to tortious liability arising out of industrial action (paragraph 20). Further questions in relation to the scope of the law applicable to industrial action and tortious matters will subsequently be dealt with (paragraph 25) before the scope of the law relating to persons entitled and persons liable will be discussed and analysed (paragraph 31), and finally the position of the individual in industrial action will be looked at from a conflict-of-laws perspective (paragraph 37). There then follows an exposition on matters of public policy (paragraph 41) and on European law (paragraph 45). Finally, an account will be given of the conflict of laws treatment of other action taken in the context of freedom of assembly (paragraph 47). The substantive-law issues in connection with international factual situations are many and varied. They are to be strictly distinguished from the conflict-of-laws issue but will none the less also be addressed in the relevant context (see paragraph 17, 27 and 37).⁶ Moreover, in regard to international situations, substantive law is partly also formed by Union law (see paragraphs 27 and 45).

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⁵ Cf. Deinert, Internationales Arbeitsrecht, Section 17 paragraphs 73 et seq. with further references.

⁶ On substantive-law issues in the context of intra-European disputes, see Hergenröder: in Heinemann (Eds.), p. 49, 50; on substantive-law issues in regard to solidarity labour disputes in multinational concerns, see A. Lyon-Caen, Rev.crit.DIP 1977, 271, 296 et seq.
II. The connecting factor of the place where the action takes place in the case of industrial action

Article 9 of the Rome II Regulation contains a conflict rule governing liability for measures taken in connection with industrial action. It concerns the law applicable to tortious acts arising out of industrial action. The connecting factor will be the place at which the industrial action takes or is to take place. That is the place of the action (locus actus). The reasoning underpinning this provision given in the Wallis report confined itself to the lapidary statement that the right of workers to take industrial action, guaranteed at the level of the national States, could not be undermined. That is a reversal of the basic connecting rule in tortious matters in Article 4 section 1 of the Rome II Regulation under which the connecting factor is the place where the injury occurs (locus damni). Accordingly, the reason for the connecting rule in Article 9 of the Rome II Regulation is partly the difficulty of ascertaining the place where the industrial action takes place and partly the fact that it is unreasonable to expect the parties to the industrial action to take into account possible consequences in other countries.

On another view, the inclusion of claims to cease and desist which are also covered by the law applicable to tortious actions arising as a result of industrial action (paragraph 30) is seen as being of such central importance as to justify the connecting factor, as regards cessation, being the place where the action takes place. That is closely connected with the idea that what is involved is the guiding of conduct which will only function if the connection is to the law of the surrounding area or, put another way, by regarding the whole of the law on industrial action of the place where the industrial action takes place from a conflict of laws perspective as constituting overriding mandatory law.

If one has regard to the historical background to the inclusion of Article 9 of the Rome II Regulation in regard to which protection of the right to strike under the national legal systems was at stake, it becomes clear that the purpose of the provision is to enable the partners to focus on their local law. At the same time that avoids the excessive application of overriding mandatory provisions and of public policy
rules. This in turn is conducive to the international concordance of decisions. The connection to the place of the action was at the same time a reaction to the decision of the ECJ in DFDS Torline (aka the Tor Caledonia case). In that case, the ECJ deemed it appropriate in terms of international jurisdiction for the place in which financial losses arose to have jurisdiction in matters of tort. That was not an answer to questions of private international law, but clearly highlighted the dangers of adopting the same solution for the international law concerning industrial action. For then there would have been a threat of measures taken in connection with industrial action being appraised under the various legal systems in which losses have arisen. Against that background the provision in Article 9 of the Rome II Regulation is intended to preclude a transposition of the solution in regard to jurisdiction to the private international law sphere. At first sight, Article 9 of the Rome II Regulation seems merely to refer to liability itself, but not to the question of unlawfulness as a precondition of liability. By implication, however, owing to Article 15 (a) of the Rome II Regulation, provision is also made at the same time for a connecting rule in regard to the issue of lawfulness (paragraph 21). Since this connecting rule covers all aspects, as will be shown (paragraph 23), essential issues concerning the law applicable to industrial action are thus also provided for under Article 9 of the Rome II Regulation. Enactment of the provision gives rise to no problems in terms of jurisdictional law. Article 153 Section 5 TFEU precludes the Union from acquiring competence in regard to strikes and lockouts; thus it is neither relevant substantively since it is the harmonisation of conflict of law rules and not of substantive law that is involved, nor is it relevant in regard to the purpose pursued by the provision (protection of national systems of law governing industrial action).

The connection with the place where the action takes place has been and is still recognised as a matter of comparative law. It ultimately corresponded to the international tortious provision in Article 40 EGBGB (introductory law to the Civil Code) under German PIL. Even under the earlier unwritten conflict of laws, it was recognised that the place where the industrial action was conducted would be the connecting factor in regard to the law applicable to the industrial

15 C. Heinze, RabelsZ 73 (2009), 770, 781; hinted at also by Joubert, in Corneloup/Joubert, (Eds.), p. 55, 78.
16 EuGH IPRax 2006, 161 – DFDS Torline; for further detail on questions of law thereby raised see Chaumette, Dr.soc. 2005, 295 et seq.
17 In general, on the possible private international law consequences see Franzen, IPRax 2006, 127, 129; see also Pataut, Dr.soc. 2005, 303, 305 et seq.
18 Crespo Hernández, Kinesis 2008, paragraph 5, 15; Dorssement/v. Hoek, in Ales/Novitz (Eds.), p. 213, 217; Huber-Illmer, Art. 9 Rome II paragraph 3; Palao Moreno, Yearbook of Private International Law 9 (2007), 115, 116; Calliess-Rödl, Art. 9 Rome II, paragraph 2; Rauscher-Unberath/Cziupka, Art. 9 Rom II-VO paragraph 5; cf. also Evju, RIW 2007, 898, 907 et seq.; also Plender/Wilderspin, paragraphs 23-004, detailed background account in Dickinson, paragraph 9.01 et seq.
19 Cf.; Calliess-Rödl, Art. 9 Rome II, paragraph 3.
action\textsuperscript{21} though classification in terms of tort law was rejected.\textsuperscript{22} There were some who advocated a connecting rule linking to the central focus of the totality of matters arising in terms of the law governing industrial action.\textsuperscript{23} Unlike under Article 40 EGBGB, the injured party has no possibility of choosing the law of the place where the damaging act took place, nor is there any escape clause.\textsuperscript{24} In England as well, procedure was determined by the general tortious connecting rule contained in Section 11 of the Private International Law (Miscellaneous Provisions) Act 1995.\textsuperscript{25} In France, the connecting factor was, likewise, the place where the act occurred, although it is unclear to what extent the law in that connection would be overriding mandatory law (see section 10, paragraph 11 et seq.).\textsuperscript{26} There is a statutory provision in Article L. 1262 – 4, 5, of the Labour Code (CT) which declares the exercise of the right to strike in cases where workers are posted to constitute overriding mandatory law. Conversely, no clear rule had yet been elaborated in Italy where there was a confused situation of individual contractual and tortious connecting rules and at national level the connecting factor of the fundamental right to strike laid down in Article 40 of the Constitution and special rules in regard to essential services (see paragraph 8).\textsuperscript{27} The Netherlands courts, for their part, applied the connecting factor of the place where the industrial action took place, whilst acknowledging that precedence could be given to another closer connection.\textsuperscript{28} 

III. Classificatory referral

Statutorily, Article 9 of the Rome II Regulation presupposes measures taken in connection with industrial action. Thus, to an extent, an autonomous European classification is being advocated.\textsuperscript{29} It is to be preferred because it renders it possible to comprehend the most various manifestations of industrial action un-


\textsuperscript{22} Cf. Birk, IPRax 1987, 14, 16; Franzen, AR-Blattei SD 920 paragraph 360 on legal policy grounds also against tortious liability under Article 9 of the Rome II Regulation owing to protection of the right to strike as a fundamental right, Pauker, p. 34 et seq.

\textsuperscript{23} Hergenröder, p. 203 et seq.; likewise FS Birk 2009, p. 197, 206 et seq.; concurring Pauker, p. 36 et seq.; Deinert, RabelsZ 64 (2000), 200, 206; for a more reserved view see Birk, FS 50 Jahre BAG, p. 1165, 1169.

\textsuperscript{24} In detail on the commonalities and differences between autonomous conflict of laws and the Rome II Regulation, Junker, Art. 9 Rom II-VO, paragraph 9 et seq.

\textsuperscript{25} Ewing, in Dorssenmont/Jaspers/v. Hoek (Eds.), p. 217, 232.


\textsuperscript{27} For further detail see Venturi in Dorssenmont/Jaspers/v. Hoek (Eds.), p. 331 et seq.

\textsuperscript{28} Cf. HR NJ 1985, 311.

\textsuperscript{29} Dorssenmont/v. Hoek, ELLJ 2011, 48, 63 et seq.; Plender/Wilderspin, paragraphs 23-007 et seq.; presumably also Morse, FS Pocar, 2009, p. 723, 727 et seq.; for another view, see ErfK-Schlachter, Art. 9 Rom II-VO paragraph 2.
der systems that from a comparative law perspective are very different (see paragraph 12). This method is likewise favoured for Article 8 of the Rome I Regulation (see Section 4 paragraph 13). In the present context, of course, a different solution is required. Recital 27 of the Rome II Regulation makes clear that, in regard to the definition as to what is to constitute a measure taken in connection with industrial action, the law under which the measure is adopted is determinant. That is referred to as a **classificatory referral**. That is a referral in regard to the issue as to what is to be classified as a measure taken in connection with industrial action. In that connection, reference is made to the law under which the measure is taken and not, for example, to the *lex fori*. It is thus a classification *lege causae*. The disadvantage of this method is to be seen in the fact that the scope of the conflict rule is dependent on the relevant domestic substantive law governing industrial action. The advantage of referral to the domestic law (and indeed to the *lex causae*), as opted for by the ECJ in regard to the restriction of fundamental freedoms by collective measures in its decisions in the *Viking* and *Laval* cases (see Section 10 paragraph 67) is, that the parties to the industrial action will be able to focus on the surrounding law. That which at the place where the action is taken is not regarded as industrial action, irrespective of whether lawful or unlawful, will be dealt with as a tortious act under the general conflict rule in Article 4 Section 1 of the Rome II Regulation, with the consequence that, subject to the escape clause in Article 4 Section 3 of the Rome II Regulation, the law of the place in which the action is taken will be applicable. For that is a consequence of the classificatory referral: that which is not regarded as industrial action at the place where the action is taken, will not fall under the special connecting rule in Article 9, whereas that which is regarded as industrial action, even if unlawful, will fall under the connecting rule in Article 9 of the Rome II Regulation. Classification by the *lex causae* may be subject to a restriction by virtue of the fact that the concept of industrial action in Article 9 of the Rome II Regulation by its nature demands to be placed in the context of collective working conditions. However, those are only the elementary limits.

30 For another view, see Knöfel, EuZA 2008 228, 241; Erman-Hohloch, Art. 9 Rom II-VO paragraph 3; Bamberger/Roth-Spichkoff, Art. 9 Rom II-VO paragraph 1; Winkler v. Mohrenfels/Block, EAS B 3000 paragraph 206.

31 For more detail, C. Heinze, RabelsZ 73 (2009), 770, 782; Zelfel, p. 27 et seq.; also Däubler-Däubler, Arbeitskampfrecht, Section 32, paragraph 23; Huber-Illmer, Art. 9 Rome II, paragraph 9; MünchKomm-Junker, Art. 9 Rom II-VO paragraph 15; Callies-Rödd, Art. 9 Rome II paragraph 11 et seq.; Rauscher-Unberath/Cziupka, Art. 9 Rom II-VO paragraph 8; Deinert, ZESAR 2012, 309, 312; concurring, it seems, J. Schmidt, Jura 2011, 117, 126 and footnote 185; presumably also v. Hein, VersR 2007, 440, 450; Palao Moreno, Yearbook of Private International Law 9 (2007), 115, 118.

32 Cf. Dickinson, paragraph 9.20; Huber-Illmer, Article 8 Rome II, paragraph 12.

33 This is referred to in MünchKomm-Junker, Art. 9 Rom II-VO paragraph 17.

34 Zelfel, p. 42.

35 MünchKomm-Junker, Art. 9 Rom II-VO paragraph 18.

36 Cf. Dickinson, paragraph 9.20; Huber-Illmer, Article 8 Rome II, paragraph 12.
of what, from the perspective of Union law, can be deemed to be industrial action.

6 In light of the wide interpretation of industrial action under German law, where the action is taken on German territory, for example, the payment of strike-breaking premiums or boycott measures, but also atypical measures in connection with industrial action, such as flash mobbing or the active lunch break, will also be classifiable as measures taken in connection with industrial action. Cessation of plant operation would in Germany not be classifiable under the law governing industrial action because the Federal Employment Court regards it as an instrument based on private law (paragraph 7). Nor would it be classified as tortious but, since it involves a question of continued payment of remuneration, would be a matter of contractual law (for the connecting rule, see section 10). A refusal to work directly in breach of a strike is permitted under German case-law in the case of each individual employee because the individual cannot be expected to stab the strikers in the back. This protection from unreasonable expectations justifies not classifying the refusal to work in breach of a strike, in itself, as industrial action, with the result that the entitlement to do so and the consequences that flow from that are to be inferred from the law applicable to the contract (see also, in that connection, paragraph 40). Nor would the exercise – in an appropriate case by collective means – of rights of retention, or of other individual rights, be classified in Germany as industrial action.

IV. Substantive law

7 In Germany, the right to strike is guaranteed as a manifestation of freedom of assembly under Article 9 section 3 of the Constitution (Grundgesetz – GG). The specific details of the law governing industrial action have not, however, been statutorily formulated but have been shaped by judge-made law. This fundamental freedom enures for the benefit not only of the individual but also for
the organisation as such.\textsuperscript{47} In that connection exercise of the right to strike is reserved to the \textit{trade unions}.\textsuperscript{48} Freedom of assembly is also enjoyed by the employers. The Federal Employment Court confers on employers the right to have recourse to a lockout as a defensive measure against partial strikes.\textsuperscript{49} This cannot be done selectively against unionists.\textsuperscript{50} In addition, lockout is restricted on grounds of proportionality by the case law on quotas\textsuperscript{51}, which has hitherto not been formally overruled.\textsuperscript{52} Alongside strike and lockout both sides also have \textbf{other means} at their disposal. The employers’ side has, for example, the possibility of engaging strike-breakers. The employer also has the possibility, without widening the dispute, of shutting down the plant and thus yielding to trade union pressure in such a way as to cause employees willing to work to lose their wage entitlements.\textsuperscript{53} The courts do not however construe this as a measure in connection with industrial action.\textsuperscript{54} On the employee side, the boycott is recognised as a traditional means employed in disputes.\textsuperscript{55} The Federal Labour Court (BAG) has deemed active disruption of retail trade by a flash mob to be not unlawful, in general terms.\textsuperscript{56} As a matter of principle, trade unions may also have recourse to strikes in support.\textsuperscript{57} Moreover, there is no limit on the number of permissible means of dispute. Instead, the principle of freedom of assembly permits and encourages groups to adapt their methods of dispute to the relevant circumstances, which also implies freedom in devising such methods or means.\textsuperscript{58} Industrial action on the employee side is reserved to the trade unions whilst, on the employers’ side, in addition to the umbrella body, the individual employer who also has capacity under Paragraph 2 section 1 of Act on Collective Agreements (TVG- Tarifvertragsgesetz), to enter into collective agreements is also authorised to take measures in connection with industrial action. A wildcat strike is precluded owing to the trade union prerogative.\textsuperscript{59} Neither an initial vote nor prior notice will be required. However, industrial action during the currency of a collective agreement is not lawful because a \textbf{specific duty to maintain peaceful relations} in regard to the matters provided for in the collective agreement is regarded as being inherent in any collective agreement.\textsuperscript{60} Industrial action is the \textbf{ultima ratio}.\textsuperscript{61} However, it remains a matter for the trade union to establish that

\begin{itemize}
\item \textsuperscript{47} BVerfG AP No. 1 on Art. 9 GG.
\item \textsuperscript{48} Cf. BVerfG AP No. 1 on Art. 9 GG; BAG AP No. 11 on § 11 ArbGG, 1953.
\item \textsuperscript{49} BAG AP No. 64 on Art. 9 GG – Arbeitskampf; BAG AP No. 65 on Art. 9 GG – Arbeitskampf.
\item \textsuperscript{50} BAG AP No. 66 on Art. 9 GG – Arbeitskampf.
\item \textsuperscript{51} But see BAG AP No. 124 on Art. 9 GG – Arbeitskampf.
\item \textsuperscript{52} BAG AP No. 64 on Art. 9 GG – Arbeitskampf; BAG AP No. 65 on Art. 9 GG – Arbeitskampf.
\item \textsuperscript{53} BAG AP No. 130 on Art. 9 GG – Arbeitskampf; BAG AP No. 65 on Art. 9 GG – Arbeitskampf; BAG AP No. 139 on Art. 9 GG – Arbeitskampf.
\item \textsuperscript{54} But impliedly BAG DB 2012, 1818.
\item \textsuperscript{55} BAG AP No. 6 on § 1 TVG – Form.
\item \textsuperscript{56} BAG AP No. 174 on Art. 9 GG – Arbeitskampf.
\item \textsuperscript{57} BAG AP No. 173 on Art. 9 GG – Arbeitskampf.
\item \textsuperscript{58} Rehder/Deinert/Callsen-Deinert (footnote 39), p. 57 et seq., 68 et seq., 87 et seq., 91 et seq.
\item \textsuperscript{59} BAG AP No. 106 on Art. 9 GG – Arbeitskampf.
\item \textsuperscript{60} BAG AP No. 76 on Art. 9 GG – Arbeitskampf.
\end{itemize}
all possibilities of negotiation have been exhausted and this assessment by the union cannot be enquired into. In conducting the industrial action, the principle of proportionality must be observed. That requires inter alia a guarantee of the continued provision of emergency services and maintenance works. An assessment of the strike objectives in light of the requirements of proportionality is not, however, required. Under the existing case law of the Federal Employment Court, the industrial action must address an objective which may be achieved by collective bargaining. It may be inferred from more recent case law that it is open to question whether this collective bargaining specificity has still to be maintained. A consequence of the requirement of collective bargaining specificity is inter alia the exclusion of purely political strikes and the exclusion of civil servants’ strikes which, in addition, is founded on the traditional principles of the civil service (guaranteed as fundamental principle by Article 33 section 5 GG). It remains to be seen whether, in light of recent decisions by the ECHR, the latter can be upheld. Conversely, under the case law, a strike concerning a social programme to be settled by collective bargaining is lawful. The legal consequence of a lawful measure taken in conjunction with industrial action is the suspension of the principal duties to be performed (remuneration and work). Industrial action is thus not a tort and does not warrant the participant’s dismissal. In the event of unlawful industrial action, the trade union will be liable in damages on the basis of Paragraph 823 section 1 of the Civil Code (breach of the right to carry on an established business) and, in an appropriate case, also on the basis of the breach of an obligation under a collective agreement. Limitations on liability are not provided for in that connection. The employee will be liable under Paragraphs 280, and 823 section of the Civil Code and runs the risk of dismissal in the case of a culpable failure to have regard to illegality which, in terms of measures supported by the trade union, will

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61 BAG (GS) AP No. 43 on Art. 9 GG – Arbeitskampf.
62 BAG AP No. 108 on Art. 9 GG – Arbeitskampf; BAG AP No. 173 on Art. 9 GG – Arbeitskampf; BVerfG on Art. 9 GG – Arbeitskampf.
63 BAG (GS) AP No. 43 on Art. 9 GG – Arbeitskampf.
64 Cf. Däubler-Reinfelder, Arbeitskampfrecht, section 15, paragraph 36.
65 Kittner/Zwanziger/Deinert–Deinert, section 136, paragraph 8 b.
66 BAG AP No. 58 on Art. 9 GG – Arbeitskampf.
67 BAG AP No. 162 on Art. 9 GG – Arbeitskampf; BAG AP No. 2 on § 1 TVG Sozialplan.
68 Gamillscheg, KAR I, p. 1100.
69 BAG AP No. 138 on Art. 9 GG – Arbeitskampf.
70 BVerfGE 8, 1; Seifert, KritV 2009, 357, 375.
73 BAG AP No. 2 on § 1 TVG Sozialplan.
74 BAG (GS) AP No 43 on Art. 9 GG – Arbeitskampf.
75 BAG AP No. 2 on Art. 9 GG – Arbeitskampf.
76 That can have serious consequences, as became apparent after the strike by metal workers in Schleswig Holstein, Kittner, Arbeitskampf, München 2005, p. 634.
generally not be the case. In respect of unlawful actions by its representatives, the trade union will be liable under Paragraph 31 of the Civil Code, but for unlawful conduct by strike pickets, it will be liable only under the preconditions laid down in Paragraph 831 of the Civil Code. This permits the union to excuse. The legal consequence of an unlawful lockout is the maintenance of the employee’s entitlement to remuneration, notwithstanding the absence of any work performed, on the basis of default of acceptance under Paragraph 615, first sentence, of the Civil Code. Employees, who without themselves going on strike or being locked out, are unable to work as a result of the industrial action will lose their entitlement to wages and in that connection bear the (financial) risk of industrial action in situations where the employer’s liability to pay remuneration would have an effect on the parity between the parties to the industrial action.

French law recognises the right to strike and has done so since 1864, but it has enjoyed full protection only since the end of the Second World War under the 1946 Constitution. Article 7 of the preamble recognises the right to strike, albeit in the context of the laws governing it. The Constitutional Council supervises the limits of Parliament’s authority to shape the law. However, there is, with the exception of Article L. 2511 – 1 of the Labour Code (CT), which will be mentioned below, no provision governing the right to strike in the private sector, with the result that the determination of scope and limits of the right to strike have, to a great extent, been left to the courts to determine. The protection of the Constitution extends only to the right to strike. It is understood as a concerted cessation of work in the pursuit of employment-related objectives. It flows from that fact that the political strike is outlawed, where it does not take place in a job-related manner but is directed, for example, against privatisations or pensions law. Secondary boycotts as action taken in solidarity are also unlawful, owing to an absence of employment-related objectives. The same applies to solidarity strikes within the plant, which do not serve the striker’s own interests. But go-slow strikes are always unlawful because there is no cessation of work. Rolling strikes are treated differently, however, only in the private sector (see Article L 2512 – 3 of the Labour Code) and only provided there is no

77 BAG AP No. 62 on Art. 9 GG – Arbeitskampf.
78 BAG AP No. 108 on Art. 9 GG – Arbeitskampf.
79 BAG AP No. 70 on Art. 9 GG – Arbeitskampf; on the issue of partial compensation by means of short-time allowances, see Deinert, AuR 2010, 290.
80 Laulom, in Ales/Novitz (Eds.), p. 31.
81 Cf. Laulom, in Ales/Novitz (Eds.), p. 31, 33.
82 Laulom, in Ales/Novitz (Eds.), p. 31, 36.
84 Palli, in Dorssemment/Jaspers/v. Hoek (Eds.), p. 123, 132 et seq.
86 Laulom, in Ales/Novitz (Eds.), p. 31, 36.
87 Palli, in Dorssemment/Jaspers/v. Hoek (Eds.), p. 123, 126.
misuse of the right to strike.\textsuperscript{88} Forms of industrial action other than strikes are unlawful. The more far-reaching recognition of the right to take collective action by the ECJ (see section 10, paragraph 61) will come into play as regards the transnational dimension, but ought not to lead to any extension of the law at domestic level.\textsuperscript{89} The right to strike is, according to French concepts, an individual right, which is exercised collectively.\textsuperscript{90} The consequence of that is, for instance, that it can only be limited by statute and not by collective agreement.\textsuperscript{91} The notice period provided for in a collective agreement for a strike can therefore only bind the trade union entering into the agreement and not the employee. In that connection, the right to strike under French law differs from the German concept under which participation in the strike as a manifestation of freedom of association may likewise be regarded as an individual right, but is subject to a reservation in favour of the collective, inasmuch as a lawful strike can only be called by a union (see paragraph 7). This is frequently used to account for the ready tendency to strike in France. However, in recent years a trend has become observable of a decline in strike action in the private sector mirrored by an increasing strike rate in the public sector, which has also given rise to discussions and debate about regulating the right to strike in the public service.\textsuperscript{92} Furthermore, the duration of industrial action as is declining whilst on the other hand, atypical forms such as go-slows and work to rule have increased.\textsuperscript{93} Likewise, there is \textbf{no duty to maintain peaceful relations} (section 15, paragraph 7).\textsuperscript{94} Since the right to strike can only be restricted by law, a duty to maintain peaceful relations provided for in a collective agreement cannot preclude the exercise of the subjective right. The only precondition for strike action is the notification that strike action is being taken and notification to the employer of the strikers’ demands.\textsuperscript{95} Unlike in the private sector, \textbf{the right to strike is subject to restrictions in the public sector}. It should be stated straightaway however, and in advance of any discussion, that officials also enjoy the right to strike.\textsuperscript{96} Thus the trade union is obliged to give notice of the strike, accompanied by further information under Article L. 2512 – 2 sections 1, 3 and 5 of the Labour Code at least five days in advance and must continue to be ready to conduct negotiations during this period. Random repeated wave strikes are unlawful under Article L. 2512 – 3. Also, under Article L. 2512 – 2 section 2 of the Labour Code, strike action is reserved to the most representative trade unions. In addition, there are different rules which lim-

\textsuperscript{88} Cf. Pélissier/Auzero/Dockès, paragraph 1356 with further observations; ELL-Despax/Rojot, France paragraph 897.

\textsuperscript{89} Laulom, in Ales/Novitz (Eds.), p. 31, 47.

\textsuperscript{90} Laulom, in Ales/Novitz (Eds.), p. 31; Palli, in Dorssement/Jaspers/v. Hoek (Eds.), p. 123, 126; Hekimler/Ring-Kaufman, p. 77, 106.


\textsuperscript{92} Laulom, in Ales/Novitz (Eds.), p. 31, 32.

\textsuperscript{93} Laulom, in Ales/Novitz (Eds.), p. 31, 32.

\textsuperscript{94} Cf. Deinert, Internationales Arbeitsrecht, § 15 paragraph 4.

\textsuperscript{95} Cass. Soc.Bull.civ. 1990 V No. 42, p. 27.

\textsuperscript{96} Conseil d’État Rec.Lebon 1950, 426.
it the right to strike in the public transport and education sectors.\textsuperscript{97} Strike action is subject to the reservation of \textit{proportionality}. Thus, strikes which occasion disproportionate injury or losses may be unlawful. In light of the constitutional guarantee of the right to strike, there can be no review as to whether the strike objectives are justified.\textsuperscript{98} The strike is \textit{not a breach of the employment contract}. Dismissal is precluded under Article L 2511 – 1. Unlike in the other cases of unjustified dismissal, the employee may demand reinstatement and the dismissal is null and void.\textsuperscript{99} However, dismissal for gross misconduct is lawful, for example, by posting pickets to prevent persons willing to work from accessing their work-places. The duties to work and to pay remuneration will be suspended.\textsuperscript{100} \textbf{Unlawful strike action} may require individuals and the trade union to pay damages. \textbf{Lockout is unlawful.} The employer may refuse to employ employees willing to work only if it is impossible for him to do so, despite all endeavours.\textsuperscript{101}

In Italy, the \textbf{right to strike} has been protected since 1948 under Article 40 of the Constitution. Previously, in a turbulent history\textsuperscript{102}, it received at least in part \textit{de facto} recognition, in particular following the fall of the Fascist Mussolini regime in 1943.\textsuperscript{103} Whether the right to strike is protected as an individual right in the French sense or is subject to a reservation in favour of the collective, as under German law, is a matter of controversy amongst academic writers and has not been definitively clarified by the courts.\textsuperscript{104} At the least, however, the unlawfulness of a wildcat strike is in no way recognised. Protection of the right to strike is not limited to the classic strike, but also includes \textbf{atypical forms of strike action}, such as, for example, wave strikes.\textsuperscript{105} Conversely, blockades and physical prevention of workers from reaching their places of work by strike pickets are not protected.\textsuperscript{106} Support strikes within the same sector are protected under Article 40 of the Constitution.\textsuperscript{107} In addition, the Court of Cassation recognises the protection of the political strike in the employment relationship.\textsuperscript{108} It seems, thereby, to have placed itself in a situation of conflict\textsuperscript{109} with an earlier decision of the Constitutional Court.\textsuperscript{110}

\begin{itemize}
\item \textsuperscript{97} \textit{Laulom}, in Ales/Novitz (Eds.), p. 31, 34, 42 et seq.
\item \textsuperscript{98} Cass. Soc.Bull.civ. 2006 V no 356, p. 223.
\item \textsuperscript{99} \textit{Laulom}, in Ales/Novitz (Eds.), p. 31, 38.
\item \textsuperscript{100} \textit{Laulom}, in Ales/Novitz (Eds.), p. 31, 38; \textit{Pansier}, paragraph 381.
\item \textsuperscript{101} \textit{Laulom}, in Ales/Novitz (Eds.), p. 31, 39 et seq.; \textit{Hekimler/Ring-Kaufman}, p. 77, 109.
\item \textsuperscript{102} For the detailed background, see \textit{Corti/Sartori}, RDT 2010, 321 et seq.
\item \textsuperscript{103} \textit{Ales/Gaeta/Orlandini}, in Ales/Novitz (Eds.), p. 77, 81; \textit{Orlandini}, in Dorssement/Jaspers/v. Hoek (Eds.), p. 77, 83, 155.
\item \textsuperscript{104} Cf. \textit{Ales/Gaeta/Orlandini}, in Ales/Novitz (Eds.) p. 77, 83.
\item \textsuperscript{105} Corte Cass. RIDL 1992 II-854.
\item \textsuperscript{106} \textit{Ales/Gaeta/Orlandini}, in Ales/Novitz (Eds.), p. 77, 81; \textit{Orlandini}, in Dorssement/Jaspers/v. Hoek (Eds.), p. 149, 153 et seq., 155 et seq., in each case with further observations.
\item \textsuperscript{107} Corte Cost. Foro Ital. 1963 I, c. 5.
\item \textsuperscript{108} Corte Cass., Orientamenti Giur. Lav 2005, 509; cf \textit{Vallebona}, I, p. 269 et seq.
\item \textsuperscript{109} Corte Cost. Foro Ital. 1993 I, c. 2401.
\item \textsuperscript{110} \textit{Ales/Gaeta/Orlandini}, in Ales/Novitz (Eds.), p. 77, 88 et seq.
\end{itemize}
employee takes action against an employer other than his own is permissible. Yet an indirect boycott whereby other persons are called upon to boycott the relevant employer is unlawful. The employers’ side is permitted to make any attempt to minimise the consequences of strike action by continuing to operate its plant but undermining the strike by the engagement for fixed periods of strike-breakers or the engagement of hired workers is unlawful. The right to strike is available to public servants, but not to police officers and soldiers. In regard to undertakings which provide essential services, the right to strike is not precluded. However, the Constitutional Court has made it clear that the right to strike must be balanced with the fundamental rights of users (customers). The requisite law in that connection was at first not enacted, having regard to obligations common to the large trade unions relating in particular to prior periods of notice. A statutory enactment was only achieved by law 146/1990 following massive strikes in the public service against the will of the trade unions. The law requires observance of a 10 day notice period, prior notification of the duration of the action and of the manner of implementation of the strike action and, finally, a guarantee that essential emergency services will be maintained. Contravention of the statutory duties can have disciplinary and, for the trade unions, also financial consequences. The provisions were supplemented by Law 83/2000 in order to make provision for compulsory mediation. Strike action does not constitute a breach of contract and merely entails a loss of entitlement to remuneration. Measures against the employee for taking part in the strike are null and void under Articles 15 and 16 of the Workers’ Statute. Where the employer is unable to employ other employees owing to an atypical strike, such as a wave strike, the employer may refuse to pay them remuneration under Articles 1256 and 1464 of the Civil Code. In 2009 an inter-sectoral framework agreement was entered into concerning mediation that has, however, not been taken forward by the relevant parties. In a collective agreement a duty to maintain peaceful relations may be agreed upon. If that agreement is breached the trade union and employees involved in the dispute may be required to pay damages, whilst, on another view, the duty to maintain peaceful relations can only be binding on the trade union and not on the employees.

111 Orlandini, in Dorssement/Jaspers/v. Hoek (Eds.), p. 149, 154 et seq.
112 Ales/Gaeta/Orlandini, in Ales/Novitz (Eds.), p. 77, 81 et seq.
113 Ales/Gaeta/Orlandini, in Ales/Novitz (Eds.), p. 77, 79, 85.
115 Ales/Gaeta/Orlandini, in Ales/Novitz (Eds.), p. 77, 93.
116 Ales/Gaeta/Orlandini, in Ales/Novitz (Eds.), p. 77, 94; German speaking presentation in Abele RdA, 1991, 79 et seq.
In England the legislation has developed contrariwise to that of the Continent. Whereas at first collective negotiations were conducted without State involvement and both sides appreciated the legislative restraint that was exercised (collective laissez-faire), the law on industrial action was initially developed by judge-made law under the common law before being made subject to legal restrictions since the Thatcher era. There was no express right to strike under English law. One could merely speak about the freedom to strike in the sense that the laws conferred immunity against penalties for measures taken in connection with industrial action. Even recognition of the right to take collective action upheld by the ECJ (Section 10 paragraph 61) could do nothing to alter that fact. Recognition of a right at European level did not compel the Member States to recognise comparable rights at domestic level. However, in the meantime, the Court of Appeal has recognised strike action as an element of freedom of association under the ECHR that has been transposed into national law by way of the Human Rights Act 1998. A strike is defined as any concerted stoppage of work or a refusal to work in order to achieve certain conditions and terms of work for oneself, or for others, see Section 246 TULR(C)A, and Section 235 Section 5 ERA 1996. The characteristic feature is therefore the objective set in order to increase negotiating power. A distinction is not made between conflicts of interest and litigation with the result that industrial action may in principle also be used to assert rights. The point of departure is that under common law strike action is a breach of contract entitling the employer to refuse to allow the employee to return to his place of work. In addition, a call to go on strike gives rise to liability in tort on the part of the trade union. That can also include liability to third parties in respect of whom the employer struck against as a result of the strike can no longer perform his contracts. Employers and third parties may apply to the courts for an order prohibiting a strike and may also obtain injunctive relief in that connection. A theoretically conceivable liability for breach of a duty under a collective agreement to maintain peaceful relations will, as a rule, be precluded because collective agreements are not legally binding.

123 Novitz, in Ales/Novitz (Eds.), p. 173, 174 et seq.
125 National Union of Rail, Maritime & Transport Workers v. Serco and Associated Society of Locomotive Engineers and Firemen v London & Birmingham Railway Ltd t/a London Midland [2011] IRLR 399. Criticising, in so far as no substantially different conclusions may be drawn from the description (prior to this decision), Krause, FS Deutsch, 2009, 795, 796 et seq.
126 Novitz, in Ales/Novitz (Eds.), p. 173, 180.
130 For further detail, see Novitz, in Ales/Novitz (Eds.), p. 173, 191 et seq.
The statutory provisions in TULR(C)A 1992 confer **immunities** from liability under specific (narrow) conditions. These immunities have had a turbulent history going back to the Trade Disputes Act 1906. The current provisions can be traced back to the Employment Act 1980 and the Trade Union Act 1984. Thus, under Sections 219, 233, and 244 of the TULR(C)A 1992 a trade union will enjoy immunity only if it has balloted its members and given notice of the strike. An excessively formalistic practice enabling the courts to prohibit strikes was subjected to criticism from the perspective of the fundamental freedom in Article 11 of the ECHR and has, in the meantime, been to a considerable extent tempered by the Court of Appeal specifically on this ground. The strike must, moreover, pursue a lawful objective within the meaning of Section 244 of the TULR(C)A 1992. That will, for example, preclude a strike for recognition by the employer in the context of a dispute concerning representation as between trade unions in relation to a specific group of employees. A **solidarity strike** will also be precluded under Section 224 TULR(C)A 1992 on the ground that it constitutes unlawful **secondary action**. This provision ultimately declares that any industrial action specific to a third party will be unlawful. There is special provision in Section 224 (1) and (3) for lawful picketing. Under Section 220 TULR(C)A pickets must confine themselves to communication and persuasion. Alongside immunities from liability in tort Section 22 TULR(C)A lays down **maximum amounts** for tortious injury which are calibrated according to the size of the trade union; the effect of those amounts is offset by various exclusions. The employer can effect a lockout at least by dismissal. But the termination of the contract of an employee taking part in the strike may prove to be unfair (see below). The **boycott** was originally regarded as lawful but, since the entry into force of the Employment Act 1980, it is now unlawful.

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131 Cf. Deinert, Internationales Arbeitsrecht, § 15 Paragraph 7 with further references.
132 On that, see Mecke, p. 45 et seq.; v. Scherpenberg, p. 34 et seq., with further references; Grote-Seifert, p. 54 et seq.; on restrictions during the Thatcher era, see Docksey, RIW 1991, 72, 724 et seq.; McKendrick/Wedderburn, AiB 1989, 394, 398 et seq.; Waas, ZTR 1992, 311, 313 et seq.
134 Cf. Countouris/Freedland, ELLJ 2010, 489, 499 et seq.
135 See above Footnote 121.
136 Novitz, in Ales/Novitz (Eds.), p. 173, 188.
138 Cf. IDS Employment Law Handbook, Industrial Action, paragraph 4.7 et seq.
139 Ultimately, the pre-eminent position of picketing in English law may be accounted for by the fact that it is the only third-party-related measure, Reiter, EuZA 2010, 469, 481 et seq., with further references.
140 The employee’s contractual liability (owing to the non-binding nature of the collective agreement the trade union will not normally be liable in contract) is indeed not precluded but is of little practical significance as proof of damage caused will be hard to adduce, Krause, FS Deutsch 2009, p.795, 797.
141 For further detail, see Reiter, EuZA 2010, 469, 477.
142 Grote-Seifert, p. 104 et seq., 113 et seq.
is a form of secondary action. The call for a consumer boycott is, however, lawful because it does not incite a breach of contract.\textsuperscript{145} The strike does not terminate the employment contract.\textsuperscript{146} The employee cannot however claim \textit{remuneration} for the period of the strike.\textsuperscript{147} In addition, the strike will, as stated, entitle the employer to dismiss the employee. However, a \textit{selective dismissal} will be unlawful under Section 237 and 238 TULR(C)A. In addition, the employee enjoys protection from unfair dismissal under Section 238A TULR(C)A where the industrial action involved enjoys immunity from tortious liability (see above). Industrial action carried out not under the protection of \textit{immunity} will mean that a subsequent contract may be challenged on the ground of economic duress.\textsuperscript{148}

In the \textit{USA} the law on industrial action is to a large extent laid down in the NLRA as regards the employment contracts of employees of private employers. It is not however applied to industrial action involving foreign seafarers on vessels flying foreign flags in US ports.\textsuperscript{149} The National Labor Relations Board (NLRB), established under the NLRA, carries significant weight in terms of the national law on industrial relations because, under Section 10 (c) of the NLRA, it is the adjudicator on measures to ban \textit{unfair labor practices}.\textsuperscript{150} This is not the place to embark upon an examination of the specific features of the Railway Labor Act or of the specific features of employment contracts of employees of the Federal States. Hitherto, there appears not to have been any constitutional protection of the right to strike.\textsuperscript{151} The Supreme Court has expressly ruled that, neither under the common law nor in the constitution, is an absolute right to strike guaranteed and, consequently, it has upheld statutory restrictions.\textsuperscript{152} Accordingly, the scope of the right to strike and of other instruments in regard to the law on industrial action are dependent upon the legal formulation. Under Section 142 (2) LMRA, a strike is a concerted cessation of work or any concerted reduction or interruption of the work processes by the employee. This also includes spontaneous strike action not organised by the trade union.\textsuperscript{153} A consequence of the creation of a bargaining unit is however that, under Section 9 (a) of the NLRA, only the majority trade union is entitled to represent employees in the unit. Industrial action by minority trade unions is therefore unlawful.\textsuperscript{154} There is no re-

\begin{thebibliography}{99}
\item \textsuperscript{144} Gamillscheg, KAR I, p. 1155.
\item \textsuperscript{145} Middlebrook Mushroom Ltd v TGWU [1993] ICR 612.
\item \textsuperscript{146} Wilkins and Others v Cantrell and Cochrane (GB) Ltd [1978] IRLR 483.
\item \textsuperscript{147} Cf. BritishTelecommunications v Ticehurst and Another [1992] ICR 383; for further detail see Novitz in Ales/Novitz (Eds.) p. 173, 185 et seq.; also IDS Employment Law Handbook, Industrial Action, paragraph 9.6; Grote-Seifert, p. 95.
\item \textsuperscript{148} Universe Tankships of Monrovia v ITF [1982] ICR 262 (HL).
\item \textsuperscript{149} Increse v Maritime Workers 372 US 24; McCulloch v Sociedad Nacional de Marineros de Honduras 372 US 10; ELL-Goldmann/Corrada, paragraph 984.
\item \textsuperscript{150} Cf. Gorman/Finkin, p. 366 et seq.
\item \textsuperscript{151} Cf. Gorman/Finkin, p. 277 et seq.
\item \textsuperscript{152} Dorchy v Kansas, 272 US 306, 311.
\item \textsuperscript{153} Westfall/Thüsing, RdA 1999, 251, 254.
\end{thebibliography}
striction to a collective bargaining objective. Therefore, at any rate, from this perspective, a political strike cannot be unlawful. The Supreme Court has by implication recognised its lawfulness. Of course, the strike may then be unlawful as a secondary boycott. Likewise, a strike in order to implement individual rights will be lawful, but may fall under a mediation or arbitration provision in the collective agreement and therefore be unlawful. In practice strikes in order to implement legal claims seldom occur. Sympathy and solidarity strikes are in principle permissible, but only if they do not contravene a no-strike clause. Thus, for instance, a trade union may strike in order to support industrial action taken by another trade union. Also, consumer boycott is a lawful means of industrial action. However, under Section 8 (b) (4) of the NLRA, a secondary boycott will be unlawful where the intention is to force the employer to boycott another employer (there is an exception under Section 8 (e) of the NLRA: textile industry). Partial strikes as well as recurring strikes of short duration and strikes without leaving the place of work are not protected by Section 7 of the NLRA, with the result that the employer may respond to them by means of reprimands and dismissal without incurring the reproach of an unfair labour practice; they will not in themselves be unlawful as an unfair labor practice. The employers’ side has the lockout at its disposal. The Supreme Court has even recognised a defensive lockout in which the expected strike is anticipated. Conversely, the payment of strike-breaking premiums is unlawful. In addition, the employer will have the possibility of the so-called permanent replacement whereby he may permanently fill the posts of striking employees if he has neither caused, nor extended the industrial action by an unfair labour practice. The employee will then only be able to demand reinstatement if a suitable post is available.

Duties to maintain peaceful relations may be inferred from no-strike clauses in a collective agreement. In addition, a cooling-off period will come into play. The trade union must notify the employer and State authorities if it wishes to amend or terminate a collective agreement. It may then not strike for 60 days, or at least not until the expiry of the collective agreement. During the lawful strike there is a duty on the employer to negotiate under Section 8 (a) (5) of the NLRA. Likewise, the trade union representing the staff will be under an

155 Westfall/Thüsing, RdA 1999, 251, 255.
158 Westfall/Thüsing, RdA 1999, 251, 255.
161 Gorman/Finkin, p. 313 et seq.
162 Westfall/Thüsing, RdA 1999, 251, 256; on the distinction between protected and unprotected collective activities, see Gorman/Finkin, p. 395.
164 For differentiations, see Westfall/Thüsing, RdA 1999, 251, 259.
165 Labor Board v Mackay Radio and Telegraph Co. 304 US 333.
obligation to negotiate in good faith under Section 8 (b)(3) of the NLRA. There is no principle of proportionality comparable to the German law on industrial relations. Accordingly, the protection of the employer from losses or damage to property by the strike is only rudimentary in outline.\footnote{166 Further detail in \textit{Westfall/Thüising}, RdA 1999, 251, 256.} Nor is there any general restriction on the right to strike in the interests of the \textit{rights of third parties}. In principle, therefore, the whole country could be made to come to a standstill as a result of the industrial action. However, since the Taft Hartley Act the President may, under Section 206 of the LMRA, request an enquiry report if he considers there is a risk to national health or safety and thereafter may instruct the Attorney General to apply to the district court for a prohibition order. During the period of the injunction a further report will be submitted within 60 days to the President containing the employer’s latest offer which may be put by the NLRB to a secret ballot of the employees concerned. The procedure is not a compulsory mediation, but is intended to serve the purposes of negotiation and mediation by deferring or delaying industrial action.\footnote{167 Biedenkopf, RdA 1964, 81, 88.}

Taking part in a strike does not end the \textit{employment contract}.\footnote{168 \textit{Labor Board v Mackay Radio and Telegraph Co.} 304 US 333.} However, reinstatement after the end of the strike may be prevented or hindered by the fact that the employer has permanently replaced the employees concerned (see above). The striking or replaced employee has no claim to remuneration. However, where the employer refuses, without cause, to reinstate the employee, he will be liable to pay remuneration.\footnote{169 \textit{Gorman/Finkin}, p. 472 et seq.} As a matter of principle, employers may sue for \textit{damages} under Section 301 of the NLRA by bringing in action against the union for breach of the collective agreement by virtue of industrial action. Conversely, actions against individual participating employees are of little significance which will be attributable to the absence of reimbursement of costs in the proceedings, the lack of acceptance by the broader public of such actions and, finally, to the danger that such action could be regarded as a reprimand going to the exercise of the right to strike and thus constituting an unfair labour practice.\footnote{170 \textit{Westfall/Thüising}, RdA 1999, 251, 259.} Section 303 NLRA confers on the victim of secondary boycott the possibility of suing for damages with the result that a person against whom the boycott is directed can bring an action.\footnote{171 \textit{Gorman/Finkin}, p. 389.}

This brief survey has already shown that the law on industrial action is \textit{regulated in very diverse ways}. Although there is wide acceptance in regard to recognition of the right to strike in itself, the United Kingdom constitutes an exception inasmuch as the most that one can say in this connection is that there is freedom to strike. A particular feature to be noted in Netherlands law is the direct application of Article 6 section 4 of the European Social Charter.\footnote{172 HR NJ 1986, 2546; \textit{Jaspers}, in Ales/Novitz (Eds.) p. 135, 141; \textit{Waas}, Modell Holland, p. 108.} Yet,
recognition of alternative and supplementary forms of industrial action is very variable. On the employer side recognition of lockout in Germany may be regarded as an exception in European comparative law terms. But, also in Switzerland and the Czech Republic it is lawful, as it is outside Europe, in the USA. Also, the persons on whom the right to strike is vested differ in the same way as international guarantees contain no direct indications on this issue, whilst interpretative rulings in practice seem to proceed rather on the basis of an individual guarantee. Whilst in France individuals are the persons entitled to the right to strike, in Germany the right can only be exercised under the responsibility of the trade unions and, ultimately, that is also the case in the USA. But in Lithuania, for example, alongside the trade unions, the works councils, but not the employees themselves, that can exercise the right. Even if differing in detail, there are in the various legal orders restrictions on the right to strike in favour of the fundamental rights of third parties which are widely discussed under the heading of essential services. There are also frequently restrictions in regard to strike objectives. Belgium may, in that connection, be an exception inasmuch as there is no definitive acceptance of such limits. A duty to maintain peaceful relations is widespread in terms of comparative law. In Sweden there is even, under Paragraph 41 of the MBL a statutory duty to maintain peaceful relations which cannot be derogated from. In the United Kingdom, on the other hand, there is normally no such duty. There is a widespread acceptance that contractual duties will be suspended. Conversely, participation in the strike will lead in Denmark to termination of the employment contract. In practice, however, the differences are rather small. The reason ultimately lies in the fact that, as a rule, reinstatement clauses are inserted into collective agreements. Worthy of note, finally, is the Austrian law on industrial action, not so much in regard to differing concept statutory concepts or specific features of relevance to the conflict of laws, but because of the fact that the Austrian law on
industrial action is markedly friendly in practice to the economy\textsuperscript{186}, there is almost no case law to buttress it.\textsuperscript{187}

It is also relevant to note that powers in regard to industrial action are subject to restrictions by European fundamental freedoms (in general see Section 10 paragraph 61, and see also paragraphs 28 and 46 below).\textsuperscript{188}

V. The law applicable to tortious acts arising out of industrial action

Article 9 of Rome II Regulation refers to the place where the industrial action takes place. However, by reference to Article 4 section 2 of the Rome II Regulation, the place will primarily be where \textit{both parties have their habitual residence}.\textsuperscript{189} This must be in the same State.\textsuperscript{190} The connecting rule of the habitual residence common to both parties may produce an effect where measures in connection with industrial action between parties within the same State are taken abroad, for instance, in the case of a strike by German seafarers against a German ship-owner taking place in a Danish port.\textsuperscript{191} The same will apply where a German plant installer is posted abroad for the purpose of prospecting for customers and, whilst there, obeys a strike order called by a trade union and ceases to work.\textsuperscript{192} Previously, these questions had been amenable to a solution by way of the acceptance of extraordinary extraterritorial effect.\textsuperscript{193} The habitual \textbf{place of residence} of the employee is generally the place in which he has the central focus of his life.\textsuperscript{194} However, by analogy with Article 23 section 2 of the Rome II Regulation, regard should primarily be had to the place where the employee works if he resides at least for part of the time in that State.\textsuperscript{195} Under Article 23 section 2 of the Rome II Regulation, the habitual residence of the employer, in the case of natural persons carrying on a business activity will be the principal place of business. If several places may be so deemed, the place to be focused

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\textsuperscript{186} Cf. statistics in Hekimler/Ring-Löschnigg, p. 211, 233 according to whom in 2001 and from 2004 to 2009 there were no industrial disputes at all.

\textsuperscript{187} Cf. exposition of the law on industrial action in Marhold/Friedrich, p. 491 et seq., in which more or less no Austrian case-law is cited but citing the German Federal Labour Court (BAG) on several occasions. Nor any practical strike experience in Luxembourg, cf. Seifert, in Becker/Schwarze (Eds.), Gemeinwohlverantwortung im Binnenmarkt, Tübingen 2010, p. 75, 80.

\textsuperscript{188} Cf. for Italy, Ales/Gaeta/Orlandini, in Ales/Novitz (Eds.), p. 77, 98 et seq.

\textsuperscript{189} Legal policy critique by Joubert, in Corneloup/Joubert, (Eds.), p.55, 79 et seq.; Zelfel, p. 100 et seq.; MünchKomm-Junker, Art. 9 Rom I-VO paragraph 31; Knöfel, EuZA 2008, 228, 238; also Morse, FS Pocar, 2009, p. 723, 726 et seq.

\textsuperscript{190} Periods of residence in several EU Member States cannot however override the law of a non-Member State, cf. v. Hein, RabelsZ 73 (2009), 461, 481 et seq.

\textsuperscript{191} Example of MünchKomm-Junker, Art. 9 Rome II VO, paragraph 30; cf. also Palao Moreno, Yearbook of International Private Law 9 (2007), 115, 122.

\textsuperscript{192} Thus also in regard to earlier conflict of laws rules, Däubler, AR 1, paragraph 695.

\textsuperscript{193} Cf. Otto, Section 13 paragraph 10 et seq.

\textsuperscript{194} Cf. in general on the concept of habitual residence, Sůjecki, EWS 2009, 310, 315.

\textsuperscript{195} In this regard, presumably also Däubler-Däubler, Arbeitskampfrecht, Section 32 paragraph 38, who seeks to draw an analogy with Article 8 Section 2, first sentence of the Rome I Regulation.
on is the place from where the employer receives his instructions. Under Article 23 section 1, first sentence, of the Rome II Regulation, for trade unions as for employers, the habitual residence will be the place of central administration, provided that they are legal persons. There is, however, an exception under the second sentence for employers: in respect of events giving rise to claims for damages occurring in the course of operation of a branch, agency or other establishment, the place where such branch, agency or other establishment is located will be treated as the habitual residence.

Of overriding importance again is the choice of law under Article 14 of the Rome II Regulation. It is indeed at times asserted that the purpose of Article 9 of the Rome II Regulation is to preclude permissibility of a choice of law. However, that does not alter the fact that Article 9 of the Rome II Regulation does not exclude a choice of law, unlike Article 6 section 4 and Article 8 section 3 in respect of unfair competition and intellectual property, with the result that a contrario reasoning would appear to favour a choice of law. Already at an earlier stage, the English courts acknowledged a choice of law under a collective agreement in regard to an action brought against the collective agreement owing to duress as a result of unlawful industrial action. The concept fails, of course, for industrial action that has neither been preceded nor ended by collective agreement. Under Article 14 of the Rome II Regulation choice of law is permitted only with restrictions. A subsequent choice of law after an event giving rise to a claim for damages has occurred will be permissible. That will also be possible in regard to prohibitory actions. The choice of law must be express or must be capable of being inferred with sufficient certainty from the circumstances of the case and, in cases occurring purely within the borders of one country and in cases within the internal market, they will only apply subject to restrictions as provided for in Article 14 sections 2 and 3 of the Rome II Regulation. These are therefore provisions analogous with those in Article 3 sections 1, 3 and 4 of the Rome I Regulation which is why reference is made to the commentary on the choice of law in regard to the law applicable to the employment contract (Section 9 paragraphs 13 and 37). Even in regard to the Rome II Regulation, the choice of law may not come about merely by negotiation around a specific law. Conversely, a prior choice of law would only be possible if all parties pursue a commercial activity, which will not be so in the case of trade unions. Under Article 14 section 1, second sentence, of the Rome II Regu-

196 Däubler-Däubler, Arbeitskampfrecht, Section 32 paragraph 38.
198 MünchKomm-Junker, Art. 9 Rom I-VO paragraph 7.
200 MünchKomm-Junker, Art. 9 Rom I-VO paragraph 33.
202 Däubler-Däubler, Arbeitskampfrecht, Section 32 paragraph 43; G. Wagner, IPRax 2008, 1, 10.
lation, the choice of law leaves the **rights of third parties** unaffected. It is open to doubt whether this is practicable in connection with the choice of law in regard to a dispute concerning cessation between parties to industrial action where the individual legal position of the parties to the employment contract involved in the dispute are affected.\(^{203}\)

The **place where the industrial action** takes place is the place in which the measure in connection with the industrial action is actually taken\(^{204}\) or in which action, specifically in the case of strike action, is omitted. Conversely, the place from which the measures are planned or coordinated is not determinant.\(^{205}\) The place where the industrial action takes place may often go hand in hand with the habitual place of employment. Difficulties arise, for instance, in the case of a boycott or supporting strike where several places of employment, that is to say, those of the persons directly involved and the places where the main dispute is played out.\(^{206}\) In addition, Article 8 of the Rome I Regulation focuses on the habitual place of employment, yet the place where the industrial action takes place may also be a temporarily different place of employment, for instance, where the temporarily posted employee goes on strike.\(^{207}\) In those cases both places will be the places where the industrial action takes place. Thus, in the case of a boycott the place where the call for a boycott was made will be the place where the industrial action takes place.\(^{208}\) For employees following the call for a boycott the place where the industrial action takes place will be the place where they refuse to work. There will therefore be one law applicable to tortious acts arising out of the industrial action in regard to the calls for boycott and another for the actual boycott.\(^{209}\) Substantive legality of the call to boycott is dependent, under the relevant *lex causae*, on the lawfulness of the blockade for which the call was made, and is thus a prior question (see in regard to its solution, paragraph 24 below).\(^{210}\)

Industrial action on the high seas is scarcely of any significance because ultimately for factual reasons they cannot be rationally carried out. Insofar as industrial action does take place on **seafaring vessels** in port the connecting factor of the flag\(^{211}\) under the Rome II Regulation can no longer be warranted.\(^{212}\) Of greater relevance here is the place where the industrial action takes place with

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\(^{203}\) Dorssement/v. Hoek, ELJJ 2011, 101, 111; in the same sense see also Palao Moreno, Yearbook of International Private Law 9 (2007), 115, 121.

\(^{204}\) Zelfel, p. 80; MünchKomm-Junker; Article 9 Rom I-VO paragraph 7.

\(^{205}\) C. Heinze, RabelsZ 73 (2009), 770, 785 et seq.; also Knöfel, EUZA 2008, 228, 244.

\(^{206}\) Cf. v. Hoek, in: Dorssement/Jaspers/v. Hoek (Eds.), p. 425, 453; see also Hergenröder; FS Birk, 2009, p. 197, 204, referring to the ‘separation principle’; in regard to its substantive-law aspect, see with further references Däubler, Der Kampf um einen weltweiten Tarifvertrag, p. 49 et seq.


\(^{208}\) Däubler-Däubler, Arbeitskampfrecht, Section 32, paragraph 30.

\(^{209}\) Hergenröder, p. 346.

\(^{210}\) Hergenröder, p. 349 et seq.

\(^{211}\) Thus, for example, the judgment of the (Danish) Arbejdsret of 31.8.2006 – A 2001.335 in DFDS Torline referring the case to the ECJ (see above under footnote 16; it remains unclear,
the result that, as in the case of loading and unloading boycotts by port workers, 213 the law of the port State will be applicable. 214 Of primordial importance will be the common domestic law, 215 if there is one. Before the Rome II Regulation that was, for example, the position in England under Section 11 of the Private International Law (Miscellaneous Provisions) Act 1995. 216 The same applies to France. 217 In the Netherlands this was upheld, at any rate, in a case where the employment contracts of those seafarers were all made subject by a choice of law to a foreign law applicable to the contract. 218 The application of the law of the port State allows a kind of strike-law shopping 219, which, however, must be accepted. 220 Moreover, it should be borne in mind that the ports used are not designated by the trade unions or by the employees. Where the law of the port State contains a self-restriction and does not itself seek to be applied, as can be the case, for example, with the US NLRA (see paragraph 11), the law of the port State contains a self-restriction and does not itself seek to be applied in accordance with the EEC’s case law on the Rome Convention (see Section 9 paragraph 172), there is nothing else for it but to elaborate a self-standing conflict rule because Article 9 of the Rome II Regulation offers no other solution. The connecting factor of the flag is not appropriate in this connection. However, whether the conflict rule is a unilateral one applying only to Danish vessels, cf. Drobnig, Der Kampf um einen weltweiten Tarifvertrag, p. 39 et seq. and Evju, RIW 2007, 898, 901); see also LAG Schleswig-Holstein, AuR 2007, 280; in regard to the flag as connecting factor, see again Hergenröder, FS Birk, 2009, p. 197, 208; Zwiller, seeleutstreik, p. 398; likewise NJW 1979, 1739.
action. The central focus of the industrial action must be located in the law with which the conflict of interests is concerned. The consequence of that is, that in the event of industrial action concerning a collective agreement a **connecting rule ancillary to the collective agreement** is necessary. For the enforcement of contractual rights an ancillary contractual connecting rule will be required. In the event of various laws being applicable to contracts, the connecting factor would be the law to which the majority of contracts are subject.

**Cross-border industrial action** is industrial action in the course of which actions or activities in connection with that industrial action take place in several countries. That applies not only to cross-border disputes in favour of a common collective agreement or for several parallel collective agreements, but also for support actions. Practice shows that cross-border collective action has hitherto served to demonstrate cross-border solidarity. By making the connecting rule the place where the industrial action takes place, Article 9 of the Rome II Regulation seems to be eluding a uniform view of the matter and to be encouraging a **fragmented view** in connection with which different laws applicable to tortious actions arising out of industrial action will govern action taken in the different countries concerned.

Thus, industrial action in support of German colleagues would be unlawful in part if it were conducted in the USA and England because it is lawful only in the USA (under certain conditions, see paragraph 11) and the English law on industrial action would be applicable to the support actions conducted in England and that law precludes solidarity strikes (see paragraph 10). Yet it would be lawful under the law governing industrial action in the principal location in which the action is being conducted (Germany) (see paragraph 7). The same would apply

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222 On the different factual configurations with examples, see Däubler-Däubler, Arbeitskampfrecht, section 32, paragraph 5.

223 Cf. in regard to practice Warneck, in: Dorsemont/Jaspers/v. Hoek (Eds.), p. 75, 76 et seq.; Däubler-Däubler, Arbeitskampfrecht, Section 32 paragraph 7.

224 Review of current situation in Zwanziger, p. 6 et seq. 10 et seq.; Däubler, Der Kampf um einen weltweiten Tarifvertrag, p. 16; cf. Däubler-Däubler, Arbeitskampfrecht, section 32, paragraph 9 et seq.

225 Däubler-Däubler, Arbeitskampfrecht, section 32, paragraphs 31 and 52; Huber-Illmer, Art. 9 Rome II paragraph 33; Joubert, in: Corneloup/Joubert (éd.), p. 55, 77, footnote 68; C. Heinze, RabelsZ 73 (2009), 770, 786; v. Hoek, in: Dorsemont/Jaspers/v. Hoek (Eds.), p. 425, 450; Knöfel, EuZA 2008 228, 246; Palao Moreno, Yearbook of Private International Law 9 (207) 115, 125; Plender/Wilderspin, paragraphs 23-021; Zelfel, p. 98 et seq.; MünchKomm-Junker, Art. 9 Rom I-VO paragraph 29; ErfK-Schlachter, Art. 9 Rom II-VO paragraph 2; MünchArb-Oetker, Section 11 paragraph 126; Bamberger/Roth-Spickhoff, Art. 9 Rom I-VO paragraph 3; Calliess-Rödl, Art. 9 Rome II paragraph 27; Deinert, ZESAR 2012, 309, 311; similarly on the previous legal position see Jechke, p. 29; Birk, RabelsZ 46 (1982) 384, 406; likewise FS 50 Jahre BAG, p. 1165, 1169; Gitter, ZfA 1971, 127, 150; from a French point of view see Lyon-Caen/Lyon-Caen, paragraph 75; for another perspective (connection to the main facts) Leible/Lehmann, RIW 2007, 721, 731; similarly see also Erman-Holoch, Art. 9 Rom II-VO, paragraph 6, the problem therein addressed of participation in strike action abroad scarcely exists in actual fact in light of the preference given to the connecting rule in favour of the common domestic law.
to a boycott by port workers in France in favour of industrial action being principally conducted in Germany (see paragraph 8). This problem may easily be resolved by the persons involved on the spot refraining from collective action. It becomes more problematical, where joint strikes are conducted across borders under the same kind of collective agreements and where, in some countries, agreement has already been reached with the result that the strike to coerce agreement to demands is transformed into a strike in support. Whether legal systems which do not permit the strike in support, or permit it only with restrictions, would have a differentiated answer to offer in this scenario, will in each case be a question for the relevant lex causae.  

In regard to the law applicable to tortious acts arising out of industrial action, as determined under Article 9 of the Rome II Regulation, there is no escape clause. It is also apparent from the genesis of the Rome II Regulation that this was a deliberate decision of the legislature. There can therefore be no application by analogy of other escape clauses. Nor, therefore, can there be any ancillary connecting rule under a collective agreement (see paragraph 21).  

Unlike under the earlier autonomous law, Article 24 of the Rome II Regulation prohibits renvoi (Section 6 paragraph 2).  

VI. Scope of the law applicable to tortious liability in connection with an industrial action  

1. Uniform assessment of lawfulness  

Problems arise in regard to interconnectedness with contractual claims. From the point of view of policy in regard to the conflict of laws, it would have been desirable for there to be a uniform connecting rule for the law applicable to matters of tort arising out of collective bargaining and industrial action and for the law governing contractual liability. There can be no coordination between the law applicable to collective bargaining and the law applicable to matters of tort arising out of industrial action owing to the absence (see paragraph 19) of an escape clause for the law applicable to liability in tort for industrial action where the parties to the subsequent collective agreement do not agree in that agreement on a choice of the law to govern the industrial action. Thus, it can happen that claims as between parties to individual agreements for breach of contract arising out of unlawful industrial action will be dealt with contractual-
On one view, which is to be rejected (paragraph 28), claims against trade unions or employer associations for breach of the duty to maintain peaceful relations can be classified as arising under the law applicable to collective agreements. That can lead to a different connecting rule being applicable, as opposed to rule applicable to claims in tort arising out of the industrial action. In that connection, it has been proposed that, in regard to the contractual connecting rule, use be made of the escape clauses and that the contractual liability of the parties to the collective agreement and the parties to the employment contract should be connected on an ancillary basis to the law applicable to liability in tort for industrial action. That would lead, it is true, to a certain fragmentation of the law applicable to the collective agreement and of the law applicable to the employment contract. Yet, that can be readily justified by the need for a uniform assessment of the situation under one legal system. On a correct view, this should be confined to the question of the assessment of lawfulness and should not include the duty of care yardstick. Because it is only in that regard that there is a need for uniform assessment (see on this solution, paragraph 24). This solution is overall more consistent with the scheme of Article 8 of the Rome I Regulation and Article 9 of the Rome II Regulation. It is also reflected in the decision in the DFDS Torline case. In the main proceedings, a court was competent to decide on the lawfulness of industrial action and another court had jurisdiction to determine damages. The ECJ deemed jurisdiction in regard to liability for tort as being also determinant and binding on the court that had jurisdiction on the question of lawfulness.

Article 9 of the Rome II Regulation governs only liability, that is to say the law applicable to liability in tort for industrial action. Conversely, the law applicable to the industrial action is not regulated in the Rome II Regulation. In light of the coordination that is desirable from the point of view of conflict of laws policy (see paragraph 21), the view which was hitherto widely taken should be followed, that is to say the relevant place is likewise that in which the industrial action takes place (see paragraph 4). All questions relating to the industrial action will thus be governed by the same legal system. Of course, this solution is one reached by autonomous German private international law which will not necessarily be uniformly binding at European level. The scope of the law applicable to the industrial action is however quite small. Liability is determined under Article 9 of the Rome II Regulation insofar as it concerns liability in tort.

234 Däubler-Däubler, Arbeitskampfrecht, Section 32 paragraph 35.
235 For a critique, see Dorssement/v. Hoek, ELLJ 2011, 48, 68 et seq.
236 MünchKomm-Junker, Art. 9 Rom II-VO paragraph 13.
237 As also in this case and indeed specifically owing to systemic considerations, C. Heinze, RabelsZ 73 (2009) 770, 790.
239 ECJ IPRax 2006, 161, 162 et seq. – DFDS Torline; paragraph 2.
240 For another view, Hergenröder, EAS B 8400, paragraphs 135 et seq., continuing to plead for a central-focus connecting factor, albeit regretting the uncoordinated outcomes.
whilst contractual liability follows the employment contract or the law applicable to the collective agreement (see on that, paragraph 21). The most significant area of application of the law applicable to the industrial action is the issue of the effect on remuneration (see paragraph 38). In addition, one may have the notion that the law applicable to industrial action embraces primarily the issue of the lawfulness of the action. However, under Article 15 of the Rome II Regulation, the law applicable to liability in tort is to apply uniformly which means that the basis of liability (and with it the issue of illegality of conduct) is covered by the law applicable to tort. This solution is in line with the objective of Article 9 of the Rome II Regulation which is intended to enable persons involved to obtain a reliable assessment on the basis of local law (see paragraph 3). No different result is arrived at as a result of the lawfulness of industrial action being determined not by the law applicable to liability in tort in connection with the industrial action, but simply by the law applicable to the industrial action, which, in its turn, will be subsumed under the place where the industrial action takes place or at least under the autonomous PIL of the place of the dispute. Nor does recital 28 point in any other direction. It is therein stated that Article 9 is without prejudice to the conditions relating to the exercise of industrial action in accordance with national law and without prejudice to the legal status of trade unions or of the representative organisations of workers as provided for in the law of the Member States.

23 Overall recital 28 has little to say. Relevance is however attached to it in regard to another question: If the ITF, whose headquarters are in London, and a national trade union were to take industrial action in a foreign port, claims against the ITF would be governed by the law of the place where the industrial action is taken, whereas for claims against the national trade union (e.g. the German service union Ver.di), the home law common to the employer would be determinant (in the example, German law) under Article 4 section 2 of the Rome II Regulation. Recital 28 is thus intended to refer to the place where the industrial action is conducted as regards the assessment of lawfulness in order to arrive at a uniform assessment of lawfulness. To infer from such a vague formulation in a recital, which is not a regulatory Article, a referral provision which runs counter to the provisions in the Article itself cannot readily be reconciled with the guarantee function of the regulatory text. Nonetheless, we are left with the unsustainable outcome that a single occurrence of industrial action would in this context be governed by the law of the place where the action is taken, whereas for claims against the national trade union, the home law common to the employer would be determinant.

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242 Däubler-Däubler, Arbeitskampfrecht, Section 32 paragraph 24.
243 Palandt-Thorn, Article 15 Rom II-VO paragraph 3.
244 MünchKomm-Junker, Article 15 Rom II-VO paragraph 9; cf. Knöfel, EuZA 2008 228, 239.
246 Thus, Däubler-Däubler, Arbeitskampfrecht, Section 32 paragraphs 44 et seq.; ErfK-Schlachter, Article 9 Rom II-VO paragraph 1.
247 Cf. Huber-Illmer, Article 9 Rome II, paragraphs 35 et seq.
248 MünchKomm-Junker, Art. 15 Rom II-VO paragraph 30, 36; Zelfel, p. 119 et seq.; for another view, Däubler-Däubler, Arbeitskampfrecht, Section 32 paragraph 40.
way end up being assessed under different legal systems. The best way of avoiding that is by a teleological reduction of Article 4 section 2 of the Rome II Regulation in the sense that the application of the common home law will only be considered if all parties involved have their habitual residence in the same State.\textsuperscript{249} Recital 28 may then schematically support this interpretation.

Moreover, there will be a single assessment of lawfulness where industrial action is dependent on the lawfulness of other industrial action.\textsuperscript{250} Example: German workers conduct a strike in support of employees of a French group company. In the context of the German law applicable to liability in tort for the industrial action under Article 9 of the Rome II Regulation, the prior question arises as to the lawfulness of the principal industrial action.\textsuperscript{251} This prior question has to be dealt with autonomously under the \textit{lex fori} (Section 6 paragraph 15).\textsuperscript{252} Thus, under French law, lawfulness under the law governing liability is thus to be assessed on the basis of Article 15 (a) of the Rome II Regulation, in accordance with Article 9 thereof, as the place where the industrial action is conducted, which therefore ensures a uniform assessment of lawfulness. The same will moreover apply in regard to the contractual liability of the parties to the collective agreement.\textsuperscript{253} Finally, the lawfulness of the industrial action as a prior question must also be determined in regard to whether the collective agreement may be challenged under Article 10 of the Rome I Regulation under the law applicable to the industrial action.\textsuperscript{254} The House of Lords adopted a different approach. The boycott by port workers in Sweden coerced a collective agreement into existence, which was set aside on the ground of duress although under Swedish law the boycott was lawful. The lawfulness of the secondary action was a matter to be determined by English law which governed the collective agreement.\textsuperscript{255} The case illustrates that the prior question of the lawfulness of the industrial action is a substantive question to be clarified by the court (see Section 6 paragraph 11), though precluded by Paragraph 25 a of the

\begin{footnotesize}
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\item \textsuperscript{249} Thus, \textit{Dorssemont/v. Hoek}, ELLJ 2011, 101, 109; \textit{Deinert}, ZESAR 2012, 309, 314.
\item \textsuperscript{250} \textit{MünchKomm-Junker}, Art. 9 Rom II-VO paragraph 37.
\item \textsuperscript{251} \textit{BAG AP No. 173 on Article 9 GG – Arbeitskampf}.
\item \textsuperscript{252} \textit{Deinert}, ZESAR 2012, 309, 313; likewise \textit{Crespo Hernández}, Kinesis 2008, paragraphs 7 et seq. To the same effect, \textit{Däubler-Däubler: Arbeitskampfrecht}, Section 32 paragraph 33; likewise on the earlier law, \textit{Gitter}, ZFA 1971, 127, 174 et seq.; for an assessment of the prior question under the \textit{lex causae} where a foreign law is the law applicable to the industrial action \textit{Hergenröder}, p. 227 et seq. As here, \textit{Jeschke} (at p. 29 et seq.) assesses the problem as a prior question but does not take a definitive view on its solution. The issue is entirely overlooked by the ArbG Wuppertal, AP No. 20 on Article 9 GG – Arbeitskampf. Expressing doubts under earlier French law in regard to industrial action in the context of multinational groups (in favour of a uniform assessment), \textit{A. Lyon-Caen}, Rev.crit.DIP 1977, 271, 289 et seq.
\item \textsuperscript{253} Thus, also \textit{Däubler-Däubler: Arbeitskampfrecht}, Section 32 paragraph 36; also \textit{Dorssemont/v. Hoek}, ELLJ 2011, 48, 72 et seq.
\item \textsuperscript{254} Cf. from a legal-policy standpoint, \textit{Hoek}, in: \textit{Dorssemont/Jaspers/v. Hoek} (Eds.), p. 425, 445, 446 et seq.
\item \textsuperscript{255} \textit{Dimskal Shipping Co. v. ITF [1992]} ICR 37 (H.L.); see, on that, \textit{Gamillscheg}, FS Gnade, 1992, p. 755, 758 et seq.
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Swedish MBL. Under that provision, a collective agreement which, under a foreign law, would be unlawful owing to unlawful industrial action must be regarded as valid if the action was carried out in compliance with the Swedish law. Whether, in the event of *supporting industrial action*, in addition to the prior question of the lawfulness of the principal industrial action under the law applicable to it, the principal action is required to be notionally lawful under the law applicable to the supporting industrial action is a substantive law question which, as regards German law, would generally be answered in the negative (see also paragraph 44 below). Secondary action in favour of the employees of a French group company would then depend for its validity on the lawfulness under French law of the principal industrial action. If that is the case, a notionally different assessment of the principal action under German law would not preclude the secondary action from being lawful.

A question which previously caused difficulty and gave rise to differing appraisals from a comparative law perspective was whether the lawfulness of the industrial action was to be classified in terms of the law applicable to the industrial action or the law applicable to the individual contract. This question can only be resolved uniformly in terms of contract and tort law and must be determined under Articles 9 and 15 of the Rome II Regulation governing the law applicable to liability in tort for industrial action (see paragraph 22) by the place where the action is conducted were one not to allow liability overall to be determined on an ancillary basis by the law applicable to liability in tort for the industrial action (see paragraph 21). This solution is attributable to the structure of the Rome II Regulation and to its interconnectedness with the Rome I Regulation and does not have regard to the fact that the question of the lawfulness of industrial action in countries such as France (paragraph 8), which construe the right to strike as an individual right, would more readily be classified in terms of contractual law. However, it cannot be denied that the internal concordance of decisions aimed at can be set at naught by the choice of law of the parties to earlier proceedings (specifically in the context of an interlocutory injunction for prohibition).

**2. Further specific questions on the scope of the law applicable to liability in tort for the industrial action**

Article 9 of the Rome II Regulation covers only tortious claims arising from an industrial dispute. Claims arising out of *unauthorised management* or out of...
pre-contractual negotiations preceding collective agreements are dealt with, respectively, under Articles 11 and 12 of the Rome II Regulation.

Questions as to the existence of duties in connection with negotiations, as provided for, for example, under US law (see paragraph 11), concern the conduct of the industrial action and under the preceding considerations will be governed in every respect by the law applicable to the industrial action.

Insofar as the duty to maintain peaceful relationships is not laid down by statute, as in Sweden (see paragraph 12), that duty is to be classified as a matter of the law concerning industrial action. Even where, as in Germany (see paragraph 7) or Spain,262 the duty is construed as an implied component of the collective agreement, it will not be classified in terms of the law governing collective agreements. In the first instance it is a matter to do with the powers of the parties to the collective agreement in respect of industrial action. The scope of the duty to maintain peaceful relationships under Swedish law came to European attention as a result of the ECJ decision in the Laval case (see Section 10 paragraph 56). The judgement contains statements on the national legal situation, showing that the prohibition against conducting industrial action against existing collective agreements was also directed against collective agreements governed by foreign law.263 Under a subsequent statutory amendment, the so-called lex Britannia, the prohibition on industrial action was restricted to collective agreements governed by the MBL264. 265 It was this that made it possible for the Laval case to become a legal case. However, that is not a conflict of laws issue, but a substantive law question of the manner of dealing with a case with the foreign element in the context of the law called upon by the conflict rule to apply. This substantive-law aspect is continued in the influence of Union law at a substantive-law level (see also paragraph 46), in so far as the ECJ infers the limits on freedom to provide services from the posting directive. Thus, the possibility of industrial action against foreign employers in Sweden was revised and circumscribed by a statutory amendment to the lex Britannia, drawing on the yardsticks contained in the directive on the posting of workers.266

In regard to mediation a distinction has to be drawn. As regards the question whether industrial action will be lawful because a prior mediation procedure was conducted, that is an issue covered by the uniformity of the law applicable to liability in tort. As regards the question of the applicable law of mediation, a distinction must again be made. Autonomous mediation law under a collective agreement follows the rules of international law on collective agreements, whilst

262 Deinert, Internationales Arbeitsrecht, Section 15 paragraph 6.
263 ECJ AP No. 15 on Article 49 EC – Laval.
264 On that, see Deinert, Internationales Arbeitsrecht, Section 17 paragraph 8.
265 For more detail, Bruun/Jonsson/Olauson, in: Bücker/Warneck (Eds.), p. 19, 26 et seq.; Köhler, ZESAR 2008, 65, 69 et seq.
the law of the place where the industrial action takes place will continue to determine the applicability of State mediation law.\textsuperscript{267}

30 The law applicable to liability in tort in connection with industrial action will cover only damage arising out of industrial action. What will not be covered will be damage caused owing to \textit{excesses} on the occasion of the industrial action, such as material damage or physical injuries.\textsuperscript{268} They are to be dealt with under Article 4 of the Rome II Regulation.\textsuperscript{269}

31 Damage arising out of imminent industrial action is covered by Article 9 of the Rome II Regulation. Disregarding more unusual configurations (for example, the holding of an initial ballot during the period of the duty to maintain peaceful relationships with the consequence that customers are lost, although in the end, no industrial action is taken) the provision above all makes sense as the \textbf{connecting rule for prohibitory actions}.

\textsuperscript{270} It is true that these would presumably also be covered by Article 9 of the Rome II Regulation, even without that formulation in regard to imminent industrial action because under Article 2 section 2 the Rome II Regulation is also applicable to non-contractual obligations which are likely to arise and under Article 2 section 3 of the Rome II Regulation damage will also be damage if its occurrence is likely. In addition, the law applicable to liability in tort under Article 15 (d) of the Rome II Regulation also covers court orders to prevent damage or loss.\textsuperscript{272} But ultimately that is not altogether clear because a claim to prohibition will not follow from an obligation likely to arise, but from an existing obligation. In any event, the terms in which Article 9 of the Rome II Regulation is couched make it clear that applications for prohibition orders are also covered by Article 9 of the Rome II Regulation.

\section{Persons entitled and persons liable}

32 As is apparent from recital 9 to the Rome II Regulation, the Regulation does not cover liability for the \textit{actions of public authorities} with the result that State liability for failure to take measures against industrial action,\textsuperscript{273} or for the consequences arising out of industrial action in which the State participated, do not fall under the Rome II Regulation and thus not under the connecting rule in Article 9 of the Rome II Regulation. Conversely, State liability as a participant in the industrial action as against the social opponent or the employees will be covered

\begin{thebibliography}{99}
\bibitem{267} Cf. already \textit{Gamillscheg}, IAR, p. 366.
\bibitem{268} \textit{Däubler-Däubler}, Arbeitskampfrecht, Section 32 paragraph 34; \textit{MünchKomm-Junker}, Art. 9 Rom II-VO paragraph 20; \textit{Bamberger/Roth-Spickhoff}, Article 9 Rom II-VO paragraph 2; \textit{C. Heinze}, RabelsZ 73 (2009), 770, 785.
\bibitem{269} \textit{Dickinson}, paragraph. 9.28; \textit{Huber-Illmer}, Article 9 Rome II paragraph 40.
\bibitem{270} \textit{Morse}, FS Pocar, 2009, p. 723, 729; \textit{Knöfel}, EuZA 2008 228, 242; \textit{Däubler-Däubler}, Arbeitskampfrecht, Section 32 paragraph 15; \textit{ErK-Schlichter}, Article 9 Rom II-VO paragraph 1; \textit{Zeffel}, p. 64 et seq.; cf. also \textit{Plender/Wilderspin}, paragraph 23-020.
\bibitem{271} For a critique of this kind of ‘reminder legislation’, \textit{MünchKomm-Junker}, Art. 9 Rom II-VO paragraph 21.
\bibitem{272} \textit{Morse}, FS Pocar, 2009, p. 723, 729.
\bibitem{273} \textit{MünchKomm-Junker}, Art. 9 Rom II-VO paragraph 20.
\end{thebibliography}
by Article 9 of the Rome II regulation because that does not concern State liability as an authority, but as a participant in a private law transaction.  

Only claims against employers and employees in that capacity are covered and against organisations, that is to say against trade unions and employer organisations. The liability of strike-breakers is also covered. In the case of employees, it will be sufficient that, at the time of the industrial action, they had that status. Whether, in a given case, trade unions will evade liability because they do not have legal capacity, as is for example, the situation under Belgian law, is a substantive-law issue and is not affected by Article 9 of the Rome II Regulation. Accordingly, recital 28 makes it clear that Article 9 is without prejudice to the legal position under national law of trade unions or representative employee organisations.

Article 9 of the Rome II regulation does not address the liability of association officials, such as union employees as strike leaders. To focus here on the wording and to subsume the liability of the official under the general conflict rule in tort laid down in Article 4 of the Rome II Regulation would fall short of what is required. Manifestly, what is at stake is a guarantee under the conflict of laws of the foreseeability of the consequences as regards liability for industrial action. To remove some actors from that, although the organisations for which they are active are privileged by that fact, would be contradictory. If one were to follow the narrow conceptual interpretation and view the officials as not capable of being subsumed under the concept of organisation, the conflict of laws symmetry of the liability regime will have to be achieved in a different way: an ancillary connection to the law applicable to liability in tort for industrial action may be achieved by way of the escape clause in Article 4 section 3 of the Rome II Regulation.

Under Article 15 (b) of the Rome II Regulation the law applicable to liability in tort for industrial action also covers the issue of limitation of liability, as provided for example under English law.

Article 9 of the Rome II Regulation covers all claims against organisations, their officials (paragraph 34), as well as employers and employees without limiting this to claims by the other party to the industrial action. Accordingly, liability in tort to third parties is determined by the law applicable under Article 9 of the Rome II Regulation, for example, the liability to railway customers owing to train cancellations on the part of the striking railway union. To an extent this

274 Däubler-Däubler, Arbeitskampfrecht, Section 32 paragraph 20.
275 Bamberger/Roth-Spickhoff, Article 9 Rom II-VO paragraph 2.
277 Cf. Dorssement, p. 464 et seq.; likewise in: Ales/Novitz (Eds.), p. 7, 17 et seq.
279 MünchKomm-Junker, Art. 9 Rom II-VO paragraph 25; Knöfel, EuZA 2008 228, 239.
280 As here Däubler-Däubler, Arbeitskampfrecht, Section 32, paragraph 28; ErfK-Schlachter, Art. 9 Rom II-VO paragraph 1.
281 Dickinson, paragraph 9.25; Huber-Illmer, Art. 9 Rome II paragraph 17.
282 Cf. on that point MünchKomm-Junker, Art. 9 Rom II-VO paragraph 25.
result is called into question by a communication by the Commission on Article 9 of the Rome II Regulation. In that document the Commission regrets that it is not clearly apparent from the wording that it should not extend to relationships vis-à-vis third parties (sic). However, the notification as such is already unclear since the regret may refer both to the absence of clarification of the legal situation deemed correct and to the omission to bring about the desired legal position. In any event, however, there is plainly no provision excluding tortious liability to third parties. If the Commission had in fact adopted a different legal opinion, that is, however, only a legal opinion on which the courts and, ultimately, the ECJ, have the last word. Ultimately, the aim of the conflict rule, namely to allow the parties to the industrial action to have a reliable legal appraisal (see paragraph 3), militates in favour of this outcome.

Conversely, as regards the contractual liability of the employer affected by industrial action towards its third-party contracting partners, the law applicable to the contract under Articles 3 to 5, 12 section 1 (c)(d) of the Rome I Regulation will be determinant, whereas culpa in contrahendo liability to those parties will be determined by Article 12 of the Rome II Regulation, which of course for its part contains an ancillary contractual connecting rule.

4. Position of the individual

In regard to the legal consequences for the individual of contractual duties, the law applicable to the individual contract will likewise be determinant under Article 12 section 1(b)-(d) of the Rome I Regulation. However, in regard to the prior question as to lawfulness of industrial action, a self-standing connection is required (see paragraph 25). Where an employee, whose contract is governed by German law, is temporarily posted to France and takes part in a

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37 Conversely, as regards the **contractual liability** of the employer affected by industrial action **towards** its third-party **contracting partners**, the law applicable to the contract under Articles 3 to 5, 12 section 1 (c)(d) of the Rome I Regulation will be determinant, whereas **culpa in contrahendo** liability to those parties will be determined by Article 12 of the Rome II Regulation, which of course for its part contains an ancillary contractual connecting rule.

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38 In regard to the **legal consequences for the individual** of contractual duties, the law applicable to the individual contract will likewise be determinant under Article 12 section 1(b)-(d) of the Rome I Regulation. However, in regard to the **prior question as to lawfulness** of industrial action, a **self-standing connection** is required (see paragraph 25). Where an employee, whose contract is governed by German law, is temporarily posted to France and takes part in a
strike not authorised by a union, the question of the lawfulness of that industrial action will fall to be assessed under French law, whilst the consequences (for example, the employer’s right to terminate in the event of unjustified strike participation) will fall to be assessed under German law. The same applies in regard to contractual liability for unlawful industrial action (paragraph 25). In regard to the consequences for remuneration, these may be presumed to be subject to classification in terms of the law applicable to the industrial action rather than the law applicable to the contract. What is involved is not merely the processing in terms of an individual contract of the effect of an interruption in the performance of obligations, but rather the remuneration question is central to the conduct of the industrial action. Where, conversely, it is pointed out that every individual employee is in a position to decide whether to take part in the industrial action, having regard to the consequences of the industrial action which will impact on him, that may be correct in relation to the individual but does not do justice to the relevance of such decisions by employees in terms of collective mobilisation capacities and, thus, for the conduct of the industrial action as a whole.

The same considerations as in paragraph 38 are relevant to the question whether participation in the industrial action has terminative or suspensory effect. This question also is to be determined by the law applicable to the industrial action. The same applies for claims to reinstatement because these are the corollary. The same also applies in regard to the consequences of knock-on effects in terms of the risk entailed with the industrial action because these also have a lasting effect on the collective. The same will apply to knock-on effects occurring abroad. Account will have to be taken of the specific features of cross-border knock-on effects in the context of the substantive law. Thus, workers in Germany as a rule will not have to bear the risk entailed by industrial action for industrial action conducted abroad because the payment of remuneration by the employer will, as a rule, have no effect on parity in the foreign industrial action. It may be otherwise within a cross-border group.

292 Däubler-Däubler, Arbeitskampfrecht, Section 32 paragraph 51.
293 Däubler-Däubler, Arbeitskampfrecht, Section 32 paragraph 50; on the earlier law, see also Otto, Section 13 paragraph 20; Jeschke, p. 30; for another view, Knöfel, EuZA 2008, 228, 240; Lyon-Caen/Lyon-Caen, paragraph 72.
294 For another view, Winkler v. Mohrenfels/Block, EAS B 3000 paragraph 208.
295 Winkler v. Mohrenfels/Block, EAS B 3000 paragraph 208.
296 Däubler-Däubler, Arbeitskampfrecht, Section 32 paragraph 50; Ferrari-Staudinger, Article 8 Rom I-VO paragraph 30; likewise, in regard to the former law, Otto, Section 13 paragraph 20; Jeschke, p. 30; Birk, RabelsZ 46 (1982), 384, 398.
298 For another view, Däubler-Däubler, Arbeitskampfrecht, Section 32 paragraph 50.
299 Däubler-Däubler, Arbeitskampfrecht, Section 32 paragraph 67; cf. also Otto, Section 16 paragraph 45; criticism by Hergenröder, EAS B 8400 paragraph 156; Franzen, AR-Blattei SD 920, paragraph 377.
300 Däubler-Däubler, Arbeitskampfrecht, Section 32 paragraph 69.
then the employees will be able to draw short-time money since Paragraph 160 of the German Social Code III provides for a cessation of benefits in substitution for remuneration only in the event of industrial action within the country.\footnote{Eichenhofer, NZA Beilage 2/2006, 67, 73 et seq.; Däubler-Deinert, Arbeitskampfrecht, Section 20 paragraph 147.} However, industrial action within the country can, as it were, radiate out where, for example, employees temporarily posted abroad take part in it.\footnote{Eichenhofer, NZA Beilage 2/2006, 67, 73; cessation of substitute remuneration payments will also be precluded in the event of participation in foreign industrial action of a worker temporarily posted from Germany, cf. Eichenhofer, EuZA 2012, 140, 152.} Nonetheless, all these considerations come into play only in the event of the infrequent configuration under which the industrial action conducted abroad is governed by German law.

The question of \textbf{entitlement to participate} in cross-border industrial action is of a \textbf{substantive-law nature}. Where German law is applicable to the industrial action, it is to be assumed that Article 9 section 3 GG will also protect cross-border action.\footnote{Däubler-Däubler, Arbeitskampfrecht, Section 32 paragraph 54; restrictive approach taken by Hergenröder, EAS B 8400, paragraph 147, without, however, any more detailed description of the consequences.}

The question whether a refusal to \textbf{work in spite of a strike} is to be classified as a matter of the law applicable to the industrial action will be determined not by the \textit{lex fori}\footnote{Thus, however, Däubler-Däubler, Arbeitskampfrecht, Section 32 paragraph 65.} but by the law of the place in which the refusal occurs (see paragraph 6). Where German law is applicable, it may be assumed, in terms of substantive law, that the substitution of striking employees will in any event be unreasonable, irrespective of whether the strike takes place within the country or abroad.\footnote{Däubler-Däubler, Arbeitskampfrecht, Section 32, paragraph 65; for another view, Hess. LAG AR-Blattei ES 170.8 No. 1; complaint against impermissibility allowed by BAG AP No. 33 on § 72 a ArbGG 1979, disposed of otherwise on the substance.} Where the place of work is within the country, this also militates in support of recognising as an unwritten law a right to refuse to work in direct breach of a strike as an overriding mandatory provision.\footnote{Left open by Hergenröder, p. 261, as here Otto, Section 13 paragraph 19.}

\textbf{VII. Overriding mandatory provisions and public policy}

Article 16 of the Rome II Regulation is a special connecting rule allowing the overriding mandatory provisions of the forum to apply. In that connection, one may first have regard to the application of provisions concerning essential services, as is provided for, for example, in Italy (see paragraph 9).\footnote{Cf. Dorssement/v. Hoek, ELLJ 2011, 48, 74.} But also the implementation of the right to strike as fundamental right may be considered relevant in that connection.\footnote{Dorssement/v. Hoek, ELLJ 2011, 101, 112 et seq.; cf. also Palao Moreno, Yearbook of International Law 9 (2007), 115, 121; also A. Lyon-Caen, Rev.crit.DIP 1977, 271, 287. One is not
ment freedoms when it is a matter of applying provisions restrictive of the right to strike.\textsuperscript{309}

There will be a sufficient connection with the country (Section 10 paragraph 36) only if the place where the industrial action is conducted was in the forum. Then, as a rule, no special connecting rule will be required owing to the connecting factor of the \textit{locus actus}.\textsuperscript{310} It might be otherwise if the parties were to have made a choice of law; or, exceptionally, under Article 4 section 2 of the Rome II Regulation, where a common home law is applicable.\textsuperscript{311} A good example of a German overriding mandatory provision which, in the case of work within the country, would need to be implemented is Paragraph 11 section 5 of the law on the hire of workers (Arbeitnehmerüberlassungsgesetz – AÜG) which confers on the \textit{hired worker} the \textit{right to strike}.\textsuperscript{312} The provision serves to ensure the functionality of the system of collective agreements.\textsuperscript{313} Even if, exceptionally, the conflict is about a collective agreement governed by foreign law which, for example, would be conceivable if a German hired worker were engaged within the country by a foreign installation company there would be an international will to apply Paragraph 11 section 5 of the statute because the provision is intended to spare hired workers from being engaged as strike-breakers against their will.\textsuperscript{314} On the question of the special connecting rule for a right to refuse work within the country in direct breach of a strike, reference is made to paragraph 41. Of course these rights are, on a proper view, nonetheless to be classified in terms of contract law (paragraph 6) with the result that in their case a special connecting rule for work in the country would only be required if the employee who refuses to work in breach of a strike or to be engaged as a temporary agency worker within the country is subject to a foreign law applicable to the contract of employment.

The question as to the treatment of \textbf{third-country overriding mandatory provisions} can arise where e.g. a German court has cases of industrial action taking place abroad.\textsuperscript{315} In that connection, the example of participation by a posted worker in a foreign strike is illustrative, as is the applicability of the common home law under Article 4 section 2 of the Rome II Regulation.\textsuperscript{316} Unlike under Article 9 section 3 of the Rome I Regulation (see Section 10 paragraph \textsuperscript{309} Cf. A. Lyon-Caen, Rev.crit.DIP 1977, 271, 280 et seq.
\textsuperscript{311} Däubler-Däubler, Arbeitskampfrecht, Section 32 paragraph 57.
\textsuperscript{312} Hergenröder, p. 258 et seq.
\textsuperscript{313} Ulber-J. Ulber, AÜG, 4th edition, Frankfurt am Main 2011, Section 11 paragraph 127.
\textsuperscript{314} Cf. ErfK-Wank, § 11 AÜG paragraph 20.
\textsuperscript{315} Däubler-Däubler, Arbeitskampfrecht, Section 32 paragraph 58.
\textsuperscript{316} Däubler-Däubler, Arbeitskampfrecht, Section 32 paragraph 58.
(90), there is no specific provision for that. However, that does not compel one to adopt the contrary reasoning that the application of third-country overriding mandatory provisions would be precluded although such application could lead to adverse effects on the international concordance of decisions. At least in the case of industrial action, recital 28 militates in favour of the applicability of overriding mandatory provisions of the place where the industrial action takes place. In the context of the international law on industrial action that militates even in favour of a special connecting rule for the overriding mandatory provisions of the place where the industrial action takes place without there being any need to embark on a general discussion of the question as to the treatment of third-country overriding mandatory provisions (Section 10 paragraph 78).

Finally, the public-policy reservation in Article 26 of the Rome II Regulation should be taken into consideration. In light of the connecting rule designating the place where the industrial action takes place, that will seldom play a role. The likeliest is that the public policy reservation will arise in the context of supporting action in light of the prior question as to the lawfulness of the principal industrial action. The illegality of the principal industrial action owing to a general prohibition on strikes, as for example in the United Arab Emirates, would be contrary to German public policy under Article 9 section 3 of the German Constitution (GG), although the French courts once plainly viewed this matter differently. At least they have accepted a foreign prohibition on strikes if the employee has contractually committed himself to observing the local laws. Further, the case law on supporting industrial action, which is against allowing the main action to be superseded by actions in support, required to be adapted for this configuration. The consequence would be that a strike in support would be lawful, even when there was no main action. If, conversely, the view is taken that the industrial action is a demonstration which is automatically

318 Palandt-Thorn, Article 16 Rom II-VO paragraph 3; Bamberger/Roth-Spichkoff, Article 9 Rom II-VO paragraph 1.
319 Also to this effect on the earlier French law, Lyon-Caen/Lyon-Caen, paragraph 74.
320 In that regard, for a substantive-law consideration, v. Hein, RabelsZ 73 (2009), 461, 506; likewise ZEup 2009, 6, 24 et seq.
321 Stated in Kollar, ZIAS 2009, 77, 90 et seq., 104.
322 Däubler, AR 1, paragraph 698; Däubler-Däubler, Arbeitskampfrecht, Section 32 paragraph 61; Knöfel, EuZA 2008, 228, 247; cf. also Gefken, Seeleutestreik, p. 413; also, with specific examples, Zelfel, p. 129; from an Italian perspective, Cassoni, Rev.crit.DIP 1986, 633, 658 et seq.
324 BAG AP No. 173 on Article 9 GG – Arbeitskampf.
325 Däubler-Däubler, Arbeitskampfrecht, Section 32 paragraph 61.
unlawful, with the result that there is no room for the public-policy reservation to apply\(^{326}\) that can hardly be challenged from a conflict of laws perspective. The question of adaptation remains a substantive-law problem. In that connection, freedom of association, when it is completely ignored abroad, permits measures within the country which would be precluded in the case of domestic cases because self-help from a legal point of view would be possible. Conversely, in the case of a main action which would be unlawful under domestic criteria, but is legal at the place where it takes place, the public-policy reservation will not be capable of being applied.\(^{327}\) That is true, in any event, insofar as certain restrictions under the domestic law applicable to industrial action are controversial in regard to their compliance with international law\(^{328}\) and are also not entirely approved by academic commentators.\(^{329}\) The line will, however, have to be drawn, from a German standpoint, where the strike objectives are incompatible with the constitutional value judgements. An example would be a strike with the objective of toppling a democratic government.\(^{330}\) Finally, it can contravene the public-policy reservation if certain employees have unlimited liability for damages without its being relevant whether they were in a position to discern the illegality of a trade union dispute (on the assessment by German substantive law, see paragraph 7 above).\(^{331}\)

The assumption that a prohibition on lockout could activate the public policy reservation encounters reservations.\(^{332}\) In view of the caution required in applying the public policy reservation, this would only be justified if the constitutional parity dogma were infringed. Yet that will not be the case where employers do not have the means of lockout at their disposal, but only where the trade union acquires such preponderance that an even-handed negotiation in the context of an ongoing strike is not possible.

VIII. EU law on industrial action

EU law can also influence domestic law (see paragraph 28, and in more detail, Section 10 paragraph 61), in regard to the law on industrial action. Substan-

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326 Hergenröder, p. 291 et seq.
327 Hergenröder, p. 301 et seq.; Deinert, ZESAR 2012, 309, 315; for another view, not further substantiated, Löwisch, observations on LAG Baden-Württemberg, AR-Blattei ES D IV No. 1.
328 Cf. for example with regard to the reservation in favour of strikes borne by the trade union, European Committee of Social Rights, Conclusions XVIII-1 Germany, p. 9; most recently, European Committee of Social Rights, Conclusions XIX-3 Germany, p. 14 (translation printed in AuR 2010, 107); with regard to the political protest strike, Freedom of Association Committee, Freedom of Association, Digest of decisions and principles of the Freedom of Association Committee of the governing Body of the ILO, Geneva 2006, paragraph 526 et seq.
329 Däubler-Däubler, Arbeitskampfrecht, Section 32 paragraph 62; C. Heinze, RabelsZ 73 (2009), 770, 788; see also Geffken, NJW 1979, 1739, 1744.
330 Knöfel, EuZA 2008 228, 247; Däubler-Däubler, Arbeitskampfrecht, Section 32 paragraph 62.
331 To this effect, also Knöfel, EuZA 2008 228, 248.
332 But thus Franzen, AR-Blattei SD 920, paragraph 372.
tive law can be affected under the conflict-of-laws provisions of the *lex causae*. The precondition is, however, the applicability of Union law. In regard to the fundamental freedoms, this will for instance, as a general rule, be the case, where there is a sufficient connection with the Union. In addition, Article 28 of the EU Charter of Fundamental Rights (rights of collective bargaining and action) can play a role in the context of the application of union law. Its scope of application is laid down in Article 51 of the Charter. That is also a question of the conflict of laws. However, it is not of a private-international-law nature, but concerns the collision of Union law and national law and, provided that Union law is applicable, will be resolved according to the hierarchy of norms in regard to their application (Section 3 paragraph 6).

Cases in which the conflict of law question raises an either/or choice between Union law and national law occur only infrequently. They will occur, for example, in the case of EU officials to whom the law on industrial action of the Union applies. Moreover, the question arises as to whether Union law on industrial action will apply to disputes concerning European collective agreement or whether the Member States’ legal systems called on to apply by conflict-rule referral will apply. In that connection, it cannot be that the wording in Article 155 section 1 of the TFEU under which social dialogue may lead to agreements, if the social partners so desire, could entail a prohibition on industrial action concerning European collective agreements. Discernibly, the contracting parties to the TFEU were not concerned to deny, in the case of the cross-border dimension, a fundamental right recognised on a Europe-wide basis. Even if a dispute is about European collective agreements such industrial dispute will actually take place within the Member States’ legal systems. In the absence of a transnational law on industrial action, national law on industrial ac-

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333 Cf. Reich, EuZW 2007, 391, 393.
334 On that, Kokott/Sobotta, EuGRZ 2010, 265, 268 et seq.
335 Viewed in that light it is no problem from an international law point of view that Birk, FS Buchner, 2009, p. 133, 139, considers it possible for a restriction of the fundamental right under Article 28 of the Charter of Fundamental Rights by duties to maintain peaceful relations under national law to be inferred from the reservation in favour of national legal provisions and usages.
336 Birk, FS 50 Jahre BAG, p. 1165, 1169; Däubler-Heuschmid, Section 11 paragraph 167; cf. Sagan, p. 198 et seq.
337 Jeschke, p. 31 et seq.; Däubler-Heuschmid, Section 11 paragraph 175.
338 Sagan, p. 375 et seq. The permissibility of industrial action is denied in that connection by Hergenröder: EAS B 8400 paragraphs 63 et seq., by reference to the wording, ‘if they so wish’, and lack of competence under a collective agreement (sic), though an absence of authorisation is meant. The wording, however, carries multiple meanings (the wish may manifest itself specifically following industrial action). In regard to legislative proposals, Pataut in: Audit/Muir Watt/Pataut (Eds.), paragraphs 390 et seq. advocates a new regime for cross-border industrial action.
339 Yet, thus Hergenröder, EAS B 8400, paragraph 164; Thüising, RdA 2012, 65, 66.
340 Cf. Sagan, p. 322 et seq.; see also C. Wagner, Der Arbeitskampf als Gegenstand des Rechts der Europäischen Union, Baden-Baden 2010 (also Freiburg im Breisgau, Univ., Diss. 2010), p. 199, according to which the wording does not warrant any such assumption.
tion must continue to be applicable. The conflict of laws questions will be determined under the principles set out herein. The fact that, upon application of national law, corrections may appear to be required in the light of Article 28 of the EU Charter of Fundamental Rights is another question.

IX. Excursus: other activity under the heading of freedom of association

The law applicable to the personnel of a trade union and an employers’ association will be that of the organisation’s seat. However, the activities specific to freedom of association are not governed by the law applicable to the personnel. Instead the applicable law will be determined by the legal relationship within the organisation and within which activities are conducted. Conversely, the question as to the international scope of Article 9 section 3 of the German Constitution (as it were, as a unilateral constitutional conflict rule), or other internal or international law guarantees of freedom of association, are not appropriate in the present context. Those provisions affect substantive law and, perhaps, also the conflict of laws but do not themselves directly lay down substantive law provisions; they merely provide determinative parameters. The law on industrial action is primarily governed by the law applicable to tortious liability in connection with industrial action. For other activities specific to freedom of association, there are no special provisions. Examples of this would be canvassing for members abroad, by email or by access to foreign undertakings or operation centres (e.g. ships), cross-border press campaigns etc.

As a general rule, private international law issues will arise where one party turns against the operation under the umbrella of freedom of association. The issue may arise from the point of view of tort or contract law. In regard to tort the law applicable to tortious liability will have to be ascertained under Article 4 of the Rome II Regulation. The details cannot be set out here; reference is made in that connection to the relevant commentaries on the Rome II Regulation. An essential difference to the law applicable to liability in tort in connection with industrial action is the connecting rule, under Article 4 section 1 of the Rome II Regulation to the locus damni (law of the place where the damage occurs) instead of the locus actus. Specific features may arise, for example, in the case of torts arising out of statements made. For contractual issues, converse-

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341 Nothing has hitherto been done either by the social partners or by the Union legislature or the ECJ to implement a European strike regime and nothing else may be expected in the near future either (on this challenge, see Jeschke, p. 223 et seq).
342 Deinert, Internationales Arbeitsrecht, Section 17 paragraph 74; cf. for France also Lyon-Caen/Lyon-Caen, paragraph 78.
343 In detail on this issue, see Hergenröder, p. 169 et seq.
344 On that, see Lyon-Caen/Lyon-Caen, paragraph 77.
345 Deinert, Internationales Arbeitsrecht, Section 3 paragraph 20.
346 Cf. case before the LAG Baden-Württemberg, AuR 1974, 316, in which the conflict-of-laws issue was however entirely occluded.
347 Reference is also made to the matters mentioned in Section 2, paragraph 12 with further references.
ly, the **law applicable to the collective agreement** will be determinant. If there is a relationship under a collective agreement between the participants, that will constitute a closer connection which will compel application of the escape clause under Article 4 section 3, second sentence, of the Rome II Regulation, with the result that **tortious liability may be subsumed on an ancillary basis under the contract**. The same is true in regard to **pre-contractual duties** as between possible subsequent parties to the collective agreement under Article 12 section 1 of the Rome II Regulation. The Regional Employment Court for Baden-Württemberg ruled in 1973 on a dispute concerning trade unions’ **right of access** to ships.\(^{349}\) That also involved ships lying in foreign ports. Plainly – the facts in that connection are unclear – what was at stake was primarily the right of access in the context of the ITF’s flag-of-convenience campaign and thus in the context of possible industrial action. In this case, it is evident for the tortious liability to be founded on an ancillary collective bargaining basis. Since, in regard to lawfulness under the law applicable to the collective agreement, there will be a self-standing connecting rule concerning the preliminary question ancillary to the law applicable to the industrial action (see paragraph 24), the law of the place where the action takes place will be relevant. The Regional Employment Court has, however, ruled that German law is applicable without further discussion. That would only be a correct outcome if under the law at that time the connection had been with the (presumably) German flag. Under the law as it currently stands, this is no longer possible (see paragraph 17). If the case, however, concerned rights of access for the mere purpose of acquiring members, German law would apply as the law (relevant to appraisal of the prohibitory action) of the place at which damage is likely to occur.

In regard to the **individual-law consequences** of individual activity under the umbrella of freedom of association, the **prior question** of lawfulness will, as a general rule, arise. In that connection, the considerations on the law applicable to liability in tort arising from industrial action will apply by analogy (paragraphs 38 et seq.).

\(^{348}\) See on that, for instance, Palandt-Thorn, Article 40 EGBGB paragraph 10.  
\(^{349}\) LAG Baden-Württemberg, AuR 1974, 316.
Chapter 5: Procedural questions

16 International jurisdiction and application of law problems

I. International jurisdiction

1. Brussels I bis Regulation
2. Lugano Convention
3. National law

II. Application of the law

1. Ascertaining the applicable law
2. Typical problem cases in employment law

The International jurisdiction of employment courts does not directly concern the conflict of laws. Yet, ultimately, from a judicial perspective, it is a precondition for the application of the conflict of laws. Other legal practitioners must always include it in their appraisal whenever it is a question of predicting judicial decisions. That is why the intention is here to provide a brief and concise overview of the provisions on international jurisdiction. In addition, there will be a brief discussion of the most important problems arising in the application of the law; these will have been addressed in various places throughout this account, but are not, for their part, in the nature of conflict of laws problems, but are simply issues that arise following referral to a specific system of laws under a conflict rule (paragraphs 13 et seq.). It is not to forget that all procedural questions are superfluous if the courts have no jurisdiction at all. The Federal Labour Court has decided in several cases in the last years on this question. The court held, that due to the law of nations, other states are under no jurisdiction of foreign states. But it also pointed out that this privilege is only applicable in labour law cases if the employee is engaged in sovereign powers. It decided that this question depends on a genuine link to the diplomatic or consular tasks of the foreign states. It denied such a genuine link in the case of an employee who had to work as a driver and to transport mail, except for diplomatic mail. It also denied the genuine link for teachers at schools of foreign states of general education.

I. International jurisdiction

Courts can adjudicate on a legal dispute only if they have international jurisdiction. In regard to international jurisdiction, various different rules apply. As between the Member States of the EU, the Brussels I bis Regulation comes into play (see paragraphs 3 et seq. below). In relation to EEA States, the Lugano Convention is applicable (see paragraph 10 below). For the remainder, interna-

1 BAG EzA Article 30 EGBGB no 11.
2 BAG NZA 2013, 1102; BAG No. 7 on § 20 GVG.
tional jurisdiction is determined in autonomous domestic law (see paragraphs 11 et seq. below).

1. Brussels I bis Regulation

3 For international jurisdiction and recognition of foreign judgements, initially the European convention on jurisdiction and enforcement (Brussels Convention\(^3\)) applied between the Member States of the European Community (now the EU). This was an international agreement. With effect from 1 March 2002, it was replaced by Regulation (EC) No. 44/2001\(^4\) (Brussels I Regulation). As in the case of the Rome I Regulation (Section 2 paragraphs 7 et seq.), the United Kingdom and Ireland joined in the Regulation, whereas it is not applicable to Denmark (recitals 20 and 21). In relation to Denmark, the Brussels Convention continues to be applicable, whilst the Brussels I Regulation was automatically applicable if the defendant’s place of residence is in the United Kingdom or Ireland. However, the Brussels I Regulation was also agreed to be applicable in relation to Denmark under an international agreement which entered into force on 1 July 2007.\(^5\) The Brussels I Regulation has in the meantime been replaced by the Brussels I bis Regulation (EU) 1215/2012\(^6\) which is under its Article 66 section 1 applicable since 10 January 2012. The Brussels I bis Regulation is under Article 1 section 1 applicable in civil and commercial matters and therefore also in employment matters. What is more controversial, however, is whether works-constitution legal disputes under law are also covered.\(^7\) That must be doubted since the Regulation contains no appropriate provisions for such disputes. In general, the Regulation will apply only to actions brought against persons having their place of residence (on that see paragraphs 4 and 7) in a Member State.\(^8\) That is because the relevant provisions on jurisdiction make the residence of the defendant in a Member State in each case a prerequisite of applicability. What is determinant is always the place of residence at the time when the action is brought, not the time when the instrument was enacted.\(^9\) Under Article

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\(^7\) Casting doubt on this LAG Berlin-Brandenburg, 8 February2011 – 7 TaBV 2744/10, paragraph 45 (OS in: NZA-RR 2011, 491); concurring Boemke, DB 2012, 802 et seq.

\(^8\) Junker, Arbeitnehmereinsatz im Ausland, paragraph 61.

\(^9\) ErfK-Schlachter, Art. 9 Rom I-VO paragraph 2.
20 section 2 of the Brussels I bis Regulation a branch, agency or other establish-
ment may also be sufficient to satisfy this requirement.  

As the starting point, a Member State will have international jurisdiction if the defendant has his place of residence in the relevant sovereign territory (Article 4 section 1 of the Brussels I bis Regulation). In accordance with Article 6 section 1, if there is no place of residence in a Member State, it will be possible for jurisdiction to be conferred only in the specific cases set out in Articles 18 section 1, 21 section 2, 24 and 25 of the Brussels I bis Regulation. From an employment-law point of view, it is noteworthy that a claim against the employer may be brought to the courts of the place where the employee normally carries out his work or of the place of the business where the employee has been engaged, according to Article 21 section 2 Brussels I bis Regulation. Furthermore, the agreement as to jurisdiction under Article 23 of the Brussels I bis Regulation is relevant. However, there is a special provision for agreements on jurisdiction in respect of individual employment contracts (see paragraph 9 below).

**Special provision for jurisdiction** is made under Article 5 of the Brussels I bis Regulation. Relevant in that connection to employment law is, in particular the jurisdiction of the courts of the place of performance of a contract (Article 7 section 1), the jurisdiction of the courts of the place in which a branch is located in regard to disputes arising out of the operations of the branch (Article 7 section 5), and jurisdiction of the court in which a claim is pending in respect of any counterclaim (Article 8 section 3). Of special relevance to the law on industrial action is the jurisdiction of the courts of the place where the harmful event occurred (Article 7 section 3). In the *DFDS Torline* case the ECJ interpreted that provision as meaning that, at the choice of the plaintiff, international jurisdiction may be conferred on the place where the original event occurs or the place where the harm arises, but the latter place need not necessarily be the flag State. On the relevance to private international law, see Section 15 paragraph 3. In the follow-up to the proceedings in the *Viking* case an amendment to confer exclusive international jurisdiction in favour of the courts of the place where the industrial action takes place was discussed. That was because in the main proceedings in that case, the English courts had jurisdiction to entertain the action brought by ITF in connection with a collective dispute in Finland because the ITF had its headquarters in London.

In regard to *individual employment contracts* international jurisdiction is determined under Article 20 of the Brussels I bis Regulation. This rule also applies to disputes on post contractual obligations. The provisions of Article 20

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10 See ECJ NZA 2012, 935 – Mahamidia.
12 ECJ AP No. 3 on Art. 43 EG – Viking.
13 BAG No. 6 on Verordnung Nr. 44/2001/EG.
are intended, in accordance with the recitals 18 and 19, to serve to protect the employee as the weaker contracting party. No other possibilities of conferring jurisdiction have been afforded under the Brussels I Regulation; thus, the ECJ has ruled that there is no single conferral of jurisdiction for a joint action against several employers which otherwise might be conferred under the general provision in Article 8 section 1 of the Brussels I Regulation. Under the new Brussels I bis this jurisdiction is not still exclusively, according to a referral in Article 20 section 1, inter alia, to Article 8 section 1. Moreover, the Brussels I bis Regulation, under Article 67 thereof, does not affect rules governing jurisdiction contained in specific Community instruments. This is true for any jurisdiction in implementation of Article 6 of the posting directive 1996/71/EC (paragraph 12).

Under the new Brussels I bis this jurisdiction is not still exclusively, according to a referral in Article 20 section 1, inter alia, to Article 8 section 1. Moreover, the Brussels I bis Regulation, under Article 67 thereof, does not affect rules governing jurisdiction contained in specific Community instruments. This is true for any jurisdiction in implementation of Article 6 of the posting directive 1996/71/EC (paragraph 12).

Under Articles 21 section 1(a), 7 of the Brussels I bis Regulation the employer can be sued at his place of residence or, in the case of disputes arising out of the operations of a branch, at the place where the branch is located. Where the employer is a legal person, this means that, under Article 63 section 1 of the Brussels I bis Regulation, the employer can be sued at his statutory seat, or central administration, or principal place of business, with the employee being able to choose from amongst those options. Even the embassy of another State may be construed as a branch. The State immunity enjoyed by the third country concerned will preclude jurisdiction only where the employee is performing tasks specific to the State’s sovereignty.

In addition, finally, under Article 21 section 1(b) of the Brussels I bis Regulation jurisdiction is conferred on the courts for the place where the employee habitually carries out his work, or if the employee does not habitually carry out his work in any one country, in the courts for the place where the business which engaged the employee is situated. On the analogous Article 5 (1) of the Rome Convention, the ECJ first ruled in the *Mulox* case that the place of performance relevant for determining international jurisdiction in regard to an employment contract is the habitual place of employment and that this is the place at which or from which the employee principally performs his duties. Following an amendment to the Rome Convention, adding a provision that the international jurisdiction for employment contracts was to be conferred on that place at which the employee habitually performs his work, the ECJ in the *Rutten* case ruled that was the place where the employer had made into the central focus of his occupational activity in which connection regard was to be had to the place from where the employee organises his activity and where he returns after every foreign trip. This case-law was then reflected in the Rome I Regulation (see Section 9 paragraph 86). In the case of work on an installation located on or

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15 Junker, NZA 2005, 199, 202, footnote 38 with further references.
16 ECJ NZA 2012, 935 – Mahamdia.
17 ECJ NZA 2012, 935 – Mahamdia.

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above the Continental shelf, the habitual place of employment will be in the
country with whose territory the Continental shelf is contiguous (on the conflict
of laws significance of this policy, see Section 9 paragraphs 163 and 171 et seq.).

In regard to the habitual place of employment of seafarers, the same question
arises as under the conflict of laws, as to whether the habitual place of em-
ployment is the flag State. The Federal Labour Court so held in regard to the in-
ternational law attribution to the flag State in the case of a ferry plying between
several Member States. The port in which the work is begun is immaterial in
that connection, since it does not indicate the central focus of the activity. The
place of employment is not the port, but the ship. Unfortunately, there is in that
connection no debate about the form of wording under which the habitual place
of employment can also be the place from which the work is performed. Nor,
unfortunately, is the Rutten case discussed. Finally, the court refrained from
making a preliminary reference to the ECJ, which was urgently necessary.
Therefore, a decision by the ECJ is still awaited. The error was later noticed and
the habitual place of employment of an inland-waterways boatman, having re-
gard to other circumstances, was deemed to be the place from which the jour-
neys were undertaken (on the conflict of laws significance, see Section 9 para-
graph 92). Yet the Federal Labour Court did not view this as a corrective to the
ferry decision because that decision, it said, related only to international ship-
ning. For flight personal the habitual place of work may, depending on the spe-
cific circumstances of the case, the crew base.

Overall, the jurisdiction rule corresponds to the objective connecting rules in
Article 8 sections 2 and 3 of the Rome I Regulation. Where there has been no
choice of law and the escape clause in Article 8 section 4 of the Rome I Regu-
lation does not come into play, this will mean that international jurisdiction
and applicable law will run in parallel. The court having jurisdiction can therefore
apply the lex fori.

It follows from all the foregoing that the employee may, at his discretion, sue
at:

– the place of residence of the employer.
– the place of the branch etc. or
– the place where the work is habitually performed or, otherwise, at the place
  of the business which engaged him.

1999, 332 et seq.; likewise EWiR 1997, 221; Junker, IZPR, Section 13 paragraph 35.
20 ECJ EuZW 2002, 220 – Weber; cf. Junker, IZPR, Section 13 paragraph 53; also Mankowski,
IPRax 2003, 21 et seq.
21 BAG AP No. 1 on Article 18 EuGVVO.
22 BAG AP No. 3 on VO. 44/2001/EC (=NZA 2011, 1309, 1311).
23 BAG No. 5 on Verordnung Nr. 44/2001/EG.
For actions brought by the employer, except in the case of a counterclaim, (see paragraph 5), international jurisdiction will, under Article 22 section 1 of the Brussels I bis Regulation, be conferred only on the courts at the employee’s place of residence.

**Agreements as to the conferral of jurisdiction** are permissible under Article 23 of the Brussels I bis Regulation, only in two cases:

- They must offer the employee additional jurisdictions.  
- They are otherwise only permissible if they are made after the dispute has arisen.

**2. Lugano Convention**

In relation to Norway, Iceland and Switzerland, none of which are Member States of the EU and also are not bound by the Brussels Convention on Jurisdiction and Enforcement, the Lugano Convention applies as between these three States and the EU and Denmark (Lugano Convention). This Brussels I bis Regulation shall, according to its Article 73 section 1, not affect the Lugano Convention. In relation to Norway, the Lugano Convention entered into force on 1 January 2010, in relation to Switzerland on 1 January 2011 and, in relation to Iceland, on 1 May 2011. Its rules on international jurisdiction likewise **accord with those contained in the Brussels I bis Regulation.** International jurisdiction for disputes concerning individual employment contracts is governed by Article 18 of the Lugano Convention.

**3. National law**

Where neither the Brussels I bis Regulation nor the Lugano Convention are applicable, autonomous national law governs the jurisdiction of the domestic courts. Jurisdiction will, in Germany, be determined, in the absence of any special rules, by the **application by analogy of the provisions concerning local jurisdiction.**

In respect of claims under the law on the posting of workers, the posting directive 1996/71/EC requires for a jurisdiction of the host country, which is implemented in Germany under Paragraph 15 of the posted workers act (AEntG, see Section 10 paragraph 71). This provision also confers substantive jurisdiction on the courts in employment matters. This jurisdiction takes its place...
alongside the jurisdictions under Article 20 of the Brussels I bis Regulation (see paragraph 6).

II. Application of the law

1. Ascertaining the applicable law

The court having international jurisdiction will apply its PIL, that is to say the *lex fori*, in order to ascertain the substantive law that is applicable.

2. Typical problem cases in employment law

Two problem areas have emerged on various occasions in the course of this account: legal lacunae and overlapping provisions (on this, see paragraph 15 below) and substitution (see paragraph 16). On the foreign factual situation, see Section 1 paragraph 16; Section 2 paragraph 26; and on the self-restricting substantive provision, see Section 6 paragraph 8.

In the context of the application of the law called upon to apply under the conflict rule situations can arise in which there are overlapping provisions. An example of this is to be found in regard to entitlement to remuneration in respect of public holidays (Section 12 paragraph 38): were the employer to be required to observe his national public holidays under the law applicable to the contract as well as the public holidays at the place where the work is performed, and pay remuneration in respect of these, that would produce a result that was provided for under neither regulation. A converse problem can arise were protection against dismissal to be subsumed under Austrian works constitution law, whilst under German law it is governed by the law applicable to the contract (Section 13 paragraph 34). A person working in the German plant, whose employment is by Austrian contract law would therefore enjoy neither the protection against dismissal provided for under Austrian law nor that provided for by German law – a result desired by neither legal system. That situation may be described as a legal lacuna.

In both cases a corrective is required. That will be affected by means of harmonisation or adjustment. The adjustment can be affected in terms of the conflict of laws by opting for a different connecting rule, or from a substantive point of view. Whichever solution is chosen will be determined by the law of least resistance. The problem of the continued payment of remuneration is best solved by substantive law (Section 12 paragraph 38); in regard to protection against dismissal a conflict of laws solution is required (Section 13 paragraph 34). Even in the absence of general overarching private international law provisions in the Rome Regulations, judicial adjustments to fill the lacunae cannot be defeated by a failure to make adequate provision in the Rome I Regulation or the Rome II Regulation. The issue is not provided for in the Regulations, although it

30 Cf. Also Kegel/Schurig, p. 361 et seq.; Koch/Magnus/Winkler v. Mohrenfels, Section 1 paragraph 31.
ought to have been provided for with the result that it is permissible for the law to be developed in the manner adumbrated. Ultimately, this is an issue on which the ECJ must take a position in the context of preliminary-ruling proceedings.

Substantive provisions of law as a rule proceed on the basis that their statutory requirements are to be fulfilled at national level and indeed under the legal parameters provided for at national level. For this reason, in the case of factual situations occurring abroad, clarification will be needed as to whether the national element may be substituted by a foreign element. This is no question of private international law but a substantive law problem. Thus, for example, in German law, the question arises whether the principle of equal treatment in regard to the hire of workers may be derogated from by a foreign collective agreement. As a matter of general principle, the substitution question must receive a positive answer where the foreign legal concept is equivalent in its effects and function to the one which is to be substituted by it.\(^{31}\) Substitution will therefore be possible, in the example given, if the foreign collective agreement satisfies certain minimum requirements to be worked out in further detail.\(^{32}\) It is conceivable, finally, that in light of the European fundamental freedoms or prohibitions on discrimination substitution will indeed be mandatory.

\(^{31}\) Cf. BGHZ 80, 76, 78 et seq.; also *Koch/Magnus/Winkler v. Mohrenfels*, Section 1 paragraph 50.

\(^{32}\) *Deinert*, Internationales Arbeitsrecht, Section 10 paragraph 105.
REGULATION (EC) No 593/2008 OF THE EUROPEAN PARLIAMENT
AND OF THE COUNCIL (Rome I)
of 17 June 2008
on the law applicable to contractual obligations (Rome I)

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 61(c) and the second indent of Article 67(5) thereof,
Having regard to the proposal from the Commission,
Having regard to the opinion of the European Economic and Social Committee¹,
Acting in accordance with the procedure laid down in Article 251 of the Treaty²,

Whereas:

(1) The Community has set itself the objective of maintaining and developing an area of freedom, security and justice. For the progressive establishment of such an area, the Community is to adopt measures relating to judicial cooperation in civil matters with a cross-border impact to the extent necessary for the proper functioning of the internal market.

(2) According to Article 65, point (b) of the Treaty, these measures are to include those promoting the compatibility of the rules applicable in the Member States concerning the conflict of laws and of jurisdiction.

(3) The European Council meeting in Tampere on 15 and 16 October 1999 endorsed the principle of mutual recognition of judgments and other decisions of judicial authorities as the cornerstone of judicial cooperation in civil matters and invited the Council and the Commission to adopt a programme of measures to implement that principle.

(4) On 30 November 2000 the Council adopted a joint Commission and Council programme of measures for implementation of the principle of mutual recognition of decisions in civil and commercial matters³. The programme identifies measures relating to the harmonisation of conflict-of-law rules as those facilitating the mutual recognition of judgments.


(6) The proper functioning of the internal market creates a need, in order to improve the predictability of the outcome of litigation, certainty as to the law applicable and the free movement of judgments, for the conflict-of-law

rules in the Member States to designate the same national law irrespective of the country of the court in which an action is brought.


(8) Family relationships should cover parentage, marriage, affinity and collateral relatives. The reference in Article 1(2) to relationships having comparable effects to marriage and other family relationships should be interpreted in accordance with the law of the Member State in which the court is seised.

(9) Obligations under bills of exchange, cheques and promissory notes and other negotiable instruments should also cover bills of lading to the extent that the obligations under the bill of lading arise out of its negotiable character.

(10) Obligations arising out of dealings prior to the conclusion of the contract are covered by Article 12 of Regulation (EC) No 864/2007. Such obligations should therefore be excluded from the scope of this Regulation.

(11) The parties' freedom to choose the applicable law should be one of the cornerstones of the system of conflict-of-law rules in matters of contractual obligations.

(12) An agreement between the parties to confer on one or more courts or tribunals of a Member State exclusive jurisdiction to determine disputes under the contract should be one of the factors to be taken into account in determining whether a choice of law has been clearly demonstrated.

(13) This Regulation does not preclude parties from incorporating by reference into their contract a non-State body of law or an international convention.

(14) Should the Community adopt, in an appropriate legal instrument, rules of substantive contract law, including standard terms and conditions, such instrument may provide that the parties may choose to apply those rules.

(15) Where a choice of law is made and all other elements relevant to the situation are located in a country other than the country whose law has been chosen, the choice of law should not prejudice the application of provisions of the law of that country which cannot be derogated from by agreement. This rule should apply whether or not the choice of law was accompanied by a choice of court or tribunal. Whereas no substantial change is intended as compared with Article 3(3) of the 1980 Convention on the Law Applicable to Contractual Obligations\(^7\) (the Rome Convention), the wording of this

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Regulation is aligned as far as possible with Article 14 of Regulation (EC) No 864/2007.

(16) To contribute to the general objective of this Regulation, legal certainty in the European judicial area, the conflict-of-law rules should be highly foreseeable. The courts should, however, retain a degree of discretion to determine the law that is most closely connected to the situation.

(17) As far as the applicable law in the absence of choice is concerned, the concept of ‘provision of services’ and ‘sale of goods’ should be interpreted in the same way as when applying Article 5 of Regulation (EC) No 44/2001 in so far as sale of goods and provision of services are covered by that Regulation. Although franchise and distribution contracts are contracts for services, they are the subject of specific rules.

(18) As far as the applicable law in the absence of choice is concerned, multilateral systems should be those in which trading is conducted, such as regulated markets and multilateral trading facilities as referred to in Article 4 of Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments, regardless of whether or not they rely on a central counterparty.

(19) Where there has been no choice of law, the applicable law should be determined in accordance with the rule specified for the particular type of contract. Where the contract cannot be categorised as being one of the specified types or where its elements fall within more than one of the specified types, it should be governed by the law of the country where the party required to effect the characteristic performance of the contract has his habitual residence. In the case of a contract consisting of a bundle of rights and obligations capable of being categorised as falling within more than one of the specified types of contract, the characteristic performance of the contract should be determined having regard to its centre of gravity.

(20) Where the contract is manifestly more closely connected with a country other than that indicated in Article 4(1) or (2), an escape clause should provide that the law of that other country is to apply. In order to determine that country, account should be taken, inter alia, of whether the contract in question has a very close relationship with another contract or contracts.

(21) In the absence of choice, where the applicable law cannot be determined either on the basis of the fact that the contract can be categorised as one of the specified types or as being the law of the country of habitual residence of the party required to effect the characteristic performance of the contract, the contract should be governed by the law of the country with which it is most closely connected. In order to determine that country, account should be taken, inter alia, of whether the contract in question has a very close relationship with another contract or contracts.

(22) As regards the interpretation of contracts for the carriage of goods, no change in substance is intended with respect to Article 4(4), third sentence, of the Rome Convention. Consequently, single-voyage charter parties and other contracts the main purpose of which is the carriage of goods should be treated as contracts for the carriage of goods. For the purposes of this Regulation, the term ‘consignor’ should refer to any person who enters into a contract of carriage with the carrier and the term ‘the carrier’ should refer to the party to the contract who undertakes to carry the goods, whether or not he performs the carriage himself.

(23) As regards contracts concluded with parties regarded as being weaker, those parties should be protected by conflict-of-law rules that are more favourable to their interests than the general rules.

(24) With more specific reference to consumer contracts, the conflict-of-law rule should make it possible to cut the cost of settling disputes concerning what are commonly relatively small claims and to take account of the development of distance-selling techniques. Consistency with Regulation (EC) No 44/2001 requires both that there be a reference to the concept of directed activity as a condition for applying the consumer protection rule and that the concept be interpreted harmoniously in Regulation (EC) No 44/2001 and this Regulation, bearing in mind that a joint declaration by the Council and the Commission on Article 15 of Regulation (EC) No 44/2001 states that ‘for Article 15(1)(c) to be applicable it is not sufficient for an undertaking to target its activities at the Member State of the consumer’s residence, or at a number of Member States including that Member State; a contract must also be concluded within the framework of its activities’. The declaration also states that ‘the mere fact that an Internet site is accessible is not sufficient for Article 15 to be applicable, although a factor will be that this Internet site solicits the conclusion of distance contracts and that a contract has actually been concluded at a distance, by whatever means. In this respect, the language or currency which a website uses does not constitute a relevant factor.’.

(25) Consumers should be protected by such rules of the country of their habitual residence that cannot be derogated from by agreement, provided that the consumer contract has been concluded as a result of the professional pursuing his commercial or professional activities in that particular country. The same protection should be guaranteed if the professional, while not pursuing his commercial or professional activities in the country where the consumer has his habitual residence, directs his activities by any means to that country or to several countries, including that country, and the contract is concluded as a result of such activities.

(26) For the purposes of this Regulation, financial services such as investment services and activities and ancillary services provided by a professional to a consumer, as referred to in sections A and B of Annex I to Directive
2004/39/EC, and contracts for the sale of units in collective investment undertakings, whether or not covered by Council Directive 85/611/EEC of 20 December 1985 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS)\(^9\), should be subject to Article 6 of this Regulation. Consequently, when a reference is made to terms and conditions governing the issuance or offer to the public of transferable securities or to the subscription and redemption of units in collective investment undertakings, that reference should include all aspects binding the issuer or the offeror to the consumer, but should not include those aspects involving the provision of financial services.

(27) Various exceptions should be made to the general conflict-of-law rule for consumer contracts. Under one such exception the general rule should not apply to contracts relating to rights in rem in immovable property or tenancies of such property unless the contract relates to the right to use immovable property on a timeshare basis within the meaning of Directive 94/47/EC of the European Parliament and of the Council of 26 October 1994 on the protection of purchasers in respect of certain aspects of contracts relating to the purchase of the right to use immovable properties on a timeshare basis\(^10\).

(28) It is important to ensure that rights and obligations which constitute a financial instrument are not covered by the general rule applicable to consumer contracts, as that could lead to different laws being applicable to each of the instruments issued, therefore changing their nature and preventing their fungible trading and offering. Likewise, whenever such instruments are issued or offered, the contractual relationship established between the issuer or the offeror and the consumer should not necessarily be subject to the mandatory application of the law of the country of habitual residence of the consumer, as there is a need to ensure uniformity in the terms and conditions of an issuance or an offer. The same rationale should apply with regard to the multilateral systems covered by Article 4(1)(h), in respect of which it should be ensured that the law of the country of habitual residence of the consumer will not interfere with the rules applicable to contracts concluded within those systems or with the operator of such systems.

(29) For the purposes of this Regulation, references to rights and obligations constituting the terms and conditions governing the issuance, offers to the public or public take-over bids of transferable securities and references to the subscription and redemption of units in collective investment undertakings should include the terms governing, *inter alia*, the allocation of securities or units, rights in the event of over-subscription, withdrawal rights and

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similar matters in the context of the offer as well as those matters referred to in Articles 10, 11, 12 and 13, thus ensuring that all relevant contractual aspects of an offer binding the issuer or the offeror to the consumer are governed by a single law.

(30) For the purposes of this Regulation, financial instruments and transferable securities are those instruments referred to in Article 4 of Directive 2004/39/EC.

(31) Nothing in this Regulation should prejudice the operation of a formal arrangement designated as a system under Article 2(a) of Directive 98/26/EC of the European Parliament and of the Council of 19 May 1998 on settlement finality in payment and securities settlement systems\(^\text{11}\).

(32) Owing to the particular nature of contracts of carriage and insurance contracts, specific provisions should ensure an adequate level of protection of passengers and policy holders. Therefore, Article 6 should not apply in the context of those particular contracts.

(33) Where an insurance contract not covering a large risk covers more than one risk, at least one of which is situated in a Member State and at least one of which is situated in a third country, the special rules on insurance contracts in this Regulation should apply only to the risk or risks situated in the relevant Member State or Member States.

(34) The rule on individual employment contracts should not prejudice the application of the overriding mandatory provisions of the country to which a worker is posted in accordance with 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\(^\text{12}\).

(35) Employees should not be deprived of the protection afforded to them by provisions which cannot be derogated from by agreement or which can only be derogated from to their benefit.

(36) As regards individual employment contracts, work carried out in another country should be regarded as temporary if the employee is expected to resume working in the country of origin after carrying out his tasks abroad. The conclusion of a new contract of employment with the original employer or an employer belonging to the same group of companies as the original employer should not preclude the employee from being regarded as carrying out his work in another country temporarily.

(37) Considerations of public interest justify giving the courts of the Member States the possibility, in exceptional circumstances, of applying exceptions based on public policy and overriding mandatory provisions. The concept of ‘overriding mandatory provisions’ should be distinguished from the expression ‘provisions which cannot be derogated from by agreement’ and should be construed more restrictively.


In the context of voluntary assignment, the term ‘relationship’ should make it clear that Article 14(1) also applies to the property aspects of an assignment, as between assignor and assignee, in legal orders where such aspects are treated separately from the aspects under the law of obligations. However, the term ‘relationship’ should not be understood as relating to any relationship that may exist between assignor and assignee. In particular, it should not cover preliminary questions as regards a voluntary assignment or a contractual subrogation. The term should be strictly limited to the aspects which are directly relevant to the voluntary assignment or contractual subrogation in question.

For the sake of legal certainty there should be a clear definition of habitual residence, in particular for companies and other bodies, corporate or unincorporated. Unlike Article 60(1) of Regulation (EC) No 44/2001, which establishes three criteria, the conflict-of-law rule should proceed on the basis of a single criterion; otherwise, the parties would be unable to foresee the law applicable to their situation.

A situation where conflict-of-law rules are dispersed among several instruments and where there are differences between those rules should be avoided. This Regulation, however, should not exclude the possibility of inclusion of conflict-of-law rules relating to contractual obligations in provisions of Community law with regard to particular matters. This Regulation should not prejudice the application of other instruments laying down provisions designed to contribute to the proper functioning of the internal market in so far as they cannot be applied in conjunction with the law designated by the rules of this Regulation. The application of provisions of the applicable law designated by the rules of this Regulation should not restrict the free movement of goods and services as regulated by Community instruments, such as Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce).

Respect for international commitments entered into by the Member States means that this Regulation should not affect international conventions to which one or more Member States are parties at the time when this Regulation is adopted. To make the rules more accessible, the Commission should publish the list of the relevant conventions in the Official Journal of the European Union on the basis of information supplied by the Member States.

The Commission will make a proposal to the European Parliament and to the Council concerning the procedures and conditions according to which Member States would be entitled to negotiate and conclude, on their own

behalf, agreements with third countries in individual and exceptional cases, concerning sectoral matters and containing provisions on the law applicable to contractual obligations.

(43) Since the objective of this Regulation cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale and effects of this Regulation, be better achieved at Community level, the Community may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty. In accordance with the principle of proportionality, as set out in that Article, this Regulation does not go beyond what is necessary to attain its objective.

(44) In accordance with Article 3 of the Protocol on the position of the United Kingdom and Ireland, annexed to the Treaty on European Union and to the Treaty establishing the European Community, Ireland has notified its wish to take part in the adoption and application of the present Regulation.

(45) In accordance with Articles 1 and 2 of the Protocol on the position of the United Kingdom and Ireland, annexed to the Treaty on European Union and to the Treaty establishing the European Community, and without prejudice to Article 4 of the said Protocol, the United Kingdom is not taking part in the adoption of this Regulation and is not bound by it or subject to its application.

(46) In accordance with Articles 1 and 2 of the Protocol on the position of Denmark, annexed to the Treaty on European Union and to the Treaty establishing the European Community, Denmark is not taking part in the adoption of this Regulation and is not bound by it or subject to its application,

HAVE ADOPTED THIS REGULATION:

CHAPTER I SCOPE

Article 1 Material scope

1. This Regulation shall apply, in situations involving a conflict of laws, to contractual obligations in civil and commercial matters.

It shall not apply, in particular, to revenue, customs or administrative matters.

2. The following shall be excluded from the scope of this Regulation:

(a) questions involving the status or legal capacity of natural persons, without prejudice to Article 13;

(b) obligations arising out of family relationships and relationships deemed by the law applicable to such relationships to have comparable effects, including maintenance obligations;

(c) obligations arising out of matrimonial property regimes, property regimes of relationships deemed by the law applicable to such relationships to have comparable effects to marriage, and wills and succession;
(d) obligations arising under bills of exchange, cheques and promissory notes and other negotiable instruments to the extent that the obligations under such other negotiable instruments arise out of their negotiable character;
(e) arbitration agreements and agreements on the choice of court;
(f) questions governed by the law of companies and other bodies, corporate or unincorporated, such as the creation, by registration or otherwise, legal capacity, internal organisation or winding-up of companies and other bodies, corporate or unincorporated, and the personal liability of officers and members as such for the obligations of the company or body;
(g) the question whether an agent is able to bind a principal, or an organ to bind a company or other body corporate or unincorporated, in relation to a third party;
(h) the constitution of trusts and the relationship between settlors, trustees and beneficiaries;
(i) obligations arising out of dealings prior to the conclusion of a contract;
(j) insurance contracts arising out of operations carried out by organisations other than undertakings referred to in Article 2 of Directive 2002/83/EC of the European Parliament and of the Council of 5 November 2002 concerning life assurance\textsuperscript{14} the object of which is to provide benefits for employed or self-employed persons belonging to an undertaking or group of undertakings, or to a trade or group of trades, in the event of death or survival or of discontinuance or curtailment of activity, or of sickness related to work or accidents at work.

3. This Regulation shall not apply to evidence and procedure, without prejudice to Article 18.

4. In this Regulation, the term ‘Member State’ shall mean Member States to which this Regulation applies. However, in Article 3(4) and Article 7 the term shall mean all the Member States.

Article 2 Universal application

Any law specified by this Regulation shall be applied whether or not it is the law of a Member State.

CHAPTER II  UNIFORM RULES

Article 3  Freedom of choice

1. A contract shall be governed by the law chosen by the parties. The choice shall be made expressly or clearly demonstrated by the terms of the contract or the circumstances of the case. By their choice the parties can select the law applicable to the whole or to part only of the contract.

2. The parties may at any time agree to subject the contract to a law other than that which previously governed it, whether as a result of an earlier choice made under this Article or of other provisions of this Regulation. Any change in the law to be applied that is made after the conclusion of the contract shall not prejudice its formal validity under Article 11 or adversely affect the rights of third parties.

3. Where all other elements relevant to the situation at the time of the choice are located in a country other than the country whose law has been chosen, the choice of the parties shall not prejudice the application of provisions of the law of that other country which cannot be derogated from by agreement.

4. Where all other elements relevant to the situation at the time of the choice are located in one or more Member States, the parties' choice of applicable law other than that of a Member State shall not prejudice the application of provisions of Community law, where appropriate as implemented in the Member State of the forum, which cannot be derogated from by agreement.

5. The existence and validity of the consent of the parties as to the choice of the applicable law shall be determined in accordance with the provisions of Articles 10, 11 and 13.

Article 4  Applicable law in the absence of choice

1. To the extent that the law applicable to the contract has not been chosen in accordance with Article 3 and without prejudice to Articles 5 to 8, the law governing the contract shall be determined as follows:

(a) a contract for the sale of goods shall be governed by the law of the country where the seller has his habitual residence;
(b) a contract for the provision of services shall be governed by the law of the country where the service provider has his habitual residence;
(c) a contract relating to a right in rem in immovable property or to a tenancy of immovable property shall be governed by the law of the country where the property is situated;
(d) notwithstanding point (c), a tenancy of immovable property concluded for temporary private use for a period of no more than six consecutive months shall be governed by the law of the country where the landlord has his habit-
ual residence, provided that the tenant is a natural person and has his habitual residence in the same country;
(e) a franchise contract shall be governed by the law of the country where the franchisee has his habitual residence;
(f) a distribution contract shall be governed by the law of the country where the distributor has his habitual residence;
(g) a contract for the sale of goods by auction shall be governed by the law of the country where the auction takes place, if such a place can be determined;
(h) a contract concluded within a multilateral system which brings together or facilitates the bringing together of multiple third-party buying and selling interests in financial instruments, as defined by Article 4(1), point (17) of Directive 2004/39/EC, in accordance with non-discretionary rules and governed by a single law, shall be governed by that law.

2. Where the contract is not covered by paragraph 1 or where the elements of the contract would be covered by more than one of points (a) to (h) of paragraph 1, the contract shall be governed by the law of the country where the party required to effect the characteristic performance of the contract has his habitual residence.

3. Where it is clear from all the circumstances of the case that the contract is manifestly more closely connected with a country other than that indicated in paragraphs 1 or 2, the law of that other country shall apply.

4. Where the law applicable cannot be determined pursuant to paragraphs 1 or 2, the contract shall be governed by the law of the country with which it is most closely connected.

**Article 5  Contracts of carriage**

1. To the extent that the law applicable to a contract for the carriage of goods has not been chosen in accordance with Article 3, the law applicable shall be the law of the country of habitual residence of the carrier, provided that the place of receipt or the place of delivery or the habitual residence of the consignor is also situated in that country. If those requirements are not met, the law of the country where the place of delivery as agreed by the parties is situated shall apply.

2. To the extent that the law applicable to a contract for the carriage of passengers has not been chosen by the parties in accordance with the second subparagraph, the law applicable shall be the law of the country where the passenger has his habitual residence, provided that either the place of departure or the place of destination is situated in that country. If these requirements are not met, the law of the country where the carrier has his habitual residence shall apply.

The parties may choose as the law applicable to a contract for the carriage of passengers in accordance with Article 3 only the law of the country where:
(a) the passenger has his habitual residence; or
(b) the carrier has his habitual residence; or
(c) the carrier has his place of central administration; or
(d) the place of departure is situated; or
(e) the place of destination is situated.

3. Where it is clear from all the circumstances of the case that the contract, in
the absence of a choice of law, is manifestly more closely connected with a
country other than that indicated in paragraphs 1 or 2, the law of that other coun-
try shall apply.

Article 6 Consumer contracts

1. Without prejudice to Articles 5 and 7, a contract concluded by a natural per-
son for a purpose which can be regarded as being outside his trade or profession
(the consumer) with another person acting in the exercise of his trade or profes-
sion (the professional) shall be governed by the law of the country where the
consumer has his habitual residence, provided that the professional:

(a) pursues his commercial or professional activities in the country where the
consumer has his habitual residence, or
(b) by any means, directs such activities to that country or to several countries
including that country,

and the contract falls within the scope of such activities.

2. Notwithstanding paragraph 1, the parties may choose the law applicable to a
contract which fulfils the requirements of paragraph 1, in accordance with Arti-
cle 3. Such a choice may not, however, have the result of depriving the con-
sumer of the protection afforded to him by provisions that cannot be derogated
from by agreement by virtue of the law which, in the absence of choice, would
have been applicable on the basis of paragraph 1.

3. If the requirements in points (a) or (b) of paragraph 1 are not fulfilled, the
law applicable to a contract between a consumer and a professional shall be de-
termined pursuant to Articles 3 and 4.

4. Paragraphs 1 and 2 shall not apply to:

(a) a contract for the supply of services where the services are to be supplied to
the consumer exclusively in a country other than that in which he has his ha-
bital residence;
(b) a contract of carriage other than a contract relating to package travel within
travel, package holidays and package tours;15

(c) a contract relating to a right *in rem* in immovable property or a tenancy of immovable property other than a contract relating to the right to use immovable properties on a timeshare basis within the meaning of Directive 94/47/EC;

(d) rights and obligations which constitute a financial instrument and rights and obligations constituting the terms and conditions governing the issuance or offer to the public and public take-over bids of transferable securities, and the subscription and redemption of units in collective investment undertakings in so far as these activities do not constitute provision of a financial service;

(e) a contract concluded within the type of system falling within the scope of Article 4(1)(h).

**Article 7 Insurance contracts**

1. This Article shall apply to contracts referred to in paragraph 2, whether or not the risk covered is situated in a Member State, and to all other insurance contracts covering risks situated inside the territory of the Member States. It shall not apply to reinsurance contracts.

2. An insurance contract covering a large risk as defined in Article 5(d) of the First Council Directive 73/239/EEC of 24 July 1973 on the coordination of laws, regulations and administrative provisions relating to the taking-up and pursuit of the business of direct insurance other than life assurance¹⁶ shall be governed by the law chosen by the parties in accordance with Article 3 of this Regulation. To the extent that the applicable law has not been chosen by the parties, the insurance contract shall be governed by the law of the country where the insurer has his habitual residence. Where it is clear from all the circumstances of the case that the contract is manifestly more closely connected with another country, the law of that other country shall apply.

3. In the case of an insurance contract other than a contract falling within paragraph 2, only the following laws may be chosen by the parties in accordance with Article 3:

(a) the law of any Member State where the risk is situated at the time of conclusion of the contract;

(b) the law of the country where the policy holder has his habitual residence;

(c) in the case of life assurance, the law of the Member State of which the policy holder is a national;

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(d) for insurance contracts covering risks limited to events occurring in one Member State other than the Member State where the risk is situated, the law of that Member State;
(e) where the policy holder of a contract falling under this paragraph pursues a commercial or industrial activity or a liberal profession and the insurance contract covers two or more risks which relate to those activities and are situated in different Member States, the law of any of the Member States concerned or the law of the country of habitual residence of the policy holder.

Where, in the cases set out in points (a), (b) or (e), the Member States referred to grant greater freedom of choice of the law applicable to the insurance contract, the parties may take advantage of that freedom.

To the extent that the law applicable has not been chosen by the parties in accordance with this paragraph, such a contract shall be governed by the law of the Member State in which the risk is situated at the time of conclusion of the contract.

4. The following additional rules shall apply to insurance contracts covering risks for which a Member State imposes an obligation to take out insurance:

(a) the insurance contract shall not satisfy the obligation to take out insurance unless it complies with the specific provisions relating to that insurance laid down by the Member State that imposes the obligation. Where the law of the Member State in which the risk is situated and the law of the Member State imposing the obligation to take out insurance contradict each other, the latter shall prevail;
(b) by way of derogation from paragraphs 2 and 3, a Member State may lay down that the insurance contract shall be governed by the law of the Member State that imposes the obligation to take out insurance.

5. For the purposes of paragraph 3, third subparagraph, and paragraph 4, where the contract covers risks situated in more than one Member State, the contract shall be considered as constituting several contracts each relating to only one Member State.

6. For the purposes of this Article, the country in which the risk is situated shall be determined in accordance with Article 2(d) of the Second Council Directive 88/357/EEC of 22 June 1988 on the coordination of laws, regulations and administrative provisions relating to direct insurance other than life assurance and laying down provisions to facilitate the effective exercise of freedom to provide services and, in the case of life assurance, the country in which the risk is situated shall be the country of the commitment within the meaning of Article 1(1)(g) of Directive 2002/83/EC.

Article 8 Individual employment contracts

1. An individual employment contract shall be governed by the law chosen by the parties in accordance with Article 3. Such a choice of law may not, however, have the result of depriving the employee of the protection afforded to him by provisions that cannot be derogated from by agreement under the law that, in the absence of choice, would have been applicable pursuant to paragraphs 2, 3 and 4 of this Article.

2. To the extent that the law applicable to the individual employment contract has not been chosen by the parties, the contract shall be governed by the law of the country in which or, failing that, from which the employee habitually carries out his work in performance of the contract. The country where the work is habitually carried out shall not be deemed to have changed if he is temporarily employed in another country.

3. Where the law applicable cannot be determined pursuant to paragraph 2, the contract shall be governed by the law of the country where the place of business through which the employee was engaged is situated.

4. Where 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.

Article 9 Overriding mandatory provisions

1. Overriding mandatory provisions are provisions the respect for which is regarded as crucial by a country for safeguarding its public interests, such as its political, social or economic organisation, to such an extent that they are applicable to any situation falling within their scope, irrespective of the law otherwise applicable to the contract under this Regulation.

2. Nothing in this Regulation shall restrict the application of the overriding mandatory provisions of the law of the forum.

3. Effect may be given to the overriding mandatory provisions of the law of the country where the obligations arising out of the contract have to be or have been performed, in so far as those overriding mandatory provisions render the performance of the contract unlawful. In considering whether to give effect to those provisions, regard shall be had to their nature and purpose and to the consequences of their application or non-application.

Article 10 Consent and material validity

1. The existence and validity of a contract, or of any term of a contract, shall be determined by the law which would govern it under this Regulation if the contract or term were valid.
2. Nevertheless, a party, in order to establish that he did not consent, may rely upon the law of the country in which he has his habitual residence if it appears from the circumstances that it would not be reasonable to determine the effect of his conduct in accordance with the law specified in paragraph 1.

Article 11 Formal validity

1. A contract concluded between persons who, or whose agents, are in the same country at the time of its conclusion is formally valid if it satisfies the formal requirements of the law which governs it in substance under this Regulation or of the law of the country where it is concluded.
2. A contract concluded between persons who, or whose agents, are in different countries at the time of its conclusion is formally valid if it satisfies the formal requirements of the law which governs it in substance under this Regulation, or of the law of either of the countries where either of the parties or their agent is present at the time of conclusion, or of the law of the country where either of the parties had his habitual residence at that time.
3. A unilateral act intended to have legal effect relating to an existing or contemplated contract is formally valid if it satisfies the formal requirements of the law which governs or would govern the contract in substance under this Regulation, or of the law of the country where the act was done, or of the law of the country where the person by whom it was done had his habitual residence at that time.
4. Paragraphs 1, 2 and 3 of this Article shall not apply to contracts that fall within the scope of Article 6. The form of such contracts shall be governed by the law of the country where the consumer has his habitual residence.
5. Notwithstanding paragraphs 1 to 4, a contract the subject matter of which is a right in rem in immovable property or a tenancy of immovable property shall be subject to the requirements of form of the law of the country where the property is situated if by that law:
   (a) those requirements are imposed irrespective of the country where the contract is concluded and irrespective of the law governing the contract; and
   (b) those requirements cannot be derogated from by agreement.

Article 12 Scope of the law applicable

1. The law applicable to a contract by virtue of this Regulation shall govern in particular:
   (a) interpretation;
   (b) performance;
(c) within the limits of the powers conferred on the court by its procedural law, the consequences of a total or partial breach of obligations, including the assessment of damages in so far as it is governed by rules of law;
(d) the various ways of extinguishing obligations, and prescription and limitation of actions;
(e) the consequences of nullity of the contract.

2. In relation to the manner of performance and the steps to be taken in the event of defective performance, regard shall be had to the law of the country in which performance takes place.

Article 13 Incapacity

In a contract concluded between persons who are in the same country, a natural person who would have capacity under the law of that country may invoke his incapacity resulting from the law of another country, only if the other party to the contract was aware of that incapacity at the time of the conclusion of the contract or was not aware thereof as a result of negligence.

Article 14 Voluntary assignment and contractual subrogation

1. The relationship between assignor and assignee under a voluntary assignment or contractual subrogation of a claim against another person (the debtor) shall be governed by the law that applies to the contract between the assignor and assignee under this Regulation.
2. The law governing the assigned or subrogated claim shall determine its assignability, the relationship between the assignee and the debtor, the conditions under which the assignment or subrogation can be invoked against the debtor and whether the debtor's obligations have been discharged.
3. The concept of assignment in this Article includes outright transfers of claims, transfers of claims by way of security and pledges or other security rights over claims.

Article 15 Legal subrogation

Where a person (the creditor) has a contractual claim against another (the debtor) and a third person has a duty to satisfy the creditor, or has in fact satisfied the creditor in discharge of that duty, the law which governs the third person's duty to satisfy the creditor shall determine whether and to what extent the third person is entitled to exercise against the debtor the rights which the creditor had against the debtor under the law governing their relationship.
Article 16  Multiple liability

If a creditor has a claim against several debtors who are liable for the same claim, and one of the debtors has already satisfied the claim in whole or in part, the law governing the debtor's obligation towards the creditor also governs the debtor's right to claim recourse from the other debtors. The other debtors may rely on the defences they had against the creditor to the extent allowed by the law governing their obligations towards the creditor.

Article 17  Set-off

Where the right to set-off is not agreed by the parties, set-off shall be governed by the law applicable to the claim against which the right to set-off is asserted.

Article 18  Burden of proof

1. The law governing a contractual obligation under this Regulation shall apply to the extent that, in matters of contractual obligations, it contains rules which raise presumptions of law or determine the burden of proof.
2. A contract or an act intended to have legal effect may be proved by any mode of proof recognised by the law of the forum or by any of the laws referred to in Article 11 under which that contract or act is formally valid, provided that such mode of proof can be administered by the forum.

CHAPTER III  OTHER PROVISIONS

Article 19  Habitual residence

1. For the purposes of this Regulation, the habitual residence of companies and other bodies, corporate or unincorporated, shall be the place of central administration.
   The habitual residence of a natural person acting in the course of his business activity shall be his principal place of business.
2. Where the contract is concluded in the course of the operations of a branch, agency or any other establishment, or if, under the contract, performance is the responsibility of such a branch, agency or establishment, the place where the branch, agency or any other establishment is located shall be treated as the place of habitual residence.
3. For the purposes of determining the habitual residence, the relevant point in time shall be the time of the conclusion of the contract.
Article 20  Exclusion of renvoi

The application of the law of any country specified by this Regulation means the application of the rules of law in force in that country other than its rules of private international law, unless provided otherwise in this Regulation.

Article 21  Public policy of the forum

The application of a provision of the law of any country specified by this Regulation may be refused only if such application is manifestly incompatible with the public policy (ordre public) of the forum.

Article 22  States with more than one legal system

1. Where a State comprises several territorial units, each of which has its own rules of law in respect of contractual obligations, each territorial unit shall be considered as a country for the purposes of identifying the law applicable under this Regulation.
2. A Member State where different territorial units have their own rules of law in respect of contractual obligations shall not be required to apply this Regulation to conflicts solely between the laws of such units.

Article 23  Relationship with other provisions of Community law

With the exception of Article 7, this Regulation shall not prejudice the application of provisions of Community law which, in relation to particular matters, lay down conflict-of-law rules relating to contractual obligations.

Article 24  Relationship with the Rome Convention

1. This Regulation shall replace the Rome Convention in the Member States, except as regards the territories of the Member States which fall within the territorial scope of that Convention and to which this Regulation does not apply pursuant to Article 299 of the Treaty.
2. In so far as this Regulation replaces the provisions of the Rome Convention, any reference to that Convention shall be understood as a reference to this Regulation.
Article 25  Relationship with existing international conventions

1. This Regulation shall not prejudice the application of international conventions to which one or more Member States are parties at the time when this Regulation is adopted and which lay down conflict-of-law rules relating to contractual obligations.
2. However, this Regulation shall, as between Member States, take precedence over conventions concluded exclusively between two or more of them in so far as such conventions concern matters governed by this Regulation.

Article 26  List of Conventions

1. By 17 June 2009, Member States shall notify the Commission of the conventions referred to in Article 25(1). After that date, Member States shall notify the Commission of all denunciations of such conventions.
2. Within six months of receipt of the notifications referred to in paragraph 1, the Commission shall publish in the *Official Journal of the European Union*:
   (a) a list of the conventions referred to in paragraph 1;
   (b) the denunciations referred to in paragraph 1.

Article 27  Review clause

1. By 17 June 2013, the Commission shall submit to the European Parliament, the Council and the European Economic and Social Committee a report on the application of this Regulation. If appropriate, the report shall be accompanied by proposals to amend this Regulation. The report shall include:
   (a) a study on the law applicable to insurance contracts and an assessment of the impact of the provisions to be introduced, if any; and
   (b) an evaluation on the application of Article 6, in particular as regards the coherence of Community law in the field of consumer protection.
2. By 17 June 2010, the Commission shall submit to the European Parliament, the Council and the European Economic and Social Committee a report on the question of the effectiveness of an assignment or subrogation of a claim against third parties and the priority of the assigned or subrogated claim over a right of another person. The report shall be accompanied, if appropriate, by a proposal to
amend this Regulation and an assessment of the impact of the provisions to be introduced.

**Article 28  Application in time**

This Regulation shall apply to contracts concluded after 17 December 2009.

**CHAPTER IV  FINAL PROVISIONS**

**Article 29  Entry into force and application**

This Regulation shall enter into force on the 20th day following its publication in the *Official Journal of the European Union*.  
It shall apply from 17 December 2009 except for Article 26 which shall apply from 17 June 2009.  
This Regulation shall be binding in its entirety and directly applicable in the Member States in accordance with the Treaty establishing the European Community.  
Done at Strasbourg, 17 June 2008.

*For the European Parliament*  
*The President*  
H.-G. PÖTTERING  
*For the Council*  
*The President*  
J. LENARČIČ
THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Articles 61(c) and 67 thereof,

Having regard to the proposal from the Commission,

Having regard to the opinion of the European Economic and Social Committee¹,

Acting in accordance with the procedure laid down in Article 251 of the Treaty in the light of the joint text approved by the Conciliation Committee on 25 June 2007²,

Whereas:

[...]

Article 9 Industrial action

Without prejudice to Article 4(2), the law applicable to a non-contractual obligation in respect of the liability of a person in the capacity of a worker or an employer or the organisations representing their professional interests for damages caused by an industrial action, pending or carried out, shall be the law of the country where the action is to be, or has been, taken.

CHAPTER I  SCOPE AND DEFINITIONS

Article 1

1. This Regulation shall apply in civil and commercial matters whatever the nature of the court or tribunal. It shall not extend, in particular, to revenue, customs or administrative matters or to the liability of the State for acts and omissions in the exercise of State authority (acta iure imperii).

2. This Regulation shall not apply to:

(a) the status or legal capacity of natural persons, rights in property arising out of a matrimonial relationship or out of a relationship deemed by the law applicable to such relationship to have comparable effects to marriage;

(b) bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings;

(c) social security;

(d) arbitration;

1 OJ C 218, 23.7.2011, p. 78.
(e) maintenance obligations arising from a family relationship, parentage, marriage or affinity;
(f) wills and succession, including maintenance obligations arising by reason of death.

[...]
Article 6

1. If the defendant is not domiciled in a Member State, the jurisdiction of the courts of each Member State shall, subject to Article 18(1), Article 21(2) and Articles 24 and 25, be determined by the law of that Member State.

2. As against such a defendant, any person domiciled in a Member State may, whatever his nationality, avail himself in that Member State of the rules of jurisdiction there in force, and in particular those of which the Member States are to notify the Commission pursuant to point (a) of Article 76(1), in the same way as nationals of that Member State.

 [...] 

SECTION 5 Jurisdiction over individual contracts of employment

Article 20

1. In matters relating to individual contracts of employment, jurisdiction shall be determined by this Section, without prejudice to Article 6, point 5 of Article 7 and, in the case of proceedings brought against an employer, point 1 of Article 8.

2. Where an employee enters into an individual contract of employment with an employer who is not domiciled in a Member State but has a branch, agency or other establishment in one of the Member States, the employer shall, in disputes arising out of the operations of the branch, agency or establishment, be deemed to be domiciled in that Member State.

Article 21

1. An employer domiciled in a Member State may be sued:

(a) in the courts of the Member State in which he is domiciled; or

(b) in another Member State:

(i) in the courts for the place where or from where the employee habitually carries out his work or in the courts for the last place where he did so; or

(ii) if the employee does not or did not habitually carry out his work in any one country, in the courts for the place where the business which engaged the employee is or was situated.

2. An employer not domiciled in a Member State may be sued in a court of a Member State in accordance with point (b) of paragraph 1.
Article 22

1. An employer may bring proceedings only in the courts of the Member State in which the employee is domiciled.
2. The provisions of this Section shall not affect the right to bring a counter-claim in the court in which, in accordance with this Section, the original claim is pending.

Article 23

The provisions of this Section may be departed from only by an agreement:

(1) which is entered into after the dispute has arisen; or
(2) which allows the employee to bring proceedings in courts other than those indicated in this Section.

concerning the posting of workers in the framework of the provision of services

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Articles 57 (2) and 66 thereof,

Having regard to the proposal from the Commission¹,

Having regard to the opinion of the Economic and Social Committee²,

Acting in accordance with the procedure laid down in Article 189 b of the Treaty³,

(1) Whereas, pursuant to Article 3 (c) of the Treaty, the abolition, as between Member States, of obstacles to the free movement of persons and services constitutes one of the objectives of the Community;

(2) Whereas, for the provision of services, any restrictions based on nationality or residence requirements are prohibited under the Treaty with effect from the end of the transitional period;

(3) Whereas the completion of the internal market offers a dynamic environment for the transnational provision of services, prompting a growing number of undertakings to post employees abroad temporarily to perform work in the territory of a Member State other than the State in which they are habitually employed;

(4) Whereas the provision of services may take the form either of performance of work by an undertaking on its account and under its direction, under a contract concluded between that undertaking and the party for whom the services are intended, or of the hiring-out of workers for use by an undertaking in the framework of a public or a private contract;

(5) Whereas any such promotion of the transnational provision of services requires a climate of fair competition and measures guaranteeing respect for the rights of workers;

(6) Whereas the transnationalization of the employment relationship raises problems with regard to the legislation applicable to the employment relationship; whereas it is in the interests of the parties to lay down the terms and conditions governing the employment relationship envisaged;

² OJ No C 49, 24. 2. 1992, p. 41.
(7) Whereas the Rome Convention of 19 June 1980 on the law applicable to contractual obligations, signed by 12 Member States, entered into force on 1 April 1991 in the majority of Member States;

(8) Whereas Article 3 of that Convention provides, as a general rule, for the free choice of law made by the parties; whereas, in the absence of choice, the contract is to be governed, according to Article 6 (2), by 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, or, if the employee does not habitually carry out his work in any one country, by the law of the country in which the place of business through which he was engaged is situated, unless it appears from the circumstances as a whole that the contract is more closely connected with another country, in which case the contract is to be governed by the law of that country;

(9) Whereas, according to Article 6 (1) of the said Convention, the choice of law made by the parties is not to have the result of depriving the employee of the protection afforded to him by the mandatory rules of the law which would be applicable under paragraph 2 of that Article in the absence of choice;

(10) Whereas Article 7 of the said Convention lays down, subject to certain conditions, that effect may be given, concurrently with the law declared applicable, to the mandatory rules of the law of another country, in particular the law of the Member State within whose territory the worker is temporarily posted;

(11) Whereas, according to the principle of precedence of Community law laid down in its Article 20, the said Convention does not affect the application of provisions which, in relation to a particular matter, lay down choice-of-law rules relating to contractual obligations and which are or will be contained in acts of the institutions of the European Communities or in national laws harmonized in implementation of such acts;

(12) Whereas Community law does not preclude Member States from applying their legislation, or collective agreements entered into by employers and labour, to any person who is employed, even temporarily, within their territory, although his employer is established in another Member State; whereas Community law does not forbid Member States to guarantee the observance of those rules by the appropriate means;

(13) Whereas the laws of the Member States must be coordinated in order to lay down a nucleus of mandatory rules for minimum protection to be observed in the host country by employers who post workers to perform temporary work in the territory of a Member State where the services are provided; whereas such coordination can be achieved only by means of Community law;

(14) Whereas a 'hard core' of clearly defined protective rules should be observed by the provider of the services notwithstanding the duration of the worker's posting;

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(15) Whereas it should be laid down that, in certain clearly defined cases of assembly and/or installation of goods, the provisions on minimum rates of pay and minimum paid annual holidays do not apply;
(16) Whereas there should also be some flexibility in application of the provisions concerning minimum rates of pay and the minimum length of paid annual holidays; whereas, when the length of the posting is not more than one month, Member States may, under certain conditions, derogate from the provisions concerning minimum rates of pay or provide for the possibility of derogation by means of collective agreements; whereas, where the amount of work to be done is not significant, Member States may derogate from the provisions concerning minimum rates of pay and the minimum length of paid annual holidays;
(17) Whereas the mandatory rules for minimum protection in force in the host country must not prevent the application of terms and conditions of employment which are more favourable to workers;
(18) Whereas the principle that undertakings established outside the Community must not receive more favourable treatment than undertakings established in the territory of a Member State should be upheld;
(19) Whereas, without prejudice to other provisions of Community law, this Directive does not entail the obligation to give legal recognition to the existence of temporary employment undertakings, nor does it prejudice the application by Member States of their laws concerning the hiring-out of workers and temporary employment undertakings to undertakings not established in their territory but operating therein in the framework of the provision of services;
(20) Whereas this Directive does not affect either the agreements concluded by the Community with third countries or the laws of Member States concerning the access to their territory of third-country providers of services; whereas this Directive is also without prejudice to national laws relating to the entry, residence and access to employment of third-country workers;
(21) Whereas Council Regulation (EEC) No 1408/71 of 14 June 1971 on the application of social security schemes to employed persons and their families moving within the Community lays down the provisions applicable with regard to social security benefits and contributions;
(22) Whereas this Directive is without prejudice to the law of the Member States concerning collective action to defend the interests of trades and professions;
(23) Whereas competent bodies in different Member States must cooperate with each other in the application of this Directive; whereas Member States must provide for appropriate remedies in the event of failure to comply with this Directive;
(24) Whereas it is necessary to guarantee proper application of this Directive and to that end to make provision for close collaboration between the Commission and the Member States;

(25) Whereas five years after adoption of this Directive at the latest the Commission must review the detailed rules for implementing this Directive with a view to proposing, where appropriate, the necessary amendments, HAVE ADOPTED THIS DIRECTIVE:

Article 1 Scope

1. This Directive shall apply to undertakings established in a Member State which, in the framework of the transnational provision of services, post workers, in accordance with paragraph 3, to the territory of a Member State.
2. This Directive shall not apply to merchant navy undertakings as regards seagoing personnel.
3. This Directive shall apply to the extent that the undertakings referred to in paragraph 1 take one of the following transnational measures:
   (a) post workers to the territory of a Member State on their account and under their direction, under a contract concluded between the undertaking making the posting and the party for whom the services are intended, operating in that Member State, provided there is an employment relationship between the undertaking making the posting and the worker during the period of posting; or
   (b) post workers to an establishment or to an undertaking owned by the group in the territory of a Member State, provided there is an employment relationship between the undertaking making the posting and the worker during the period of posting; or
   (c) being a temporary employment undertaking or placement agency, hire out a worker to a user undertaking established or operating in the territory of a Member State, provided there is an employment relationship between the temporary employment undertaking or placement agency and the worker during the period of posting.
4. Undertakings established in a non-member State must not be given more favourable treatment than undertakings established in a Member State.

Article 2 Definition

1. For the purposes of this Directive, 'posted worker' means a worker who, for a limited period, carries out his work in the territory of a Member State other than the State in which he normally works.
2. For the purposes of this Directive, the definition of a worker is that which applies in the law of the Member State to whose territory the worker is posted.
Article 3 Terms and conditions of employment

1. Member States shall ensure that, whatever the law applicable to the employment relationship, the undertakings referred to in Article 1 (1) guarantee workers posted to their territory the terms and conditions of employment covering the following matters which, in the Member State where the work is carried out, are laid down:

- by law, regulation or administrative provision, and/or
- by collective agreements or arbitration awards which have been declared universally applicable within the meaning of paragraph 8, insofar as they concern the activities referred to in the Annex:
  (a) maximum work periods and minimum rest periods;
  (b) minimum paid annual holidays;
  (c) the minimum rates of pay, including overtime rates; this point does not apply to supplementary occupational retirement pension schemes;
  (d) the conditions of hiring-out of workers, in particular the supply of workers by temporary employment undertakings;
  (e) health, safety and hygiene at work;
  (f) protective measures with regard to the terms and conditions of employment of pregnant women or women who have recently given birth, of children and of young people;
  (g) equality of treatment between men and women and other provisions on non-discrimination.

For the purposes of this Directive, the concept of minimum rates of pay referred to in paragraph 1 (c) is defined by the national law and/or practice of the Member State to whose territory the worker is posted.

2. In the case of initial assembly and/or first installation of goods where this is an integral part of a contract for the supply of goods and necessary for taking the goods supplied into use and carried out by the skilled and/or specialist workers of the supplying undertaking, the first subparagraph of paragraph 1 (b) and (c) shall not apply, if the period of posting does not exceed eight days.

This provision shall not apply to activities in the field of building work listed in the Annex.

3. Member States may, after consulting employers and labour, in accordance with the traditions and practices of each Member State, decide not to apply the first subparagraph of paragraph 1 (c) in the cases referred to in Article 1 (3) (a) and (b) when the length of the posting does not exceed one month.

4. Member States may, in accordance with national laws and/or practices, provide that exemptions may be made from the first subparagraph of paragraph 1 (c) in the cases referred to in Article 1 (3) (a) and (b) and from a decision by a Member State within the meaning of paragraph 3 of this Article, by means of collective agree-

Directive 96/71/EC

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ments within the meaning of paragraph 8 of this Article, concerning one or more sectors of activity, where the length of the posting does not exceed one month.

5. Member States may provide for exemptions to be granted from the first subparagraph of paragraph 1 (b) and (c) in the cases referred to in Article 1 (3) (a) and (b) on the grounds that the amount of work to be done is not significant. Member States availing themselves of the option referred to in the first subparagraph shall lay down the criteria which the work to be performed must meet in order to be considered as ‘non-significant’.

6. The length of the posting shall be calculated on the basis of a reference period of one year from the beginning of the posting. For the purpose of such calculations, account shall be taken of any previous periods for which the post has been filled by a posted worker.

7. Paragraphs 1 to 6 shall not prevent application of terms and conditions of employment which are more favourable to workers. Allowances specific to the posting shall be considered to be part of the minimum wage, unless they are paid in reimbursement of expenditure actually incurred on account of the posting, such as expenditure on travel, board and lodging.

8. ‘Collective agreements or arbitration awards which have been declared universally applicable’ means collective agreements or arbitration awards which must be observed by all undertakings in the geographical area and in the profession or industry concerned.

In the absence of a system for declaring collective agreements or arbitration awards to be of universal application within the meaning of the first subparagraph, Member States may, if they so decide, base themselves on:

- collective agreements or arbitration awards which are generally applicable to all similar undertakings in the geographical area and in the profession or industry concerned, and/or
- collective agreements which have been concluded by the most representative employers’ and labour organizations at national level and which are applied throughout national territory,

provided that their application to the undertakings referred to in Article 1 (1) ensures equality of treatment on matters listed in the first subparagraph of paragraph 1 of this Article between those undertakings and the other undertakings referred to in this subparagraph which are in a similar position. Equality of treatment, within the meaning of this Article, shall be deemed to exist where national undertakings in a similar position:

- are subject, in the place in question or in the sector concerned, to the same obligations as posting undertakings as regards the matters listed in the first subparagraph of paragraph 1, and
- are required to fulfil such obligations with the same effects.
9. Member States may provide that the undertakings referred to in Article 1 (1) must guarantee workers referred to in Article 1 (3) (c) the terms and conditions which apply to temporary workers in the Member State where the work is carried out.

10. This Directive shall not preclude the application by Member States, in compliance with the Treaty, to national undertakings and to the undertakings of other States, on a basis of equality of treatment, of:

- terms and conditions of employment on matters other than those referred to in the first subparagraph of paragraph 1 in the case of public policy provisions,
- terms and conditions of employment laid down in the collective agreements or arbitration awards within the meaning of paragraph 8 and concerning activities other than those referred to in the Annex.

Article 4 Cooperation on information

1. For the purposes of implementing this Directive, Member States shall, in accordance with national legislation and/or practice, designate one or more liaison offices or one or more competent national bodies.

2. Member States shall make provision for cooperation between the public authorities which, in accordance with national legislation, are responsible for monitoring the terms and conditions of employment referred to in Article 3. Such cooperation shall in particular consist in replying to reasoned requests from those authorities for information on the transnational hiring-out of workers, including manifest abuses or possible cases of unlawful transnational activities. The Commission and the public authorities referred to in the first subparagraph shall cooperate closely in order to examine any difficulties which might arise in the application of Article 3 (10).

Mutual administrative assistance shall be provided free of charge.

3. Each Member State shall take the appropriate measures to make the information on the terms and conditions of employment referred to in Article 3 generally available.

4. Each Member State shall notify the other Member States and the Commission of the liaison offices and/or competent bodies referred to in paragraph 1.

Article 5 Measures

Member States shall take appropriate measures in the event of failure to comply with this Directive.
They shall in particular ensure that adequate procedures are available to workers and/or their representatives for the enforcement of obligations under this Directive.

Article 6 Jurisdiction

In order to enforce the right to the terms and conditions of employment guaranteed in Article 3, judicial proceedings may be instituted in the Member State in whose territory the worker is or was posted, without prejudice, where applicable, to the right, under existing international conventions on jurisdiction, to institute proceedings in another State.

Article 7 Implementation

Member States shall adopt the laws, regulations and administrative provisions necessary to comply with this Directive by 16 December 1999 at the latest. They shall forthwith inform the Commission thereof. When Member States adopt these provisions, they shall contain a reference to this Directive or shall be accompanied by such reference on the occasion of their official publication. The methods of making such reference shall be laid down by Member States.

Article 8 Commission review

By 16 December 2001 at the latest, the Commission shall review the operation of this Directive with a view to proposing the necessary amendments to the Council where appropriate.

Article 9

This Directive is addressed to the Member States.
Done at Brussels, 16 December 1996.

For the European Parliament
The President
K. HÄNSCH
For the Council
The President
I. YATES
The activities mentioned in Article 3 (1), second indent, include all building work relating to the construction, repair, upkeep, alteration or demolition of buildings, and in particular the following work:

1. excavation
2. earthmoving
3. actual building work
4. assembly and dismantling of prefabricated elements
5. fitting out or installation
6. alterations
7. renovation
8. repairs
9. dismantling
10. demolition
11. maintenance
12. upkeep, painting and cleaning work
13. improvements.
of 15 May 2014
on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services and amending Regulation (EU) No 1024/2012 on administrative cooperation through the Internal Market Information System (‘the IMI Regulation’)

(TEXT with EEA relevance)

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,
Having regard to the Treaty on the Functioning of the European Union, and in particular Article 53(1) and Article 62 thereof,
Having regard to the proposal from the European Commission,
After transmission of the draft legislative act to the national parliaments,
Having regard to the opinion of the European Economic and Social Committee\(^1\),
Having regard to the opinion of the Committee of the Regions\(^2\),
Acting in accordance with the ordinary legislative procedure\(^3\),

Whereas:

(1) The free movement of workers, freedom of establishment and freedom to provide services are fundamental principles of the internal market in the Union enshrined in the Treaty on the Functioning of the European Union (TFEU). The implementation of those principles is further developed by the Union aimed at guaranteeing a level playing field for businesses and respect for the rights of workers.

(2) The freedom to provide services includes the right of undertakings to provide services in another Member State, to which they may post their own workers temporarily in order to provide those services there. It is necessary for the purpose of the posting of workers to distinguish this freedom from the free movement of workers, which gives every citizen the right to move freely to another Member State to work and reside there for that purpose and protects them against discrimination as regards employment, remuneration and other conditions of work and employment in comparison to nationals of that Member State.

(3) With respect to workers temporarily posted to carry out work in order to provide services in another Member State than the one in which they habitually carry out their work, Directive 96/71/EC of the European Parliament and of the Council\(^4\) establishes a core set of clearly defined terms and con-

\(^1\) OJ C 351, 15.11.2012, p. 61.
\(^2\) OJ C 17, 19.1.2013, p. 67.
\(^3\) Position of the European Parliament of 16 April 2014 (not yet published in the Official Journal) and decision of the Council of 13 May 2014.
ditions of employment which are required to be complied with by the service provider in the Member State to which the posting takes place to ensure the minimum protection of the posted workers concerned.

(4) All measures introduced by this Directive should be justified and proportionate so as not to create administrative burdens or to limit the potential that undertakings, in particular small and medium-sized enterprises (SMEs), have to create new jobs, while protecting posted workers.

(5) In order to ensure compliance with Directive 96/71/EC, whilst not putting an unnecessary administrative burden on the service providers, it is essential that the factual elements referred to in the provisions on the identification of a genuine posting and preventing abuse and circumvention in this Directive are considered to be indicative and non-exhaustive. In particular, there should be no requirement that each element is to be satisfied in every posting case.

(6) Notwithstanding the fact that the assessment of the indicative factual elements should be adapted to each specific case and take account of the specificities of the situation, situations representing the same factual elements should not lead to a different legal appreciation or assessment by competent authorities in different Member States.

(7) In order to prevent, avoid and combat abuse and circumvention of the applicable rules by undertakings taking improper or fraudulent advantage of the freedom to provide services enshrined in the TFEU and/or of the application of Directive 96/71/EC, the implementation and monitoring of the notion of posting should be improved and more uniform elements, facilitating a common interpretation, should be introduced at Union level.

(8) Therefore, the constituent factual elements characterising the temporary nature inherent to the notion of posting, and the condition that the employer is genuinely established in the Member State from which the posting takes place, need to be examined by the competent authority of the host Member State and, where necessary, in close cooperation with the Member State of establishment.

(9) When considering the size of the turnover realised by an undertaking in the Member State of establishment for the purpose of determining whether that undertaking genuinely performs substantial activities, other than purely internal management and/or administrative activities, competent authorities should take into account differences in the purchasing power of currencies.

(10) The elements set out in this Directive relating to the implementation and monitoring of posting may also assist the competent authorities in identifying workers falsely declared as self-employed. According to Directive 96/71/EC, the relevant definition of a worker is that which applies in the

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law of the Member State to whose territory a worker is posted. Further clarification and improved monitoring of posting by relevant competent authorities would enhance legal certainty and provide a useful tool contributing to combating bogus self-employment effectively and ensuring that posted workers are not falsely declared as self-employed, thus helping prevent, avoid and combat circumvention of the applicable rules.

(11) Where there is no genuine posting situation and a conflict of law arises, due regard should be given to the provisions of Regulation (EC) No 593/2008 of the European Parliament and of the Council\(^5\) (‘Rome I’) or the Rome Convention\(^6\) that are aimed at ensuring that employees should not be deprived of the protection afforded to them by provisions which cannot be derogated from by an agreement or which can only be derogated from to their benefit. Member States should ensure that provisions are in place to adequately protect workers who are not genuinely posted.

(12) The lack of the certificate concerning the applicable social security legislation referred to in Regulation (EC) No 883/2004 of the European Parliament and of the Council\(^7\) may be an indication that the situation should not be characterised as one of temporarily posting to a Member State other than the one in which the worker concerned habitually works in the framework of the provision of services.


(14) Respect for the diversity of national industrial relations systems as well as the autonomy of social partners is explicitly recognised by the TFEU.

(15) In many Member States, the social partners play an important role in the context of the posting of workers for the provision of services since they may, in accordance with national law and/or practice, determine the different levels, alternatively or simultaneously, of the applicable minimum rates of pay. The social partners should communicate and inform about those rates.

(16) Adequate and effective implementation and enforcement are key elements in protecting the rights of posted workers and in ensuring a level-playing field for the service providers, whereas poor enforcement undermines the effectiveness of the Union rules applicable in this area. Close cooperation

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between the Commission and the Member States, and where relevant, regional and local authorities, is therefore essential, without neglecting the important role of labour inspectorates and the social partners in this respect. Mutual trust, a spirit of cooperation, continuous dialogue and mutual understanding are essential in this respect.

(17) Effective monitoring procedures in Member States are essential for the enforcement of Directive 96/71/EC and of this Directive and therefore they should be established throughout the Union.

(18) Difficulties in accessing information on terms and conditions of employment are very often the reason why existing rules are not applied by service providers. Member States should therefore ensure that such information is made generally available, free of charge and that effective access to it is provided, not only to service providers from other Member States, but also to the posted workers concerned.

(19) Where terms and conditions of employment are laid down in collective agreements which have been declared to be universally applicable, Member States should ensure, while respecting the autonomy of social partners, that those collective agreements are made generally available in an accessible and transparent way.

(20) In order to improve accessibility of information, a single source of information should be established in Member States. Each Member State should provide for a single official national website, in accordance with web accessibility standards, and other suitable means of communication. The single official national website should, as a minimum, be in the form of a website portal and should serve as a gateway or main entry point and should provide in clear and precise way links to the relevant sources of the information as well as brief information on the content of the website and the links referred to. Such websites should include in particular any website put in place pursuant to Union legislation with a view to promoting entrepreneurship and/or the development of cross-border provision of services. Host Member States should provide information on the periods laid down in their national law for which the service providers have to retain documents after the period of posting.

(21) Posted workers should have the right to receive from the host Member State general information on national law and/or practice that is applicable to them.

(22) Administrative cooperation and mutual assistance between the Member States should comply with the rules on the protection of personal data laid down in Directive 95/46/EC of the European Parliament and of the Council\(^9\), and in accordance with national data protection rules implementing

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Union legislation. With regard to administrative cooperation through the Internal Market Information System (IMI), it should also comply with Regulation (EC) No 45/2001 of the European Parliament and of the Council\textsuperscript{10} and Regulation (EU) No 1024/2012 of the European Parliament and of the Council\textsuperscript{11}.

(23) In order to ensure the correct application of, and to monitor compliance with, the substantive rules on the terms and conditions of employment to be respected with regard to posted workers, Member States should apply only certain administrative requirements and control measures to undertakings that post workers in the framework of the provision of services. According to the case law of the Court of Justice of the European Union, such requirements and measures may be justified by overriding reasons of general interest, which include the effective protection of workers' rights, provided they are appropriate for securing the attainment of the objective pursued and do not go beyond what is necessary to attain it. Such requirements and measures may only be imposed provided that the competent authorities cannot carry out their supervisory task effectively without the requested information and/or less restrictive measures would not ensure that the objectives of the national control measures deemed necessary are attained.

(24) A service provider should ensure that the identity of the posted workers included in the declaration made by the service provider in order to allow factual controls at the workplace is verifiable for the duration of the posting by the competent authorities.

(25) A service provider established in another Member State should inform the competent authorities in the host Member State without undue delay of any important changes to the information contained in the declaration made by the service provider in order to allow factual controls at the workplace.

(26) The obligation to communicate administrative requirements and control measures to the Commission should not constitute an ex-ante authorisation process.

(27) In order to ensure better and more uniform application of Directive 96/71/EC as well as its enforcement in practice and to reduce, as far as possible, differences in the level of application and enforcement across the Union, Member States should ensure that effective and adequate inspections are carried out on their territory, thus contributing, inter alia, to the

\textsuperscript{10} Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data (OJ L 8, 12.1.2001, p. 1).

fight against undeclared work in the context of posting, also taking into account other legal initiatives to address this issue better.

(28) Member States should provide, where applicable, in accordance with their national law and/or practice, the inspected undertaking with a post-inspection or control document which includes any relevant information.

(29) Member States should ensure that sufficient staff are available with the skills and qualifications needed to carry out inspections effectively and to enable requests for information as provided for in this Directive, from the host Member State or the Member State of establishment to be responded to without undue delay.

(30) Labour inspectorates, social partners and other monitoring bodies are of paramount importance in this respect and should continue to play a crucial role.

(31) In order to cope in a flexible way with the diversity of labour markets and industrial relations systems, by way of exception, the management and labour and/or other actors and/or bodies may monitor certain terms and conditions of employment of posted workers, provided they offer the persons concerned an equivalent degree of protection and exercise their monitoring in a non-discriminatory and objective manner.

(32) Member States' inspection authorities and other relevant monitoring and enforcement bodies should avail themselves of the cooperation and exchange of information provided for in the relevant law in order to verify whether the rules applicable to posted workers have been respected.

(33) Member States are particularly encouraged to introduce a more integrated approach to labour inspections. The need to develop common standards in order to establish comparable methods, practices and minimum standards at Union level should equally be examined. However, the development of common standards should not result in Member States being hampered in their efforts to combat undeclared work effectively.

(34) To facilitate the enforcement of Directive 96/71/EC and ensure its more effective application, effective complaint mechanisms should exist through which posted workers may lodge complaints or engage in proceedings either directly or, with their approval, through relevant designated third parties, such as trade unions or other associations as well as common institutions of social partners. This should be without prejudice to national rules of procedure concerning representation and defence before the courts and to the competences and other rights of trade unions and other employee representatives under national law and/or practice.

(35) For the purpose of ensuring that a posted worker receives the correct pay and provided that allowances specific to posting can be considered part of minimum rates of pay, such allowances should only be deducted from wages if national law, collective agreements and/or practice of the host Member State provide for this.
(36) Compliance with the applicable rules in the field of posting in practice and the effective protection of workers' rights in this respect is a matter of particular concern in subcontracting chains and should be ensured through appropriate measures in accordance with national law and/or practice and in compliance with Union law. Such measures may include the introduction on a voluntary basis, after consulting the relevant social partners, of a mechanism of direct subcontracting liability, in addition to or in place of the liability of the employer, in respect of any outstanding net remuneration corresponding to the minimum rates of pay and/or contributions due to common funds or institutions of social partners regulated by law or collective agreement in so far as these are covered by Article 3(1) of Directive 96/71/EC. However, Member States remain free to provide for more stringent liability rules under national law or to go further under national law on a non-discriminatory and proportionate basis.

(37) Member States that have introduced measures to ensure compliance with the applicable rules in subcontracting chains should have the possibility to provide that a (sub)contractor should not be liable in specific circumstances or that the liability may be limited in cases where due diligence obligations have been undertaken by that (sub)contractor. Those measures should be defined by national law, taking into account the specific circumstances of the Member State concerned, and they may include, inter alia, measures taken by the contractor concerning documentation of compliance with administrative requirements and control measures in order to ensure effective monitoring of compliance with the applicable rules on the posting of workers.

(38) It is a matter of concern that there are still many difficulties for Member States to recover cross-border administrative penalties and/or fines and therefore the mutual recognition of administrative penalties and/or fines needs to be addressed.

(39) The disparities between the systems of the Member States for enforcing imposed administrative penalties and/or fines in cross-border situations are prejudicial to the proper functioning of the internal market and risk making it very difficult, if not impossible, to ensure that posted workers enjoy an equivalent level of protection throughout the Union.

(40) Effective enforcement of the substantive rules governing the posting of workers for the provision of services should be ensured by specific action focusing on the cross-border enforcement of imposed financial administrative penalties and/or fines. Approximation of the legislation of the Member States in this field is therefore an essential prerequisite in order to ensure a higher, more equivalent and comparable level of protection necessary for the proper functioning of the internal market.

(41) The adoption of common rules which provide mutual assistance and support for enforcement measures and the associated costs, as well as the adopt-
tion of uniform requirements for the notification of decisions relating to administrative penalties and/or fines imposed for the non-respect of Directive 96/71/EC, as well as of this Directive, should resolve a number of practical cross-border enforcement problems and guarantee better communication and better enforcement of such decisions emanating from another Member State.

(42) If it emerges that the service provider is indeed not established in the Member State of establishment or that the address or the company data are false, the competent authorities should not terminate the procedure on formal grounds but should investigate the matter further in order to establish the identity of the natural or legal person responsible for the posting.

(43) The recognition of decisions imposing an administrative penalty and/or fine and requests to recover such a penalty and/or fine should be based on the principle of mutual trust. To that end, the grounds for non-recognition or a refusal to recover an administrative penalty and/or fine should be limited to the minimum necessary.

(44) Notwithstanding the establishment of more uniform rules with respect to the cross-border enforcement of administrative penalties and/or fines and the need for more common criteria to make follow-up procedures more effective in the event of the non-payment, they should not affect the Member States’ competences to determine their system of penalties, sanctions and fines or the recovery measures available under their national law. Therefore, the instrument permitting enforcement or execution of such penalties and/or fines may, if appropriate, and taking into account national law and/or practice in the requested Member State, be completed, or be accompanied or replaced by a title permitting its enforcement or execution in the requested Member State.

(45) The more uniform rules should not have the effect of amending or modifying the obligation to respect fundamental rights and freedoms of defendants as well as fundamental legal principles that apply to them as enshrined in Article 6 of the Treaty on European Union (TEU), such as the right to be heard and the right to an effective remedy and to a fair trial or the principle ‘ne bis in idem’.

(46) This Directive does not aim to establish harmonised rules for judicial cooperation, jurisdiction, or the recognition and enforcement of decisions in civil and commercial matters, or to deal with applicable law.

(47) Member States should take appropriate measures in the event of failure to comply with the obligations laid down in this Directive, including administrative and judicial procedures, and should provide for effective, dissuasive and proportionate penalties for any breaches of the obligations under this Directive.

(48) This Directive respects the fundamental rights and observes the principles recognised in the Charter of Fundamental Rights of the European Union,
notably protection of personal data (Article 8), the freedom to choose an occupation and right to engage in work (Article 15), the freedom to conduct a business (Article 16), the right to collective bargaining and action (Article 28), fair and just working conditions (Article 31), the right to an effective remedy and to a fair trial (Article 47), the presumption of innocence and right of defence (Article 48) and the right not to be tried twice for the same offence (ne bis in idem) (Article 50), and has to be implemented in accordance with those rights and principles.

(49) In order to facilitate better and more uniform application of Directive 96/71/EC, it is appropriate to provide for an electronic information exchange system to facilitate administrative cooperation and competent authorities should use the IMI as much as possible. However, that should not prevent the application of existing and future bilateral agreements or arrangements concerning administrative cooperation and mutual assistance.

(50) Since the objective of this Directive, namely to establish a common framework of a set of appropriate provisions, measures and control mechanisms necessary for better and more uniform implementation, application and enforcement in practice of Directive 96/71/EC, cannot be sufficiently achieved by the Member States, and can rather, by reason of the scale and effects of the action, be better achieved at Union level, the Union may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the TEU. In accordance with the principle of proportionality, as set out in that Article, this Directive does not go beyond what is necessary in order to achieve that objective.

(51) The European Data Protection Supervisor has been consulted in accordance with Article 28(2) of Regulation (EC) No 45/2001 and delivered an opinion on 19 July 2012.

HAVE ADOPTED THIS DIRECTIVE:

CHAPTER I  GENERAL PROVISIONS

Article 1  Subject matter

1. This Directive establishes a common framework of a set of appropriate provisions, measures and control mechanisms necessary for better and more uniform implementation, application and enforcement in practice of Directive 96/71/EC, including measures to prevent and sanction any abuse and circumvention of the applicable rules and is without prejudice to the scope of Directive 96/71/EC.
This Directive aims to guarantee respect for an appropriate level of protection of the rights of posted workers for the cross-border provision of services, in particular the enforcement of the terms and conditions of employment that apply in

the Member State where the service is to be provided in accordance with Article 3 of Directive 96/71/EC, while facilitating the exercise of the freedom to provide services for service providers and promoting fair competition between service providers, and thus supporting the functioning of the internal market.

2. This Directive shall not affect in any way the exercise of fundamental rights as recognised in Member States and at Union level, including the right or freedom to strike or to take other action covered by the specific industrial relations systems in Member States, in accordance with national law and/or practice. Nor does it affect the right to negotiate, conclude and enforce collective agreements and to take collective action in accordance with national law and/or practice.

Article 2 Definitions

For the purposes of this Directive, the following definitions apply:

(a) ‘competent authority’ means an authority or body, which may include the liaison office(s) as referred to in Article 4 of Directive 96/71/EC, designated by a Member State to perform functions set out in Directive 96/71/EC and this Directive;

(b) ‘requesting authority’ means the competent authority of a Member State which makes a request for assistance, information, notification or recovery of a penalty and/or fine, as referred to in Chapter VI;

(c) ‘requested authority’ means the competent authority of a Member State to which a request for assistance, information, notification or recovery of a penalty and/or fine is made, as referred to in Chapter VI.

Article 3 Competent authorities and liaison offices

For the purposes of this Directive, Member States shall, in accordance with national law and/or practice, designate one or more competent authorities, which may include the liaison office(s) as referred to in Article 4 of Directive 96/71/EC. When designating their competent authorities Member States shall have due regard for the need to ensure data protection of exchanged information and the legal rights of natural and legal persons that may be affected. Member States shall remain ultimately responsible for safeguarding data protection and the legal rights of affected persons and shall put in place appropriate mechanisms in this respect.

Member States shall communicate the contact details of the competent authorities to the Commission and to the other Member States. The Commission shall publish and regularly update the list of the competent authorities and liaison offices.
Other Member States and Union institutions shall respect each Member State's choice of competent authorities.

**Article 4 Identification of a genuine posting and prevention of abuse and circumvention**

1. For the purpose of implementing, applying and enforcing Directive 96/71/EC, the competent authorities shall make an overall assessment of all factual elements that are deemed to be necessary, including, in particular, those set out in paragraphs 2 and 3 of this Article. Those elements are intended to assist competent authorities when carrying out checks and controls and where they have reason to believe that a worker may not qualify as a posted worker under Directive 96/71/EC. Those elements are indicative factors in the overall assessment to be made and therefore shall not be considered in isolation.

2. In order to determine whether an undertaking genuinely performs substantial activities, other than purely internal management and/or administrative activities, the competent authorities shall make an overall assessment of all factual elements characterising those activities, taking account of a wider timeframe, carried out by an undertaking in the Member State of establishment, and where necessary, in the host Member State. Such elements may include in particular:

   (a) the place where the undertaking has its registered office and administration, uses office space, pays taxes and social security contributions and, where applicable, in accordance with national law has a professional licence or is registered with the chambers of commerce or professional bodies;
   (b) the place where posted workers are recruited and from which they are posted;
   (c) the law applicable to the contracts concluded by the undertaking with its workers, on the one hand, and with its clients, on the other;
   (d) the place where the undertaking performs its substantial business activity and where it employs administrative staff;
   (e) the number of contracts performed and/or the size of the turnover realised in the Member State of establishment, taking into account the specific situation of, inter alia, newly established undertakings and SMEs.

3. In order to assess whether a posted worker temporarily carries out his or her work in a Member State other than the one in which he or she normally works, all factual elements characterising such work and the situation of the worker shall be examined. Such elements may include in particular:

   (a) the work is carried out for a limited period of time in another Member State;
   (b) the date on which the posting starts;
(c) the posting takes place to a Member State other than the one in or from which the posted worker habitually carries out his or her work according to Regulation (EC) No 593/2008 (Rome I) and/or the Rome Convention;
(d) the posted worker returns to or is expected to resume working in the Member State from which he or she is posted after completion of the work or the provision of services for which he or she was posted;
(e) the nature of activities;
(f) travel, board and lodging or accommodation is provided or reimbursed by the employer who posts the worker and, if so, how this is provided or the method of reimbursement;
(g) any previous periods during which the post was filled by the same or by another (posted) worker.

4. The failure to satisfy one or more of the factual elements set out in paragraphs 2 and 3 shall not automatically preclude a situation from being characterised as one of posting. The assessment of those elements shall be adapted to each specific case and take account of the specificities of the situation.

5. The elements that are referred to in this Article used by the competent authorities in the overall assessment of a situation as a genuine posting may also be considered in order to determine whether a person falls within the applicable definition of a worker in accordance with Article 2(2) of Directive 96/71/EC. Member States should be guided, inter alia, by the facts relating to the performance of work, subordination and the remuneration of the worker, notwithstanding how the relationship is characterised in any arrangement, whether contractual or not, that may have been agreed between the parties.

CHAPTER II ACCESS TO INFORMATION

Article 5 Improved access to information

1. Member States shall take the appropriate measures to ensure that the information on the terms and conditions of employment referred to in Article 3 of Directive 96/71/EC which are to be applied and complied with by service providers is made generally available free of charge in a clear, transparent, comprehensive and easily accessible way at a distance and by electronic means, in formats and in accordance with web accessibility standards that ensure access to persons with disabilities and to ensure that the liaison offices or other competent national bodies referred to in Article 4 of Directive 96/71/EC are in a position to carry out their tasks effectively.

2. In order to bring about further improvements with respect to access to information, Member States shall:

(a) indicate clearly, in a detailed and user-friendly manner and in an accessible format on a single official national website and by other suitable means,
which terms and conditions of employment and/or which parts of their national and/or regional law are to be applied to workers posted to their territory;

(b) take the necessary measures to make generally available on the single official national website and by other suitable means information on which collective agreements are applicable and to whom they are applicable, and which terms and conditions of employment are to be applied by service providers from other Member States in accordance with Directive 96/71/EC, including where possible, links to existing websites and other contact points, in particular the relevant social partners;

(c) make the information available to workers and service providers free of charge in the official language(s) of the host Member State and in the most relevant languages taking into account demands in its labour market, the choice being left to the host Member State. That information shall be made available if possible in summarised leaflet form indicating the main labour conditions applicable, including the description of the procedures to lodge complaints and upon requests in formats accessible to persons with disabilities; further detailed information on the labour and social conditions applicable to posted workers, including occupational health and safety, shall be made easily available and free of charge;

(d) improve the accessibility and clarity of the relevant information, in particular that provided on a single official national website, as referred to in point (a);

(e) indicate a contact person at the liaison office in charge of dealing with requests for information;

(f) keep the information provided for in the country fiches up to date.

3. The Commission shall continue to support the Member States in the area of access to information.

4. Where, in accordance with national law, traditions and practice, including respect for the autonomy of social partners, the terms and conditions of employment referred to in Article 3 of Directive 96/71/EC are laid down in collective agreements in accordance with Article 3(1) and (8) of that Directive, Member States shall ensure that those terms and conditions are made available in an accessible and transparent way to service providers from other Member States and to posted workers, and shall seek the involvement of the social partners in that respect. The relevant information should, in particular, cover the different minimum rates of pay and their constituent elements, the method used to calculate the remuneration due and, where relevant, the qualifying criteria for classification in the different wage categories.

5. Member States shall indicate the bodies and authorities to which workers and undertakings can turn for general information on national law and practice applicable to them concerning their rights and obligations within their territory.
CHAPTER III  ADMINISTRATIVE COOPERATION

Article 6  Mutual assistance — general principles

1. Member States shall work in close cooperation and provide each other with mutual assistance without undue delay in order to facilitate the implementation, application and enforcement in practice of this Directive and Directive 96/71/EC.

2. The cooperation of the Member States shall in particular consist in replying to reasoned requests for information from competent authorities and in carrying out checks, inspections and investigations with respect to the situations of posting referred to in Article 1(3) of Directive 96/71/EC, including the investigation of any non-compliance or abuse of applicable rules on the posting of workers. Requests for information include information with respect to a possible recovery of an administrative penalty and/or fine, or the notification of a decision imposing such a penalty and/or fine as referred to in Chapter VI.

3. The cooperation of the Member States may also include the sending and service of documents.

4. For the purpose of responding to a request for assistance from competent authorities in another Member State, Member States shall ensure that service providers established in their territory supply their competent authorities with all the information necessary for supervising their activities in compliance with their national laws. Member States shall take appropriate measures in the event of failure to provide such information.

5. In the event of difficulty in meeting a request for information or in carrying out checks, inspections or investigations, the Member State in question shall without delay inform the requesting Member State with a view to finding a solution.

In the event of any persisting problems in the exchange of information or a permanent refusal to supply information, the Commission being informed, where relevant by means of IMI, shall take the appropriate measures.

6. Member States shall supply the information requested by other Member States or the Commission by electronic means within the following time limits:

   (a) in urgent cases requiring the consultation of registers, such as those on confirmation of the VAT registration, for the purpose of checking an establishment in another Member State, as soon as possible and up to a maximum of two working days from the receipt of the request.
   The reason for the urgency shall be clearly indicated in the request, including some details to substantiate that urgency.

   (b) in all other requests for information, up to a maximum of 25 working days from the receipt of the request, unless a shorter time limit is mutually agreed between the Member States.
7. Member States shall ensure that registers in which service providers have been entered, and which may be consulted by the competent authorities in their territory, may also be consulted, in accordance with the same conditions, by the equivalent competent authorities of the other Member States, for the purposes of implementing this Directive and Directive 96/71/EC, in so far as these registers are listed by the Member States in the IMI.

8. Member States shall ensure that the information exchanged by bodies referred to in point (a) of Article 2 or transmitted to them shall be used only in respect of the matter(s) for which it was requested.

9. Mutual administrative cooperation and assistance shall be provided free of charge.

10. A request for information shall not preclude the competent authorities from taking measures in accordance with the relevant national and Union law to investigate and prevent alleged breaches of Directive 96/71/EC or this Directive.

**Article 7 Role of the Member States in the framework of administrative cooperation**

1. In accordance with the principles established in Articles 4 and 5 of Directive 96/71/EC, during the period of posting of a worker to another Member State, the inspection of terms and conditions of employment to be complied with according to Directive 96/71/EC is the responsibility of the authorities of the host Member State in cooperation, where necessary, with those of the Member State of establishment.

2. The Member State of establishment of the service provider shall continue to monitor, control and take the necessary supervisory or enforcement measures, in accordance with its national law, practice and administrative procedures, with respect to workers posted to another Member State.

3. The Member State of establishment of the service provider shall assist the Member State to which the posting takes place to ensure compliance with the conditions applicable under Directive 96/71/EC and this Directive. That responsibility shall not in any way reduce the possibilities of the Member State to which the posting takes place to monitor, control or take any necessary supervisory or enforcement measures in accordance with this Directive and Directive 96/71/EC.

4. Where there are facts that indicate possible irregularities, a Member State shall, on its own initiative, communicate to the Member State concerned any relevant information without undue delay.

5. Competent authorities of the host Member State may also ask the competent authorities of the Member State of establishment, in respect of each instance where services are provided or each service provider, to provide information as to the legality of the service provider's establishment, the service provider's good
conduct, and the absence of any infringement of the applicable rules. The competent authorities of the Member State of establishment shall provide this information in accordance with Article 6.

6. The obligations laid down in this Article shall not give rise to a duty on the part of the Member State of establishment to carry out factual checks and controls in the territory of the host Member State in which the service is provided. Such checks and controls may be carried out by the authorities of the host Member State on their own initiative or at the request of the competent authorities of the Member State of establishment, in accordance with Article 10 and in conformity with the powers of supervision provided for in the host Member State's national law, practice and administrative procedures and in compliance with Union law.

Article 8  Accompanying measures

1. Member States shall, with the assistance of the Commission, take accompanying measures to develop, facilitate and promote the exchange between officials in charge of the implementation of administrative cooperation and mutual assistance as well as monitoring the compliance with, and enforcement of, the applicable rules. Member States may also take accompanying measures to support organisations that provide information to posted workers.

2. The Commission shall assess the need for financial support in order to further improve administrative cooperation and increase mutual trust through projects, including promoting exchanges of relevant officials and training, as well as developing, facilitating and promoting best practice initiatives, including those of social partners at Union level, such as the development and updating of databases or joint websites containing general or sector-specific information concerning terms and conditions of employment to be respected and the collection and evaluation of comprehensive data specific to the posting process. Where it concludes that such a need exists, the Commission shall, without prejudice to the prerogatives of the European Parliament and the Council in the budgetary procedure, use available financing instruments aimed at strengthening administrative cooperation.

3. While respecting the autonomy of social partners, the Commission and Member States may ensure adequate support for relevant initiatives of the social partners at the Union and national level that aim to inform undertakings and workers on the applicable terms and conditions of employment laid down in this Directive and in Directive 96/71/EC.
CHAPTER IV  MONITORING COMPLIANCE

Article 9  Administrative requirements and control measures

1. Member States may only impose administrative requirements and control measures necessary in order to ensure effective monitoring of compliance with the obligations set out in this Directive and Directive 96/71/EC, provided that these are justified and proportionate in accordance with Union law.

For these purposes Member States may in particular impose the following measures:

(a) an obligation for a service provider established in another Member State to make a simple declaration to the responsible national competent authorities at the latest at the commencement of the service provision, into (one of) the official language(s) of the host Member State, or into (an)other language(s) accepted by the host Member State, containing the relevant information necessary in order to allow factual controls at the workplace, including:
   (i) the identity of the service provider;
   (ii) the anticipated number of clearly identifiable posted workers;
   (iii) the persons referred to under points (e) and (f);
   (iv) the anticipated duration, envisaged beginning and end date of the posting;
   (v) the address(es) of the workplace; and
   (vi) the nature of the services justifying the posting;

(b) an obligation to keep or make available and/or retain copies, in paper or electronic form, of the employment contract or an equivalent document within the meaning of Council Directive 91/533/EEC\(^\text{13}\), including, where appropriate or relevant, the additional information referred to in Article 4 of that Directive, payslips, time-sheets indicating the beginning, end and duration of the daily working time and proof of payment of wages or copies of equivalent documents during the period of posting in an accessible and clearly identified place in its territory, such as the workplace or the building site, or for mobile workers in the transport sector the operations base or the vehicle with which the service is provided;

(c) an obligation to deliver the documents referred to under point (b), after the period of posting, at the request of the authorities of the host Member State, within a reasonable period of time;

(d) an obligation to provide a translation of the documents referred to under point (b) into (one of) the official language(s) of the host Member State, or into (an)other language(s) accepted by the host Member State;

(e) an obligation to designate a person to liaise with the competent authorities in the host Member State in which the services are provided and to send out and receive documents and/or notices, if need be;

(f) an obligation to designate a contact person, if necessary, acting as a representative through whom the relevant social partners may seek to engage the service provider to enter into collective bargaining within the host Member State, in accordance with national law and/or practice, during the period in which the services are provided. That person may be different from the person referred to under point (e) and does not have to be present in the host Member State, but has to be available on a reasonable and justified request;

2. Member States may impose other administrative requirements and control measures, in the event that situations or new developments arise from which it appears that existing administrative requirements and control measures are not sufficient or efficient to ensure effective monitoring of compliance with the obligations set out in Directive 96/71/EC and this Directive, provided that these are justified and proportionate.

3. Nothing in this Article shall affect other obligations deriving from the Union legislation, including those deriving from Council Directive 89/391/EEC\(^{14}\) and the Regulation (EC) No 883/2004, and/or those under national law regarding the protection or employment of workers provided that the latter are equally applicable to undertakings established in the Member State concerned and that they are justified and proportionate.

4. Member States shall ensure that the procedures and formalities relating to the posting of workers pursuant to this Article can be completed in a user-friendly way by undertakings, at a distance and by electronic means as far as possible.

5. Member States shall communicate to the Commission and inform service providers of any measures referred to in paragraphs 1 and 2 that they apply or that have been implemented by them. The Commission shall communicate those measures to the other Member States. The information for the service providers shall be made generally available on a single national website in the most relevant language(s), as determined by the Member State.

The Commission shall monitor the application of the measures referred to in paragraphs 1 and 2 closely, evaluate their compliance with Union law and shall, where appropriate, take the necessary measures in accordance with its competences under the TFEU.

The Commission shall report regularly to the Council on measures communicated by Member States and, where appropriate, on the state of play of its analysis and/or assessment.

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Article 10 Inspections

1. Member States shall ensure that appropriate and effective checks and monitoring mechanisms provided in accordance with national law and practice are put in place and that the authorities designated under national law carry out effective and adequate inspections on their territory in order to control and monitor compliance with the provisions and rules laid down in Directive 96/71/EC, taking into account the relevant provisions of this Directive and thus guarantee their proper application and enforcement. Notwithstanding the possibility of conducting random checks, inspections shall be based primarily on a risk assessment by the competent authorities. The risk assessment may identify the sectors of activity in which the employment of workers posted for the provision of services is concentrated on their territory. When making such a risk assessment, the carrying out of large infrastructural projects, the existence of long chains of subcontractors, geographic proximity, the special problems and needs of specific sectors, the past record of infringement, as well as the vulnerability of certain groups of workers may in particular be taken into account.

2. Member States shall ensure that inspections and controls of compliance under this Article are not discriminatory and/or disproportionate, whilst taking into account the relevant provisions of this Directive.

3. If information is needed in the course of the inspections and in the light of Article 4, the host Member State and the Member State of establishment shall act in accordance with the rules on administrative cooperation. In particular, the competent authorities shall cooperate pursuant to the rules and principles laid down in Articles 6 and 7.

4. In Member States where, in accordance with national law and/or practice, the setting of the terms and conditions of employment of posted workers referred to in Article 3 of Directive 96/71/EC, and in particular the minimum rates of pay, including working time, is left to management and labour they may, at the appropriate level and subject to the conditions laid down by the Member States, also monitor the application of the relevant terms and conditions of employment of posted workers, provided that an adequate level of protection equivalent to that resulting from Directive 96/71/EC and this Directive is guaranteed.

5. Member States where labour inspectorates have no competence with respect to the control and monitoring of the working conditions and/or terms and conditions of employment of posted workers may, in accordance with national law and/or practice, establish, modify or maintain arrangements, procedures and mechanisms guaranteeing the respect of these terms and conditions of employment, provided that the arrangements offer the persons concerned an adequate degree of protection equivalent to that resulting from Directive 96/71/EC and this Directive.
CHAPTER V ENFORCEMENT

Article 11 Defence of rights — facilitation of complaints — back-payments

1. For the enforcement of the obligations under Directive 96/71/EC, in particular Article 6 thereof, and this Directive, Member States shall ensure that there are effective mechanisms for posted workers to lodge complaints against their employers directly, as well as the right to institute judicial or administrative proceedings, also in the Member State in whose territory the workers are or were posted, where such workers consider they have sustained loss or damage as a result of a failure to apply the applicable rules, even after the relationship in which the failure is alleged to have occurred has ended.

2. Paragraph 1 shall apply without prejudice to the jurisdiction of the courts in the Member States as laid down, in particular, in the relevant instruments of Union law and/or international conventions.

3. Member States shall ensure that trade unions and other third parties, such as associations, organisations and other legal entities which have, in accordance with the criteria laid down under national law, a legitimate interest in ensuring that this Directive and Directive 96/71/EC are complied with, may engage, on behalf or in support of the posted workers or their employer, and with their approval, in any judicial or administrative proceedings with the objective of implementing this Directive and Directive 96/71/EC and/or enforcing the obligations under this Directive and Directive 96/71/EC.

4. Paragraphs 1 and 3 shall apply without prejudice to:

(a) national rules on prescription deadlines or time limits for bringing similar actions, provided that they are not regarded as capable of rendering virtually impossible or excessively difficult the exercise of those rights;

(b) other competences and collective rights of social partners, employees and employers representatives, where applicable, under national law and/or practice;

(c) national rules of procedure concerning representation and defence before the courts.

5. Posted workers bringing judicial or administrative proceedings within the meaning of paragraph 1 shall be protected against any unfavourable treatment by their employer.

6. Member States shall ensure that the employer of the posted worker is liable for any due entitlements resulting from the contractual relationship between the employer and that posted worker.

Member States shall in particular ensure that the necessary mechanisms are in place to ensure that the posted workers are able to receive:
(a) any outstanding net remuneration which, under the applicable terms and conditions of employment covered by Article 3 of Directive 96/71/EC, would have been due;
(b) any back-payments or refund of taxes or social security contributions unduly withheld from their salaries;
(c) a refund of excessive costs, in relation to net remuneration or to the quality of the accommodation, withheld or deducted from wages for accommodation provided by the employer;
(d) where relevant, employer’s contributions due to common funds or institutions of social partners unduly withheld from their salaries.

This paragraph shall also apply in cases where the posted workers have returned from the Member State to which the posting took place.

**Article 12 Subcontracting liability**

1. In order to tackle fraud and abuse, Member States may, after consulting the relevant social partners in accordance with national law and/or practice, take additional measures on a non-discriminatory and proportionate basis in order to ensure that in subcontracting chains the contractor of which the employer (service provider) covered by Article 1(3) of Directive 96/71/EC is a direct subcontractor can, in addition to or in place of the employer, be held liable by the posted worker with respect to any outstanding net remuneration corresponding to the minimum rates of pay and/or contributions due to common funds or institutions of social partners in so far as covered by Article 3 of Directive 96/71/EC.

2. As regards the activities mentioned in the Annex to Directive 96/71/EC, Member States shall provide for measures ensuring that in subcontracting chains, posted workers can hold the contractor of which the employer is a direct subcontractor liable, in addition to or in place of the employer, for the respect of the posted workers' rights referred to in paragraph 1 of this Article.

3. The liability referred to in paragraphs 1 and 2 shall be limited to worker's rights acquired under the contractual relationship between the contractor and his or her subcontractor.

4. Member States may, in conformity with Union law, equally provide for more stringent liability rules under national law on a non-discriminatory and proportionate basis with regard to the scope and range of subcontracting liability. Member States may also, in conformity with Union law, provide for such liability in sectors other than those referred to in the Annex to Directive 96/71/EC.

5. Member States may in the cases referred to in paragraphs 1, 2 and 4 provide that a contractor that has undertaken due diligence obligations as defined by national law shall not be liable.

6. Instead of the liability rules referred to in paragraph 2, Member States may take other appropriate enforcement measures, in accordance with Union and na-
tional law and/or practice, which enable, in a direct subcontracting relationship, effective and proportionate sanctions against the contractor, to tackle fraud and abuse in situations when workers have difficulties in obtaining their rights.

7. Member States shall inform the Commission about measures taken under this Article and shall make the information generally available in the most relevant language(s), the choice being left to Member States.

In the case of paragraph 2, the information provided to the Commission shall include elements setting out liability in subcontracting chains.

In the case of paragraph 6, the information provided to the Commission shall include elements setting out the effectiveness of the alternative national measures with regard to the liability rules referred to in paragraph 2.

The Commission shall make this information available to the other Member States.

8. The Commission shall closely monitor the application of this Article.

CHAPTER VI CROSS-BORDER ENFORCEMENT OF FINANCIAL ADMINISTRATIVE PENALTIES AND/OR FINES

Article 13 Scope

1. Without prejudice to the means which are or may be provided for in other Union legislation, the principles of mutual assistance and mutual recognition as well as the measures and procedures provided for in this Chapter shall apply to the cross-border enforcement of financial administrative penalties and/or fines imposed on a service provider established in a Member State, for failure to comply with the applicable rules on posting of workers in another Member State.

2. This Chapter shall apply to financial administrative penalties and/or fines, including fees and surcharges, imposed by competent authorities or confirmed by administrative or judicial bodies or, where applicable, resulting from industrial tribunals, relating to non-compliance with Directive 96/71/EC or this Directive. This Chapter shall not apply to the enforcement of penalties which fall under the scope of application of Council Framework Decision 2005/214/JHA, Council Regulation (EC) No 44/2001 or Council Decision 2006/325/EC.

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Article 14 Designation of the competent authorities

Each Member State shall inform the Commission through IMI which authority or authorities, under its national law, are competent for the purpose of this Chapter. Member States may designate, if it is necessary as a result of the organisation of their internal systems, one or more central authorities responsible for the administrative transmission and reception of requests and to assist other relevant authorities.

Article 15 General principles — mutual assistance and recognition

1. At the request of the requesting authority, the requested authority shall, subject to Articles 16 and 17:

(a) recover an administrative penalty and/or fine that has been imposed in accordance with the laws and procedures of the requesting Member State by a competent authority or confirmed by an administrative or judicial body or, where applicable, by industrial tribunals, which is not subject to further appeal; or

(b) notify a decision imposing such a penalty and/or fine.

In addition, the requested authority shall notify any other relevant document related to the recovery of such a penalty and/or fine, including the judgment or final decision, which may be in the form of a certified copy, that constitutes the legal basis and title for the execution of the request for recovery.

2. The requesting authority shall ensure that the request for recovery of an administrative penalty and/or fine or the notification of a decision imposing such a penalty and/or fine is made in accordance with the laws, regulations and administrative practices in force in that Member State. Such a request shall only be made when the requesting authority is unable to recover or to notify in accordance with its laws, regulations and administrative practices.

The requesting authority shall not make a request for recovery of an administrative penalty and/or fine or notification of a decision imposing such a penalty and/or fine if and as long as the penalty and/or fine, as well as the underlying claim and/or the instrument permitting its enforcement in the requesting Member State, are contested or challenged in that Member State.

3. The competent authority requested to recover an administrative penalty and/or fine or to notify a decision imposing such a penalty and/or fine which has been transmitted in accordance with this Chapter and Article 21, shall recognise it without any further formality being required and shall forthwith take all the necessary measures for its execution, unless that requested authority decides to invoke one of the grounds for refusal provided for in Article 17.
4. For the purpose of recovery of an administrative penalty and/or fine or notification of a decision imposing such a penalty and/or fine, the requested authority shall act in accordance with the national laws, regulations and administrative practices in force in the requested Member State applying to the same or, in the absence of the same, a similar infringement or decision.

The notification of a decision imposing an administrative penalty and/or fine by the requested authority and the request for recovery shall, in accordance with the national laws, regulations and administrative practices of the requested Member State, be deemed to have the same effect as if it had been made by the requesting Member State.

Article 16  Request for recovery or notification

1. The request of the requesting authority for recovery of an administrative penalty and/or fine as well as the notification of a decision concerning such a penalty and/or fine shall be carried out without undue delay by means of a uniform instrument and shall at least indicate:

(a) the name and known address of the addressee, and any other relevant data or information for the identification of the addressee;
(b) a summary of the facts and circumstances of the infringement, the nature of the offence and the relevant applicable rules;
(c) the instrument permitting enforcement in the requesting Member State and all other relevant information or documents, including those of a judicial nature, concerning the underlying claim, administrative penalty and/or fine;

and

(d) the name, address and other contact details regarding the competent authority responsible for the assessment of the administrative penalty and/or fine, and, if different, the competent body where further information can be obtained concerning the penalty and/or fine or the possibilities for contesting the payment obligation or decision imposing it.

2. In addition to that which has been provided for in paragraph 1, the request shall indicate:

(a) in the case of notification of a decision, the purpose of the notification and the period within which it shall be effected;
(b) in the case of a request for recovery, the date when the judgment or decision has become enforceable or final, a description of the nature and amount of the administrative penalty and/or fine, any dates relevant to the enforcement process, including whether, and if so how, the judgment or decision has been served on defendant(s) and/or given in default of appearance, a confirmation from the requesting authority that the penalty and/or fine is not subject to
any further appeal, and the underlying claim in respect of which the request 
is made and its different components.

3. The requested authority shall take all the necessary steps to notify the service 
provider of the request for recovery or of the decision imposing an administra-
tive penalty and/or fine and of the relevant documents, where necessary, in ac-
cordance with its national law and/or practice as soon as possible, and no later 
than one month of receipt of the request. 
The requested authority shall as soon as possible inform the requesting authority of:

(a) the action taken on its request for recovery and notification and, more 
specifically, of the date on which the addressee was notified;
(b) the grounds for refusal, in the event that it refuses to execute a request for 
recovery of an administrative penalty and/or fine or to notify a decision im-
posing an administrative penalty and/or fine in accordance with Article 17.

Article 17  Grounds for refusal

The requested authorities shall not be obliged to execute a request for recovery 
or notification if the request does not contain the information referred to in Arti-
cle 16(1) and (2), is incomplete or manifestly does not correspond to the under-
lying decision.
In addition, the requested authorities may refuse to execute a request for recov-
ery in the following circumstances:

(a) following inquiries by the requested authority it is obvious that the envis-
aged costs or resources required to recover the administrative penalty and/or 
fine are disproportionate in relation to the amount to be recovered or would 
give rise to significant difficulties;
(b) the overall financial penalty and/or fine is below EUR 350 or the equivalent 
to that amount;
(c) fundamental rights and freedoms of defendants and legal principles that ap-
ply to them as laid down in the Constitution of the requested Member State 
are not respected.

Article 18  Suspension of the procedure

1. If, in the course of the recovery or notification procedure, the administrative 
penalty and/or fine and/or underlying claim is challenged or appealed by the ser-
vice provider concerned or by an interested party, the cross-border enforcement 
procedure of the penalty and/or fine imposed shall be suspended pending the de-
cision of the appropriate competent body or authority in the requesting Member State in the matter.
Any challenge or appeal shall be made to the appropriate competent body or authority in the requesting Member State.
The requesting authority shall without delay notify the requested authority of the contestation.
2. Disputes concerning the enforcement measures taken in the requested Member State or concerning the validity of a notification made by a requested authority shall be brought before the competent body or judicial authority of that Member State in accordance with its laws and regulations.

Article 19 Costs
1. Amounts recovered with respect to the penalties and/or fines referred to in this Chapter shall accrue to the requested authority.
The requested authority shall recover the amounts due in the currency of its Member State, in accordance with the laws, regulations and administrative procedures or practices which apply to similar claims in that Member State.
The requested authority shall, if necessary, in accordance with its national law and practice convert the penalty and/or fine into the currency of the requested State at the rate of exchange applying on the date when the penalty and/or fine was imposed.
2. Member States shall not claim from each other the reimbursement of costs arising from any mutual assistance they grant each other pursuant to this Directive or resulting from its application.

CHAPTER VII FINAL PROVISIONS

Article 20 Penalties

Member States shall lay down rules on penalties applicable in the event of infringements of national provisions adopted pursuant to this Directive and shall take all the necessary measures to ensure that they are implemented and complied with. The penalties provided for shall be effective, proportionate and dissuasive. Member States shall notify those provisions to the Commission by 18 June 2016. They shall notify without delay any subsequent amendments to them.

Article 21 Internal Market Information System

1. The administrative cooperation and mutual assistance between the competent authorities of the Member States provided for in Articles 6 and 7, Article 10(3),
and Articles 14 to 18 shall be implemented through the Internal Market Information System (IMI), established by Regulation (EU) No 1024/2012.

2. Member States may apply bilateral agreements or arrangements concerning administrative cooperation and mutual assistance between their competent authorities as regards the application and monitoring of the terms and conditions of employment applicable to posted workers referred to in Article 3 of Directive 96/71/EC, in so far as these agreements or arrangements do not adversely affect the rights and obligations of the workers and undertakings concerned.

Member States shall inform the Commission of the bilateral agreements and/or arrangements they apply and shall make the text of those bilateral agreements generally available.

3. In the context of bilateral agreements or arrangements referred to in paragraph 2, competent authorities of the Member States shall use IMI as much as possible. In any event, where a competent authority in one of the Member States concerned has used IMI, it shall where possible be used for any follow-up required.

Article 22 Amendment to Regulation (EU) No 1024/2012

In the Annex to Regulation (EU) No 1024/2012 the following points are added:


Article 23 Transposition

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by 18 June 2016. They shall immediately inform the Commission thereof.

When Member States adopt those measures, they shall contain a reference to this Directive or shall be accompanied by such reference on the occasion of their official publication. The methods of making such reference shall be laid down by Member States.

2. Member States shall communicate to the Commission the text of the main measures of national law which they adopt in the field covered by this Directive.
Article 24  Review

1. The Commission shall review the application and implementation of this Directive.
No later than 18 June 2019, the Commission shall present a report on its application and implementation to the European Parliament, the Council and the European Economic and Social Committee and propose, where appropriate, necessary amendments and modifications.
2. In its review the Commission shall, after consultation of Member States and, where relevant, social partners at Union level, in particular assess:
   (a) the necessity and appropriateness of the factual elements for identification of a genuine posting, including the possibilities to amend existing and defining possible new elements to be taken into account in order to determine whether the undertaking is genuine and a posted worker temporarily carries out his or her work, as referred to in Article 4;
   (b) the adequacy of data available relating to the posting process;
   (c) the appropriateness and adequacy of the application of national control measures in light of the experience with and effectiveness of the system for administrative cooperation and exchange of information, the development of more uniform, standardised documents, the establishment of common principles or standards for inspections in the field of the posting of workers and technological developments, as referred to in Article 9;
   (d) liability and/or enforcement measures introduced to ensure compliance with the applicable rules and effective protection of workers' rights in subcontracting chains, as referred to Article 12;
   (e) the application of the provisions on cross-border enforcement of financial administrative penalties and fines in particular in light of experience with and effectiveness of the system, as laid down in Chapter VI;
   (f) the use of bilateral agreements or arrangements in relation to IMI, taking into account, where appropriate, the report referred to in Article 25(1) of Regulation (EU) No 1024/2012;
   (g) the possibility to adjust the deadlines established in Article 6(6) for supplying the information requested by Member States or the Commission with a view to reducing those deadlines, taking into account the progress achieved in the functioning and use of IMI.

Article 25  Entry into force

This Directive shall enter into force on the twentieth day following that of its publication in the Official Journal of the European Union.
Article 26  Addressees

This Directive is addressed to the Member States.
Done at Brussels, 15 May 2014.

For the European Parliament
The President
M. SCHULZ
For the Council
The President
D. KOURKOUSAS

Joint statement by the European Parliament, the Council and the Commission on Article 4(3)(g)

The fact whether or not the post to which the posted worker is temporarily assigned to carry out his/her work in the framework of the provision of services was filled by the same or another (posted) worker during any previous periods constitutes only one of the possible elements to be taken into account while making an overall assessment of the factual situation in case of doubt.

The mere fact that it can be one of the elements should in no way be interpreted as imposing a ban on the possible replacement of a posted worker by another posted worker or hampering the possibility of such a replacement, which may be inherent in particular to services which are provided on a seasonal, cyclical or repetitive basis.
EXPLANATORY MEMORANDUM

1. CONTEXT OF THE PROPOSAL

1.1. Reasons for and objectives of the proposal

The Commission announced in its Political Guidelines and confirmed in its Work Programme 2016 a targeted revision of the Posting of Workers Directive to address unfair practices and promote the principle that the same work at the same place should be remunerated in the same manner.

Posting of workers plays an essential role in the Internal Market, particularly in the cross-border provision of services. Directive 96/71/EC\(^1\) (hereafter: 'the Directive') regulates three variants of posting: the direct provision of services by a company under a service contract, posting in the context of an establishment or company belonging to the same group ('intra-group posting'), and posting through hiring out a worker through a temporary work agency established in another Member State.

The EU established an Internal Market which is based on a highly competitive social market economy, aiming at full employment and social progress (Article 3(3) TEU).

The Treaty establishes the right for companies to provide their services in other Member States. It provides that restrictions on the freedom to provide ser-

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vices in the Union shall be prohibited in respect of nationals of Member States who are established in a Member State other than that of the person to whom the services are intended’ (Article 56 TFEU). The freedom to provide services may be limited only by rules which are justified by overriding reasons of general interest, provided that these are justified, proportionate and applied in a non-discriminatory way.

Altogether, in 2014 (latest data available), there were over 1.9 million postings in the EU (representing 0.7% of a total EU labour force), up by 10.3% as compared to 2013 and by 44.4% with respect to 2010. The upward trend followed some stagnation during the years 2009 and 2010.

The 1996 Directive sets the EU regulatory framework to establish a balance between the objectives of promoting and facilitating the cross-border provision of services, providing protection to posted workers and ensuring a level-playing field between foreign and local competitors. It stipulates a ‘core set’ of terms and conditions of employment of the host Member State which are mandatory to be applied by foreign service providers, which include (article 3(1) of the Directive): maximum work periods and minimum rest periods; the minimum rates of pay, including overtime rates; minimum paid annual holidays; the conditions of hiring-out of workers; health, safety and hygiene at work; protective measures in favour of pregnant women, mothers who have recently given birth, children, and young people; equality of treatment between genders; and other provisions of non-discrimination.

The 2014 Enforcement Directive\textsuperscript{2} has provided for new and strengthened instruments to fight and sanction circumventions, fraud and abuses. It addresses problems caused by so-called “letter-box companies” and increases the Member States’ ability to monitor working conditions and enforce the rules applicable. Inter alia, the Directive lists qualitative criteria characterising the existence of a genuine link between the employer and the Member State of establishment, which can also be used to determine whether a person falls within the applicable definition of a posted worker. The Enforcement Directive also lays down provisions to improve administrative cooperation between national authorities in charge of posting. For instance, it provides for an obligation to respond to requests for assistance from the competent authorities in other Member States within two working days in the case of urgent requests for information and within 25 working days in non-urgent cases. Moreover, the Directive lists national control measures that the Member States may apply when monitoring compliance with the working conditions applicable to posted workers and requires that appropriate and effective checks and monitoring mechanisms are in place and

that national authorities carry out effective and adequate inspections on their territory in order to control and monitor compliance with the provisions and rules laid down in Directive 96/71/EC. The full effects of the Directive should become tangible as of mid-2016, as Member States have until 18 June 2016 to transpose the Directive.

The current initiative does not address any issue touched upon by the Enforcement Directive. Rather, it focuses on issues which were not addressed by it and pertain to the EU regulatory framework set by the original 1996 Directive. Therefore, the revised posting of Workers Directive and the Enforcement Directive are complementary to each other and mutually reinforcing.

1.2. Consistency with existing policy provisions in the policy area

The Commission has set itself to work towards a deeper and fairer Single Market as one of the chief priorities for its mandate. The proposal of targeted amendments to the Posting of Workers Directive integrates and complements the provisions set in the Enforcement Directive, which is to be transposed by 18 June 2016.

In the preparatory consultations led by the Commission with about 300 stakeholders, mostly SMEs, 30% of companies providing services across borders reported problems with existing rules on posting of workers, such as burdensome administrative requirements, paperwork, fees and registration obligations. The lack of clarity of labour market rules in the country of destination is also considered a relevant hindrance to cross-border service provision, especially among SMEs.

At the same time, the Posting of Workers Directive underpins the initiatives for the road transport sector announced by the Commission in its Work Programme 2016. These measures will aim in particular to further enhance social and working conditions of road transport workers fostering at the same time the efficient and fair provision of road transport services. The two million workers engaged in international road transport operations regularly carry out work on the territory of different Member States, over brief periods of time. In this context, the forthcoming initiatives for the road transport sector should contribute to more clarity and better enforcement of the rules applicable to employment contracts in the transport sector and may address the specific challenges the application of the provisions of the Posting of Workers Directive raises in this specific sector.

A modernised legislative framework for posting of workers will contribute to creating transparent and fair conditions for the implementation of the Investment Plan for Europe. The Investment Plan will provide an additional boost to cross-border service provision and thereby lead to increased demand for skilled labour to be fulfilled. As strategic infrastructural projects are realised across the Member States, companies will require appropriate skills for the job, and adequate conditions need to be set for that demand to be satisfied with adequate supply
across borders. A modernised Posting of Workers Directive will contribute to investments taking place within conditions of undistorted competition and protection of workers' rights.

The EU Platform against Undeclared Work may positively interact with a view to tackling fraudulent aspects of the phenomenon of posting of workers. Posting is exposed to the risk of being subject of undeclared work practices, such as „envelope wages“ or „cash-in-hand“, whereby only part of the salary is paid officially, while the rest is given to the employee unofficially, bogus self-employment, and circumvention of relevant EU and national legislation. The EU has stepped action to fight undeclared work and continues to act against letter box companies. The Commission proposed in April 2014 the establishment of a Platform for the prevention and deterrence of undeclared work. The Platform will bring together the enforcement authorities of all Member States. It will facilitate the exchange of best practices, develop expertise and analysis and support cross-border cooperation of Member States in order to fight undeclared work more efficiently and effectively.

2. LEGAL BASIS, SUBSIDIARITY AND PROPORTIONALITY

2.1. Legal basis

This proposal amends Directive 96/71/EC and is therefore based on the same legal basis, Articles 53(1) and 62 TFEU.

2.2. Subsidiarity (for non-exclusive competence)

An amendment to an existing Directive can only be achieved by adopting a new Directive.

2.3. Proportionality

It is settled case law that restrictions to the freedom to provide services are only admissible if justified by overriding reasons in the public interest, relating in particular to the protection of workers, and must be proportionate and necessary.

The present proposal complies with this requirement since it does not harmonise the labour costs in Europe and is limited to what is necessary to guarantee conditions adapted to living costs and standards of the host Member State for the duration of the assignment of the posted workers.

In a highly competitive internal market, competition is based on quality of the service, productivity, costs (of which labour costs are but one part) and innovation. The present proposal does not therefore go beyond what is necessary to achieve its objective.
3. RESULTS OF EX-POST EVALUATIONS, STAKEHOLDER CONSULTATIONS AND IMPACT ASSESSMENTS

3.1. Stakeholder consultations

By a joint letter, Austria, Belgium, France, Germany, Luxembourg, the Netherlands and Sweden have claimed support for a modernisation of the Posting of Workers Directive establishing the principle of 'equal pay for equal work in the same place'. These Member States suggested that the provisions regarding working and social conditions, most notably including remuneration, applicable to posted workers should be amended and widened; the set-up of a maximum duration limit to postings should be considered, with particular regard to aligning provisions with the EU Regulation on coordination of social security; the applicable conditions to the road transport sector should be clarified; the information basis contained in the Portable Documents A1 should be strengthened in its reliability; cross-border cooperation between inspection services should be improved; and a study on the extent and impact of bogus self-employment in the context of posting should be promoted.

Bulgaria, Czech Republic, Estonia, Hungary, Lithuania, Latvia, Poland, Slovakia and Romania, by a joint letter, have argued that a review of the 1996 Directive is premature and should be postponed after the deadline for the transposition of the Enforcement Directive has elapsed and its effects carefully evaluated and assessed. These Member States have expressed the concern that the principle of equal pay for equal work in the same place may be incompatible with the single market, as pay rate differences constitute one legitimate element of competitive advantage for service providers. Moreover, they have taken the position that posted workers should remain under the legislation of the sending Member State for social security purposes, and no measure should thus be taken to revise the linkages between the posting of workers and the social security coordination in this sense. Finally, they called upon the Commission to consider action only insofar as evidence is rigorously analysed concerning the challenges and specificities of cross-border service provision.

ETUC has expressed support for a revision to ensure the principle of equal treatment. In this context, however, the ETUC called the Commission upon respecting the principle of autonomy of the social partners to negotiate wages and the plurality of national industrial relation systems, by establishing provisions on the constituent elements of pay having the effect of favouring company-level over sector-level collective agreements. In turn, the ETUC advised that the Commission proposes measures regarding the requirement of a previous period of employment in the country of origin to be especially applied to posted temporary agency workers, new rules on combatting bogus self-employment, and better enforcement measures, in particular inspections and more reliable social security forms.
The European Builders Confederation (EBC), representing SMEs in the construction sector, has expressed support for reopening the 1996 Directive in line with the principle „equal pay for equal work in the same place“. Favourable to revising the Directive have also been the EU Trade Union of Building and Woodworkers (EFBWW), the Dutch Trade Union Confederation (FNV), the Estonian Trade Union Confederation and the Council of Nordic Trade Unions. The EU social partners in the construction industry (FIEC and EFBWW) have also taken a joint position asking the Commission to assess a number of issues related to posting.

BUSINESSEUROPE has considered a priority to ensure the correct transposition of the Enforcement Directive as it deems that most of the challenges with posting of workers are related to poor enforcement and lack of controls in the Member States. Businesseurope has also suggested that the reopening of the Directive may reduce posting activities because of the uncertainty that the negotiation would create among companies. While supportive of measures to increase the reliability and transparency of Portable Documents, Business Europe has considered that the principle of „equal pay for equal work“ would create an undue interference of the EU in the free determination of wage levels by the social partners and recalls that a level playing field for competition is created by a large body of EU law addressing various aspects of labour law. These arguments were also shared by the representatives of employers of the metal, engineering and technology industries (CEEMET), by the Confederation of European Managers (CEC). The Confederation of Industry of the Czech Republic and the Industry Associations from Finland, Sweden, Denmark, Iceland and Norway have in a joint letter also expressed concerns about introducing the principle of equal pay for equal work in the Posting of Workers Directive.

Likewise, UAPME has taken the view that the Posting of Workers Directive should not be modified before the transposition of the Enforcement Directive is completed and its effects evaluated.

EUROCIETT, representing the temporary work agency industry, has found that there is in general no need for reopening the 1996 Directive. Eurociett has nevertheless supported the principle of equal pay for equal work for posted agency workers and the application of the full set of rules provided for by the Temporary Agency Work Directive to posted agency workers.

4. Collection and use of expertise

Several studies, reports and articles were used during the preparation of this initiative. The references are to be found in the Impact Assessment Report accompanying the present proposal.
5. Impact assessment

This proposal is accompanied by an Impact Assessment Report which analyses the phenomenon of posting, describes the problem with the current legal framework, envisages different policy options to address it and finally assesses the social and economic impact of the policy options.

6. Fundamental rights

This Directive respects the fundamental rights and complies with the principles recognised by the Charter of Fundamental Rights of the European Union. In particular, it is designed to ensure full compliance with Article 31 of the Charter, which provides that every worker has the right to working conditions which respect his or her health, safety and dignity, and to limitation of maximum working hours, to daily and weekly rest periods and to an annual period of paid leave.

7. Detailed explanation of the specific provisions of the proposal

Article 1 of the proposal introduces several changes to Directive 96/71/EC.

7.1. Paragraph 1

Paragraph 1 adds a new Article 2bis to the Directive. This Article deals with the labour law to be applied to posted workers when the anticipated or the effective duration of posting exceeds twenty-four months. This is without prejudice to the possible duration of a temporary provision of services. The Court of Justice has consistently held that the distinction between the freedom of establishment and the freedom to provide services on a temporary basis needs to be made on a case by case basis, taking into account not only the duration but also the regularity, periodicity and continuity of the provision of services.

Paragraph 1 of the new Article 2bis applies when it is anticipated that the duration of posting will be superior to 24 months or when the effective duration of posting exceeds 24 months. In both cases, the host Member State is deemed to be the country in which the work is habitually carried out. In application of the rules of the Rome I Regulation\(^3\), the labour law of the host Member State will therefore apply to the employment contract of such posted workers if no other choice of law was made by the parties. In case a different choice was made, it cannot, however, have the result of depriving the employee of the protection afforded to him by provisions that cannot be derogated from by agreement under the law of the host Member State.

In order to prevent the circumvention of the rule set out in paragraph 1, paragraph 2 clarifies that, in case of replacement of a worker regarding the same

task, calculation of the duration of posting must take into account the cumulative
duration of the posting of the workers concerned. The rule of paragraph 1 will
apply whenever the accumulated duration exceeds 24 months but, in order to re-
spect the principle of proportionality, only to the workers posted for at least six
months.

7.2. Paragraph 2

Paragraph 2 introduces several changes to Article 3 of the Directive.

Point (a)

Point (a) replaces paragraph 1 of Article 3 of the Directive.
The new text introduces three main changes:
– it suppresses the reference to the „activities referred to in the Annex“ in the
second indent;
– it replaces the reference to „minimum rates of pay” by a reference to „remu-
neration”;
– it adds a new subparagraph imposing on Member States an obligation to
publish information on the constituent elements of remuneration.

The first change makes the collective agreements universally applicable within
the meaning of Article 3(8) applicable to posted workers in all sectors of the
economy, irrespective of whether the activities are referred to in the annex to the
Directive (which currently is the case only for the construction sector).

It is within Member States' competence to set rules on remuneration in accord-
ance with their law and practice. The second amendment implies that the rules
on remuneration applicable to local workers, stemming from the law or collec-
tive agreements universally applicable within the meaning of Article 3(8), are
also applicable to posted workers.

Finally, the new subparagraph imposes on Member States an obligation to
publish in the website referred to in Article 5 of Directive 2014/67/EU the con-
stituent elements of remuneration applicable to posted workers.

Point (b)

A new paragraph is added which deals with situations of subcontracting
chains. This new rule gives the faculty to Member States to oblige undertakings
to subcontract only to undertakings that grant workers certain conditions on re-
muneration applicable to the contractor, including those resulting from non-un-
iversally applicable collective agreements. This is only possible on a proportion-
ate and non-discriminatory basis and would thus in particular require that the
same obligations be imposed on all national sub-contractors.

4 Building on case law of the Court in Case C-396/13.
Point (c)

It adds a new paragraph which sets the conditions applicable to the workers referred to in Article 1(3)(c) of the Directive, i.e. workers hired out by a temporary agency established in a Member State other than the Member State of establishment of the user undertaking. This new paragraph corresponds to Article 3(9) of the Directive. It specifies that the conditions to be applied to cross-border agencies hiring out workers must be those that are, pursuant to Article 5 of Directive 2008/104/EC, applied to national agencies hiring out workers. Contrary to Article 3(9) of the Directive, this is now a legal obligation imposed on Member States.

7.3. Paragraph 3

Paragraph 3 amends the Annex to the Directive following the changes made to Article 3(1).
Proposal for a

DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL


(TEXT WITH EEA RELEVANCE)

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Articles 53(1) and 62 thereof,

Having regard to the proposal from the European Commission,

After transmission of the draft legislative act to the national parliaments,

Having regard to the opinion of the European Economic and Social Committee

Acting in accordance with the ordinary legislative procedure,

Whereas:

(1) The free movement of workers, freedom of establishment and freedom to provide services are fundamental principles of the internal market in the Union enshrined in the Treaty on the Functioning of the European Union (TFEU). The implementation of those principles is further developed by the Union aimed at guaranteeing a level playing field for businesses and respect for the rights of workers.

(2) The freedom to provide services includes the right of undertakings to provide services in another Member State, to which they may post their own workers temporarily in order to provide those services there.

(3) According to Article 3 TEU, the Union shall promote social justice and protection. Article 9 TFEU gives the Union the task to promote a high level of employment, to guarantee an adequate social protection and to combat social exclusion.

(4) Almost twenty years after its adoption, it is necessary to assess whether the Posting of Workers Directive still strikes the right balance between the need to promote the freedom to provide services and the need to protect the rights of posted workers.

(5) The principle of equal treatment and the prohibition of any discrimination based on nationality are enshrined in EU law since the founding Treaties. The principle of equal pay has been implemented through secondary law

5 OJ C, p.
not only between women and men, but also between employees with fixed term contracts and comparable permanent workers, between part-time and full-time workers or between temporary agency workers and comparable workers of the user undertaking.

(6) The Rome I Regulation generally permits employers and employees to choose the law applicable to the employment contract. However, the employee must not be deprived of the protection of the mandatory rules of the law of the country in which or, failing that, from which the employee habitually carries out his work. In the absence of choice, the contract is governed by the law of the country in which or, failing that, from which the employee habitually carries out his work in performance of the contract.

(7) The Rome I Regulation provides that the country where the work is habitually carried out shall not be deemed to have changed if he is temporarily employed in another country.

(8) In view of the long duration of certain posting assignments, it is necessary to provide that, in case of posting lasting for periods higher than 24 months, the host Member State is deemed to be the country in which the work is carried out. In accordance with the principle of Rome I Regulation, the law of the host Member States therefore applies to the employment contract of such posted workers if no other choice of law was made by the parties. In case a different choice was made, it cannot, however, have the result of depriving the employee of the protection afforded to him by provisions that cannot be derogated from by agreement under the law of the host Member State. This should apply from the start of the posting assignment whenever it is envisaged for more than 24 months and from the first day subsequent to the 24 months when it effectively exceeds this duration. This rule does not affect the right of undertakings posting workers to the territory of another Member State to invoke the freedom to provide services in circumstances also where the posting exceeds 24 months. The purpose is merely to create legal certainty in the application of the Rome I Regulation to a specific situation, without amending that Regulation in any way. The employee will in particular enjoy the protection and benefits pursuant to the Rome I Regulation.

(9) It is settled case law that restrictions to the freedom to provide services are only admissible if justified by overriding reasons in the public interest and must be proportionate and necessary.

(10) Because of the highly mobile nature of work in international road transport, the implementation of the posting of workers directive raises particular legal questions and difficulties (especially where the link with the concerned Member State is insufficient). It would be most suited for these challenges to be addressed through sector-specific legislation together with other EU initiatives aimed at improving the functioning of the internal road transport market.
(11) In a competitive internal market, service providers compete not only on the basis of a labour costs but also on factors such as productivity and efficiency, or the quality and innovation of their goods and services.

(12) It is within Member States' competence to set rules on remuneration in accordance with their law and practice. However, national rules on remuneration applied to posted workers must be justified by the need to protect posted workers and must not disproportionately restrict the cross-border provision of services.

(13) The elements of remuneration under national law or universally applicable collective agreements should be clear and transparent to all service providers. It is therefore justified to impose on Member States the obligation to publish the constituent elements of remuneration on the single website provided for by Article 5 of the Enforcement Directive.

(14) Laws, regulations, administrative provisions or collective agreements applicable in Member States may ensure that subcontracting does not confer on undertakings the possibility to avoid rules guaranteeing certain terms and conditions of employment covering remuneration. Where such rules on remuneration exist at national level, the Member State may apply them in a non-discriminatory manner to undertakings posting workers to its territory provided that they do not disproportionately restrict the cross-border provision of services.

(15) Directive 2008/104/EC of the European Parliament and of the Council on temporary agency work gives expression to the principle that the basic working and employment conditions applicable to temporary agency workers should be at least those which would apply to such workers if they were recruited by the user undertaking to occupy the same job. This principle should also apply to temporary agency workers posted to another Member State.

(16) In accordance with the Joint Political Declaration of 28 September 2011 of Member States and the Commission on explanatory documents, Member States have undertaken to accompany, in justified cases, the notification of their transposition measures with one or more documents explaining the relationship between the components of a directive and the corresponding parts of national transposition instruments. With regard to this Directive, the legislator considers the transmission of such documents to be justified,
HAVE ADOPTED THIS DIRECTIVE:

**Article 1** Amendments to Directive 96/71/EC

Directive 96/71/EC is hereby amended as follows:

(1) The following Article 2 a is added:

**Article 2 a**

Posting exceeding twenty-four months

1. When the anticipated or the effective duration of posting exceeds twenty-four months, the Member State to whose territory a worker is posted shall be deemed to be the country in which his or her work is habitually carried out.

2. For the purpose of paragraph 1, in case of replacement of posted workers performing the same task at the same place, the cumulative duration of the posting periods of the workers concerned shall be taken into account, with regard to workers that are posted for an effective duration of at least six months.

(2) Article 3 is amended as follows:

(a) Paragraph 1 is replaced by the following:

1. Member States shall ensure that, whatever the law applicable to the employment relationship, the undertakings referred to in Article 1 (1) guarantee workers posted to their territory the terms and conditions of employment covering the following matters which, in the Member State where the work is carried out, are laid down:
   - by law, regulation or administrative provision, and/or
   - by collective agreements or arbitration awards which have been declared universally applicable within the meaning of paragraph 8:
     (a) maximum work periods and minimum rest periods;
     (b) minimum paid annual holidays
     (c) remuneration, including overtime rates; this point does not apply to supplementary occupational retirement pension schemes;
     (d) the conditions of hiring-out of workers, in particular the supply of workers by temporary employment undertakings;
     (e) health, safety and hygiene at work;
     (f) protective measures with regard to the terms and conditions of employment of pregnant women or women who have recently given birth, of children and of young people;
     (g) equality of treatment between men and women and other provisions on non-discrimination.

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For the purpose of this Directive, remuneration means all the elements of remuneration rendered mandatory by national law, regulation or administrative provision, collective agreements or arbitration awards which have been declared universally applicable and/or, in the absence of a system for declaring collective agreements or arbitration awards to be of universal application, other collective agreements or arbitration awards within the meaning of paragraph 8 second subparagraph, in the Member State to whose territory the worker is posted. Member States shall publish in the single official national website referred to in Article 5 of Directive 2014/67/EU the constituent elements of remuneration in accordance with point (c).

(b) The following paragraph is added:

1 a. If undertakings established in the territory of a Member State are obliged by law, regulation, administrative provision or collective agreement, to sub-contract in the context of their contractual obligations only to undertakings that guarantee certain terms and conditions of employment covering remuneration, the Member State may, on a non-discriminatory and proportionate basis, provide that such undertakings shall be under the same obligation regarding subcontracts with undertakings referred to in Article 1 (1) posting workers to its territory.

(c) The following paragraph is added

1 b. Member States shall provide that the undertakings referred to in Article 1(3)(c) guarantee posted workers the terms and conditions which apply pursuant to Art. 5 Directive 2008/104/EC of the European Parliament and of the Council of 19 November 2008 on temporary agency work to temporary workers hired-out by temporary agencies established in the Member State where the work is carried out.

(d) Paragraph 9 is deleted.

(e) The second subparagraph of paragraph 10 is deleted.

(3) The first paragraph of the Annex is amended as follows:

The activities mentioned in Article 3 include all building work related to the construction, repair, upkeep, alteration or demolition of buildings, and in particular the following work:

Article 2

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by [two years after adoption] at the latest. They shall forthwith communicate to the Commission the text of those provisions.

When Member States adopt those provisions, they shall contain a reference to this Directive or be accompanied by such a reference on the occasion of their
official publication. Member States shall determine how such reference is to be made.

2. Member States shall communicate to the Commission the text of the main provisions of national law which they adopt in the field covered by this Directive.

Article 3

This Directive shall enter into force on the [twentieth] day following that of its publication in the Official Journal of the European Union.

Article 4

This Directive is addressed to the Member States.

Done at Strasbourg,

For the European Parliament
The President

For the Council
The President
Register

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