European Union Private International Labour Law

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Introductory Comments

The European Union as an area of freedom, security and justice has created a community which adheres to unified laws. In matters regulated by labour law (individual and collective) as well as social security law, the above aim may be met by introducing unified regulations, allowing for identical ways of resolving conflicts of labour law issued in work relations where there is a foreign element present. In order to assure the legal stability within work relations, national regulations concerning international private labour law had to be replaced by unified conflicts of law norms. These norms are then to be applied by both employees and employers of EU member states as well as applied in work relations situations (individual or collective) where there are third parties involved. EU private international law is a collection of international private labour law regulations issued by EU institutions, which unanimously and in a unifying fashion describe the legal situations of the parties to a work relationship, where there is a foreign element present, allowing for the application of foreign laws based on citizenship, residency, where the headquarters of one of the parties is located, where the work is carried out or where the action has taken place (e.g. the place of the work related accident).

The unification of such conflict of law issues, which resolve conflicts in work relations where there is a national labour law system present as well as a foreign element (including the indication of the rightful court to resolve such conflicts), assures the equal treatment of EU citizens and third party nationals whose subjects come under the EU legislation when entering legal relationships governed by labour law. Most member states of the European Union have extensive experience in settling conflicts of law in national legislations used for resolving conflicts in obligatory issues as well as in labour relations. The difference in view between the doctrine of private international law and court decisions in the European Union Member States, which stem from a rich tradition, have not created legal certainty or assured a uniform treatment of the parties in the work relationship within the European Union. In addition, the existence of conflict of law norms within certain Member States do not regulate the conflict rules applicable to events that are not obligations. Foremostly, difficulties arose in situations of collective labour law standards, used to determine the competence of the workers' representatives, collective action taken by the parties to industrial relations in order to exert pressure on the other party during the negotiations preceding the conclusion of a collective agreement or other agreements governing the normative rights and obligations of parties to work relations.

Matters regulated by the social security relations between states were governed by bilateral agreements. The freedom of movement for workers, the self-employed and their families required a standard issue of coordinating the national social security systems. Coordination allows for the resolution of social security conflict enforced in the certain Member States. A book devoted to regulating labour relations and social security conflict issues, contained the material on international agreements and treaties enforced in the EU. Such agreements and treaties uniformly regulate the resolution of conflicts in individual and collective labour relations and in social security relations and are required for clarity purposes. Thanks to such clarity, decisions can easily be made with regards to the selection of stakeholders, issues concerning parties to labour and social security relations (where there is a foreign element), in matters relating to the selection of appropriate systems of substantive and procedural law, and whether labour courts have the jurisdiction to rule in contested cases arising from such legal relations.

Part I

Preliminary Part

Chapter 1

The subject of international private labour law

It is generally accepted that private international law is a branch of national (internal) law, which governs conflicts between rules of substantive law that should be used for the evaluation of social relations shaped by such laws and procedures. In the case of labour law, the subject of private international labour law are standards, which allow to select and apply labour law standards of particular Member States to assess the legal positions of parties within legal relations regulated by employment law (workers, employers) and social security law (the insured, policyholders and insurers). Labour and social security law is a branch capable of a certain reach only. Within the vast majority of countries, labour and social rights are governed by one system of labour law and one system of social security law. Occasionally, the federal states in their various organisational units, which make up the federation (states, provinces, regions, republics), have within their structure two separate systems of law both for labour and for social security. Establishing a work relationship between parties, of which at least one of the parties comes under the regulations of another member state, either on the grounds of nationality (*lex patriae*), or residence – domicile (employee, insured) (*lex domicilii*), or because of the location of the headquarters – *situs* (employer, insurer, the insurer – the insurance) (*lex rei sitae*), makes regulation necessary of the content of legal relations governed by different national systems of labour and social security law. Theoretically speaking, labour and social security relations may be regulated by the rules which form part of a system of labour law or social security law enforced in a country from which one of the contracting parties comes under. In situations where the work is provided in a country with which the labour or social security relations have no ties, appropriate regulations of rights may stem from the laws that are enforced at the place of work (*lex loci laboris*).

At the core of national labour and social security law – like many other systems of private or public law, which are laid down by the authorities of sovereign nations – lies the principle of territoriality. Within the one national territory or within its autonomous part, only one system of labour and social security law should apply. This rule does not allow any derogation in the case of regulating labour relations and social security relations established between the parties having the same nationality, or having resident status and/or an established headquarters within the territory of the one country and carrying out business within it,

in cases where one party is obliged to provide employment (the employer) and the other to carry out the work (the employee). The principle of territoriality is generally accepted, even without having to specify it in the collection of rights (labour codes), which govern the content and scope of labour relations and social security relations. In the Polish system of labour law there is a standard provision of Article 1 of the Labour Code – act enforced on June 26, 1974, which states[1] that "the Labour Code defines the rights and obligations of employees and employers," and does not make any additional comments relating to the territorial scope of the basic sources of labour relations within labour law. For each lawyer (Polish and foreign), it is obvious that the Polish Labour Code takes effect on Polish territory. Lawyers dealing with matters, which are regulated by labour and social security law, often reflect on which national law shall apply to work and social security relations where there is a foreign element present.[2] Labour relations and social security relations, which consist of or are composed solely of national "ingredients" in their entirety, are without any doubt governed by labour and social security law of the country in which they arise and exist. Therefore the principle of territoriality, from which derive the monopoly of the national systems of labour and social security law and an absolute obligation to comply with such monopolistic systems in labour and social security relations, holds an exception that such a system allows and that is when one of the elements does not come under the authority of the same country. The elements required in allowing the parties in a work relation to be exempted from such labour law monopolistic systems, are that one or two parties are from another country or that the work is carried out elsewhere. A Polish worker may be employed by a Turkish employer to perform work under an employment relationship in the territory of Greece. Because of the introduction of the three "foreign" components to the work relationship (the employee, the employer and the place of work), none of the three national labour law systems, determinanted to the work relationship on grounds of nationality of the employee (the Polish system of labour law), the seat of the employer (the Turkish labour law system), and the place of work (the Greek system of labour law), will have exclusivity based on the principle of territoriality to regulate the legal relationship. In such a situation, which results from the free movement of workers within the European Union and outside it, the three abovementioned systems of law will compete for the regulation of the work relation. This includes, which system will regulate issues connected with the establishment of an employment relationship, its contents, its relationship changes and its solution, as well as other issues that may arise during the employment (work-related accidents, occu-

[1] The consolidated text of December 23, 1997, Journal of Laws 1998, No. 21, pos. 94 as amended.

[2] The notion of the "foreign element" is used by the authors dealing with international private law. See: M. Bogdan, *Concise Introduction to EU Private International Law*, Europa Law Publishing, Groningen 2006, p. 3 et seq. F. Morgenstern, *International Conflicts of labour Law. A Survey of the Law Applicable to the International Employment Relations*, Geneva 1984, p. 1.

pational illnesses). The law, which shall designate or recommend to the parties the relevant national legal labour system (where there is a foreign element present), is private international labour law. Standards permitting international labour law to resolve conflicts which may arise between different national systems of labour law (each system deeming itself as the one to be applied) allow for the regulation of the legal relationship. International labour law, in the wake of private international law is defined in the literature as "the right of determining the legal rules," "the law allowing parties to resolve conflicts of laws," "conflicts of law," "*règle de conflit*," "*conflit des lois*," "*Kollissionsregeln*," "*Kollisionrecht*." It is a law which in its part of the collision generally covers standards delimiting the spheres of the legal systems of different countries.[3]

In settling the conflict of competing national labour law systems, an applicable substantive law and/or process may be chosen. The principle of territoriality only opposes the application by a Polish court other than the Polish labour law and provisions of the Code of Civil Procedure to address issues related to labour law, which are carried out against the background of disputes arising from employment relationships established by the Polish employee of the Polish employer, and relating to work within Polish territory. This finding is directly applicable to all work relations within those relationships where the parties are subject to the sovereignty of a State, if the workplace is situated within the administrative boundary of that State. The territoriality principle is tempered when the work relations with "foreign elements" decide to resolve disputes that may occur according to the procedural rules of another country. It is therefore necessary to draw attention to two aspects of the conflict rules of international labour law: the substantive and procedural. They will be presented in separate parts of this volume.

Private international law is a specific part of the international labour law. In contrast to the ILO Conventions, as well as distinct from regional international treaties – the European Union and the Council of Europe, the standards governing the conflicts between the substantive and procedural law did not work for the adoption of the Convention on June 19, 1980 the law applicable to contractual obligations ("Rome I") the nature of international.[4] The adjective "international" standards stands to address conflicts characterised by substantive and procedural norms of labour law. It was, and still is, used not only to describe the nature and the type of source the regulations stem from containing conflicts of law issues (as this forms part of the national labour law norms) but it is applied to the legal nature of employment relationships governed by these standards.[5] The foreign element in such relations gives it their status of "international" norms. They were, and remain

[3] K. Przybyłowski, *Prawo prywatne międzynarodowe. Część ogólna*, Lwów 1935, s. 2. (K. Przybyłowski, *Private International Law. General Part*, Lviv 1935, p. 2); M. Pazdan, *Międzynarodowe prawo prywatne* (*International Private Law*), Warsaw 2010.

[4] Official Journal, L. 266, October 09, 1980, pp. 0001–0019.

[5] M. Bogdan, *Concise Introduction to EU Private...*, p. 3.

still, norms of national law. In Poland, a work relation involving a foreign element was governed by, until the Rome Convention ("Rome I") was entered into,[6] the Act of November 12, 1965 – Private international law (Art. 32–33).[7] According to the principle of territoriality, the provisions of Polish labour law are also subject to labour relations between workers – Polish citizens and institutions of foreign states and international institutions operating in Poland, which appear as employers. Contracts, arrangements or international agreements may provide for exceptions to this rule (Article 5 LC). I share the sentiment that "every country has its own private international law, incorporated in its domestic legal system." I only stress that the above statement retained its timeliness until the ratification of the Rome Convention ("Rome I") by individual countries, mainly European Union Member States. After the ratification of the Convention by the EU Member States[8] national labour law has been superseded by the provisions of the Rome Convention ("Rome I"), which is an international treaty. From the above statement it is clearly evident that international labour law's nature has undergone changes. Out of the conflict of law rules stemming from national regulations, the above assumes the status of international law in the strict sense of the term. The Rome Convention ("Rome I") within the EU is undoubtedly a source of private international law, which contains conflicts of law rules governing labour standards in work relations containing "elements" or "foreign elements." Above all, however, the Rome Convention ("Rome I") unifies the diverse determinants (which are introduced the by judicature and by the doctrine of private international law), which determine the appropriate choice of substantive or procedural labour law of EU Member States. The main advantage of the Rome Convention

[6] Rome Convention ("Rome I") contains statements made by the President of Poland on March 28, 2007 about: to declare it to be just "both in whole and in relation to each of the provisions contained therein, its adoption, ratification and confirmation, a declaration of its constant observance ("its conservation")." Journal of Laws, in which the above statement was made, was published on January 22, 2008. Rome Convention ("Rome I") entered into force in Poland on August 01, 2007. See: Government Statement on December 05, 2007 the effect of the Convention on the accession of the Czech Republic, Estonia, Cyprus, Latvia, Hungary, Malta, Poland, Slovenia and Slovakia to the Convention on the Law Applicable to Contractual Obligations, opened for signature in Rome on June 19, 1980 and to the First and Second Protocols on its interpretation by the Court of Justice of European Communities, signed in Luxembourg on April 14, 2005, Journal of Laws 2008, No. 10, item 58.

[7] Journal of Laws No. 46, item 290, as amended.

[8] Rome Convention ("Rome I") has been ratified by Austria on November 01, 2006, Belgium on September 01, 2007, Cyprus on November 01, 2006, Czech Republic on July 01, 2007, Estonia on October 01, 2006, Finland on September 01, 2006, Lithuania on December 01, 2006, Latvia on December 01, 2006, Germany on November 01, 2006, Spain on September 01, 2007, Greece on February 01, 2007, Luxembourg on October 01, 2006, Malta on January 01, 2007, the Netherlands on May 01, 2006, Portugal on May 01, 2007, Slovakia on August 01, 2006, Slovenia on May 01, 2006, Sweden on May 01, 2006, Hungary on June 01, 2006, Italy on May 01, 2007. See: Government Statement on December 05, 2007..., p. 533.

("Rome I") is to introduce a uniform way of choosing the appropriate national labour law (substantive and procedural). The limited scope of the Rome Convention ("Rome I") should also be mentioned. In matters governed by the provisions of labour law, the Convention applies only to individual employment contracts (Article 6). Beyond the control of this Convention are the cases of conflicts of norms regulating collective labour law issues as well as obligations arising outside of contractual agreements. (Article 1, paragraph 1). The Rome Convention ("Rome I") does not regulate the conflict of social security law issues.

In cases relating to compensation for unlawful acts caused in cases of collective disputes governed by the provisions of collective labour law, and for occupational accidents, occupational diseases and occupational accidents, the Rome Convention ("Rome I") has been supplemented and developed by Regulation (EC) No. 864/2007 European Parliament and Council on July 11, 2007 the law applicable to non-contractual obligations ("Rome II").[9]

Procedural aspects related to jurisdiction, recognition and enforcement of judgements issued by the labour courts of EU Member States were regulated by the Brussels Convention of 1968, the Lugano Convention of 1988. Currently, these issues are governed by Council Regulation (EC) No. 44/2001 of December 22, 2000 on jurisdiction and enforcement of judgements in civil and commercial matters.[10] The issue of jurisdiction, recognition and enforcement of the courts and authorities in deciding labour cases in the European Union Member States is presented in seven parts of this here volume.

In considering the scope and subject matter of the conflict of laws issue contained in the Rome Convention ("Rome I"), I wonder whether all the legal relationships regulated under national labour law systems of EU Member States and other countries that have ratified the Rome Convention ("Rome I") should be governed by the provisions of substantive law and the same system of labour law that applies in the Member State concerned. I discuss whether the Rome Convention ("Rome I") aims to harmonise the substantive regulation of the European Union labour laws in the sense that:

- all European Union Member States and other countries which have ratified the said Convention use the identical selection criteria (determinants) of the relevant national legal system work. I wonder therefore, whether after ratifying the Rome Convention ("Rome I") within the European Union, we are dealing with a situation which can be described as "unifying the determinants," when deciding to choose an appropriate substantive national system of labour law;
- all legal relationships governed by labour law (individual and collective labour law, social security of workers law) use the same criteria (determinants) in the

[9] Official Journal of the European Union, L 199/40 of July 31, 2007.
[10] OJ (EC), L 012, January 16, 2001, pp. 0001–0023.

selection of an appropriate system of national labour law in the event of a conflict of norms regulating labour or social security relations.

Separation of regulation of the conflict of laws governing the choice of substantive or procedural rights of labour are presented in Parts 2–6 of this book. Due to the specificity of social security law, especially in view of the unitary nature of these standards clearly falling into the category of public law, conflict of law issues in social security law are presented in Part V of this book. Within the European Union a positive (conflict of norms), and a negative clash of national social security legislation, is governed by the Council Regulation No. 1408/71 of June 14, 1971 on the application of social security schemes to employed persons, self-employed persons and members of their families moving within the EEC,[11] Council Regulation No. 574/72 of March 21, 1972 on the implementation of Regulation No. 1408/71.[12] Coordinating complex standards contained in the abovementioned Regulations No. 1408/71 and No. 574/72 were replaced with the enforced EU rules implementing the Regulation EC No. 883/2004 of the European Parliament and the Council of April 29, 2004 concerning the coordination of social security systems.[13] Regulation No. 883/2004 came into force on the twentieth day following its publication in the Official Journal of the European Union (Article 91). A precondition for the application of this regulation is the entry into force of the implementing regulation that will replace Regulation No. 574/72. On January 31, 2006 The Commission of the European Communities, referring to the Article 89 of Regulation No. 883/2004, which states that the subsequent regulation establish a procedure for implementing Regulation No. 883/2004, the proposed adoption by the European Parliament and Council Regulation on the implementation of Regulation (EC) No. 883/2004 on the coordination of social security systems.[14] The aim of this proposal is to simplify and modernise the provisions of Regulation (EEC) No. 574/72. Achieving this objective is to take place through the strengthening of cooperation between social security institutions of the EU Member States and improving the methods of exchanges between the two institutions. The purpose of requesting the adoption of the implementing regulation is to define procedures for implementing the provisions of Regulation No. 883/2004 to all interested parties: insured persons (the beneficiaries), social security institutions and competent authorities in Member States. The proposal seeks to more clearly regulate the rights and obligations of the various subjects and parties in social security relations. It simplifies the coordination of national social security systems. It modifies, and makes clearer administrative procedures

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[11] Uniform text: Journal of Laws EC, L 28, January 30, 1997, pp. 1–229, as amended. See: F. Pennings, *Introduction to European Social Security Law*, Antwerp–Oxford–New York 2003, p. 25 et seq.

[12] Uniform text: Journal of Laws EC, L 28, January 30, 1997, as amended.

[13] OJ (EU), L 166, April 30, 2004, pp. 1–123.

[14] COM (2006) 16 final version 2006/0006 (COD).

applicable to the insured, policyholders and insurers and public authorities (national and European) that precede the decision to establish the entitlement of social benefits and the allocation of regulated national and EU social security regulations. Implementing Regulation No. 883/2004 shall enter into force after six months *vacatio legis* from the date of its adoption.

One of the guiding principles of European social security law is the principle of exclusivity and the unity of the applicable national social security system. According to this principle insured persons moving within the European Union may be subject only to a single national system of social security law. Anti conflict of laws provisions of the European social security law are to prevent situations whereby one insured person comes under the effect of two different national social security systems. Since the rules of European social security law assure persons (who by virtue of an employment agreement, or self-employment with family relationships in both scenarios) the right to social benefits within one of the 27 national social security systems, European social security regulations were also issued to address the negative conflicts between such systems. Prevention of positive and negative conflicts between national social security systems in the European Union are international (regional) rules, which coordinate national social security systems. Part V will concentrate on the conflict of laws norms, which attempt to resolve conflicts between two or more competing national social security systems. International labour law and social security law settle conflicts in cases where there are positive cashes of different national social security laws. Regulation No. 883/2004 on the coordination of national social security systems also includes substantive legal rules that determine how the institutions responsible for administering social security funds should govern the right to social benefits and rules for the payment of benefits to insured persons who during their working lives covered former national systems of social security rules that apply to two or more Member States of the European Union. Regulation No. 883/2004 contains two types of standards falling into the category of private international law: conflict and substantive law. The task of these standards is the coordination of 27 national social security systems.

The issue previously raised concerning the legal public nature of the social security law, prevented lawyers a few decades ago from getting involved in matters of private international law analysis of national labour legislation of private international law in order to resolve conflicts between competing systems of national labour laws. In the few research pieces devoted to international labour law issues, conflict of social security law is not given much attention.[15] F. Morgenstern does not write about the rules of international labour law at all in the part dealing with the resolution of conflicts between the separate national systems of social security.

[15] I. Szászy, *International Labour Law. A Comparative Survey of the Conflict Rules Affecting Labour Legislation and Regulation*, Leyden 1968, pp. 368–382.

Morgenstern considers that the objective of the conflict rules of social security law is to counteract the positive and negative conflicts of national social security law ("delimitation and interplay of relevant legislation") in order to avoid extreme situations, i.e. eliminating social protection or the unjustifiable double cover of such protection.[16] In the case of the social security law, the principle of territoriality, which is crucial in choosing the law applicable for the conflict resolution between the parties governed by the standards of social relations rights (*lex fori*), plays the same role as in the case of labour relations only if the insured is working, engaged in business or lives in a particular Member State. Transferring one's employment activity and/or the centre of one's life to another country, makes it automatic, by law, that the legal situation of the insured is assessed by institutions and social security authorities of that country. Exceptions to this rule may be provided by international agreements entered into by the countries concerned. However, in the event of a collision of national social security systems, it is necessary to apply the provisions that differentiate the ranges of these standards. Therefore private international labour law and social security is applied, whose task it is to ensure a choice of conflict of law rules, allowing for the differentiation of spheres of the legal systems of different countries (by determining which of them should be used). In the event of conflict of social security relations, their inclusion into the sphere of private international labour law must be satisfied by two elements. In a social security relation the first is the foreign element, which is expressed in the place of residence, employment or activity of a person covered by insurance. In the case of social insurance cover due to employment under an employment relationship, this component can be enriched by an additional element, which is the "foreign" nature of the employer, when the insured worker is employed by a foreign employer. As a rule, the insuring institution, functioning within another country than that which the insured is a citizen of, is an administrative body appointed for life and works by foreign social security laws. A further important factor supporting the inclusion of conflict of law rules applicable to social security relations, is the international nature of the pre-established sources of international social security law – institutions of the European Union Regulations No. 1408/71 and 883/2004. I mention the Regulation No. 1408/71, because despite the adoption of Regulation No. 883/2004, Regulation No. 1408/71 remains in force and produces legal effects for the purposes of the following provisions of European law on social security:

- Council Regulation (EC) No. 859/2003 of May 14, 2003 extending the provisions of Regulation (EEC) No. 1408/71 and Regulation (EEC) No. 574/72 to nationals of third countries who are not covered by these provisions solely on the grounds of their nationality;[17]

[16] F. Morgenstern, *International Conflicts of Labour Law*, pp. 3, 4, footnote 7.
[17] Journal of Laws, L 124, May 20, 2003, p. 1.

- Council Regulation (EC) No. 1661/85 of June 13, 1985 down the technical adaptations to the Community rules on social security for workers migrating to Greenland;[18]
- Agreement on the European Economic Area[19] and the agreement between the European Economic Community and its Member States on the one hand and the Swiss Confederation on the other hand on the free movement of persons[20] and other agreements containing a reference to Regulation (EEC) No. 1408/71, as long as those agreements are not changed because of the entry into force of Regulation (EC) No. 883/2004.

In my opinion, it does no harm to include conflict of law rules of social security into the category of public law. About the dilemmas for lawyers dealing with private international labour law, caused by difficulties in passing unanimously labour law and social security into the category of public law or private law, see Part 1 – General of the second volume. Today, this breakdown of law into public and private is no longer relevant. In the case of labour law and social security law, the division of the above, based on the Roman principle of the division of rights, which relate to the state (*quoad ad statum rei Romanae spectat*) as well as laws protecting the rights and interests of individuals (*quoad ad singulorum utilitatem*) has no relevance. Recognising that the right to social security is one of the three divisions of labour law[21] and should be noted that the standards of this law in the section on social security law protects both the interests of individuals (the insured) and state social security agencies. The hybrid nature of this law becomes clear, when the division between public and private law is divided according to the criteria that public law regulates non-property relationships whilst private law regulates property interests. Labour law consists of mandatory standards and unilaterally mandatory standards, both which are regarded as a type of obligatory standard. For this reason labour law cannot be divided into categories such as *juris cogentis*, which consists of public law and *juris dispositivi*, which is characterised by private law.[22] Instead labour and social security law can be categorised into either public law or private law. According to this criteria, the legal relationship in which they participate in any capacity or authority of state administration are classified as public law. All other legal relations are considered private law relations. Although labour and social security relations public/private institutions (such as labour inspection or pension bodies) are superior to the other participants in these rela-

[18] Journal of Laws, L 160, June 20, 1885, p. 7.

[19] Journal of Laws, L1, January 03, 1994, p. 1.

[20] Journal of Laws, L 114, April 30, 2002, p. 6. The Agreement was amended by the European Union–Switzerland Committee No. 2/2003, Journal of Laws, L 187, July 26, 2003, p. 55.

[21] Two other sections of labour law are, the individual labour law and collective labour law. A.M. Świątkowski, *Polskie prawo pracy*, Warszawa 2012. (A.M. Świątkowski, *Polish labour law*, Lexis Nexis, Warszawa 2012).

[22] Ibid., pp. 21–22.

tionships (such as employees, employers, policy-holders, insurers). Neither labour nor social security relations can be included in the category of legal relationships governed by public law, because entities to these relations are considered by labour law as equal. I share the sentiment expressed in legal literature that the division of rights into two categories, public and private law has resulted in the loss of its meaning due to the increased interference of the state (having a social purpose in mind) into the legal relations traditionally viewed as private law. Labour and social security law regulates social relations. Public institutions have a considerable impact on this. This is a prime example of he thesis according to which such branches of law may be treated as public and private. For this reason authors dealing with international labour law should be treated as having historical arguments only. Such authors had difficulties with the application of conflict of law rules in the category of private international law work because such conflicts of some labour standards and all social security laws were perceived as public law norms.

Private international law is a branch of labour law which contains the "standard of standards." It is the branch of law which consists of a choice of laws falling into the categories of substantive law and procedural law. The first of them allows interested parties to employment relationships to decide on the selection of the applicable substantive law. The second allows the parties to assert claims governed by the substantive law of the relevant standards of work to choose the appropriate authorities of a definitive judicial review of labour and social security relation disputes. Private international labour comprises of laws governing over conflicts of law rules as well as over those institutions which exercise jurisdiction in contentious matters concerning labour and social security. Standards of private international labour law, contained in national or international regulations show substantive law and procedural rules of national labour law and social security, which are appropriate (containing within elements of foreign relations) to the legal position of the parties and the process of labour and social security relations. Conflict of substantive norms of labour and social security law has been presented in Parts 2–5 of this book. Subject of Part 6 of this book are legal issues related to the collision of procedural norms of labour law, concerning the jurisdiction, recognition and enforcement of judgements in matters dealing with labour and social security[23] and administrative procedures prior to decisions handed down by the pension bodies in social security matters. [24]

[23] Conflict of laws in labour litigation are regulated by the Brussels Convention of September 27, 1968 concerning the jurisdiction and the enforcement of judgements in civil and commercial matters (consolidated version) [OJ, C 027, January 26, 1998, pp. 0001–0027]. European Union Member States and the European Free Trade Area (EFTA) concluded in Lugano on September 16, 1988 Convention on the Jurisdiction and the Enforcement of Judgements in Civil and Commercial Matters. Poland ratified the Convention on August 26, 1999, OJ 2000, No. 10, item 132. The Lugano Convention was a parallel convention to the Brussels Convention. On March 01, 2002, the Brussels Convention was replaced by Council Regulation (EC) No. 44/2001 of December 22,

Due to the specific nature of the rules of private international labour law Polish studies into labour law have not shown any interest in the conflict of laws rules. There is in contemporary Polish literature, a book on labour problems in resolving conflicts between labour standards and social security concerning Polish workers performing work abroad,[25] the employment of workers abroad (citizens of foreign countries) by Polish employers, and Poles undertaking employment abroad for foreign employers. Polish accession to the European Union, the acquisition of rights of of Polish citizens of the European Union – an international regional organization based on the principles of free movement of workers, freedom of establishment and provision of services by employers – reduces considerably the principle of the personal sovereignty rule or it creates the scenario in which national labour law and social security law applies to the development of the legal and procedural pages of these relations. For the same reason as for the choice of law, the sovereign State government does not automatically decide over the place of work between parties to a legal relationship, which contains a foreign element. In the case of the European Union, the organization which seeks to establish a uniform system of private international law, part of which is private international law of labour and social security, expressed in the provisions of primary Community law (i.e. the freedom of movement of citizens of the EU, and the shipment of goods or services), takes on the form of the freedom of choice of law for regulating individual employment relationships established on the basis of an agreement work. To other than the contractual obligations of parties to an employment relationship or to obligations regulated by social security law rules, conflict of law rules contained in the rules of private international law require the use of determinants that allow you to choose the most relevant national standards and procedures of employment law.

The book described the unification process of the investigation of private international labour law in the EU. Considerations prior to analysis of the current European Union rules of international labour law are not only historical in character. In matters that are not governed by international standards of conflict of laws, national rules on international labour law continue to apply. In Poland, they

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2000 on the jurisdiction and recognition of judgements, and their performance in civil and commercial matters, Journal of Laws, L 012, January 16, 2001, pp. 0001–0023.

[24] Administrative procedures in matters of social security governed by the aforementioned Council Regulation No. 1408/71 of June 14, 1971 on the application of social security schemes to employed persons, self-employed persons and members of their families moving within the EEC, Council Regulation No. 574/72 of March 21, 1972 on the implementation of Regulation No. 1408/71, EC Regulation No. 883/2004 of the European Parliament and the Council of April 29, 2004 on the coordination of social security systems and implementing regulation of 2006 on the implementation of Regulation (EC) No. 883/2004, replacing Regulation No. 574/72.

[25] The only monograph devoted to these issues was written 33 years ago – S. Kalus, *Międzynarodowe stosunki pracy. Wybrane zagadnienia kolizyjne*, Warszawa (S. Kalus, *International Labour Relations. Selected topics on the Conflict of Laws Issue*, Warsaw 1978).

are statutes from November 12, 1965 Private International Law and later February 4th, 2011[26] as well as of November 17, 1964 Code of Civil Procedure.[27] The Fourth Part of the Code of Civil Procedure consists of the international rules of civil procedure that apply in matters concerning labour and social security.

[26] Journal of Laws, No. 80, item 432.
[27] OJ 1965 No. 43, pos. 296 as amended.

Chapter 2

An attempt to erradicate any national labour law conflicts within EU private international labour regulations

With the exception of social security law, which includes separate standards coordinating national systems of social security law of the Member States of the European Union, the conflicts of substantive labour laws have been – and still are – regulated by internal and international rules of private international law. The need to adopt separate standards of private international labour law has been acknowledged by the institutions in a few years after the adoption of Regulation No. 1612/68, Council Directive No. 68/360 – international treaties, adopted on October 15, 1968, guaranteeing employees the freedom of movement within the then European Economic Community. In order to repeal the legal barriers to the free movement of persons within the common market on the June 14, 1971 Regulation No. 1408/71 was issued for coordinating national social security systems. The freedom of movement in order to take up employment under an employment relationship or business self-employment has increased with the adoption of directives to ensure the freedom of transferring capital to entrepreneurs, technology and staff within the common market within the economic freedom to provide services and the posting of workers to temporarily perform the work in another Member State. The Commission quickly recognised that the free movement of people (workers, employers, job seekers) between the borders of the Member States of the international regional organisation in Europe called the European Economic Community, leads to a situation whereby the local labour market ("intra-Community employment relationships"), located within the administrative borders of the Member States, in which different national systems of labour law relations exist, where employers are established in different Member States and the workers are nationals of various countries, are all governed by separate provisions of labour law. National systems of employment law in force in the countries of origin of employees is or is not used by employers in the ordinary course of business in the country or in the Member States within the territory where the workplaces or certain jobs are located in jobs. It was found that the same companies, managed by employers domestic or foreign, in which workers are employed having come from other Member States, employment relationships are governed by different national labour laws. These differences in the legal position of labour relations, taking the form of a legal patchwork, which could not be

explained objectively, led to an unjustified differentiation of employees, from an equal treatment perspective. I address the problem of the unfounded differentiation of workers in light of the basic European law of equality. I deliberately do not use the term "discrimination", as no Member State law or no private international law prohibits employers to regulate labour relations on the basis of different national systems of substantive labour law. The phenomenon of discrimination in employment relationships eventuates when an employer applies either criteria that are prohibited by law to differentiate workers (direct discrimination) or uses seemingly neutral criteria, that when used, produce negative consequences prohibited by law in the case of a large number of employees (indirect discrimination). Indirect discrimination should be regarded as a situation hidden under a seemingly neutral legal criteria for differentiation of employees or as a practice used by employers who do not seem to differentiate between the powers, duties or privileges because of legally prohibited, openly discriminatory conditions, which leads to non-beneficial regulation of a social group (or a major part of one) because of the seemingly objective criteria used for differentiation. It is an attempt to determine whether jurisprudence uses two indicators when dealing with the issue indirect discrimination in a work relationship. One of them is the number of people affected by the condition referred to differentiate the legal situation. The latter allows to determine the legal consequences of this differentiation. The case of indirect discrimination occurs in those situations where on the basis of an apparently neutral criterion of legal repercussions occur in a particular social group, separate on the basis of an apparently neutral criterion of differentiation, and affect more members of the group.

In a compiled, considered and revised draft regulation, which was reported by the European Commission to the European Council on April 28, 1976 concerning the basis of articles 149, paragraph 2 of the Treaty of the European proposal was included in a binding settlement of a conflict as the substantive law of labour force in the Member States.[28] In support of this project, inter alia, stated that the criteria used by the rules of private international law applicable in the Member States show significant differences. The above statement of the European Commission should be taken as contemporary criticism of the legal situation in which the Member States, then the predecessor of today's European Union could not achieve consistent regulation of conflicts of law rules of substantive labour law within particular Member States. Differentiation of the legal position of private parties to employment relationships, depending on what rules are subject to labour law has been evaluated negatively by the European Commission. In the explanatory memorandum, the reasons for which a draft regulation containing

[28] Commission of the European Communities, amended proposal for a Regulation of the Council on the provision on conflicts on employment relationships within the Community, COM (75) 653 final.

a separate conflict in matters of regulation of private international labour law has been lodged for consideration by the Commission of the European Council, concluded that the differences between national rules of private international law, including those which are passed to solve national conflicts substantive labour law, should be seized in order to prevent a situation in which the social situation of employees (who make use of the assured freedom of movement within the Community) will be less favourable. It is not evident in any of the passages of the draft submitted in 1976 by the European Commission explaining what entails less favourable regulations of workers' rights benefiting from the freedom to migrate in order to work in another Member State. Comparing the labour laws in force in the Member States one can come to the conclusion that at times labour law in host countries, which welcome workers, are less and sometimes more favourable to labour laws that are in force in the home Member States of the workers. No comparative studies have been conducted on the differences in the implementation of protection and care functions of labour law in the Member States of the European Union today. From further passages of the draft regulation, which was presented by the Commission of the European Council, one can come to one logical conclusion. Differentiation of national rules of private international law applicable in Member States applied in order to deal with national standards of substantive conflict in labour relations containing a foreign element, is unfavourable because it leads to uniform regulation of labour relations of employees employed in the same period in one Member State. Thus, a statement about the negative effects of differentiation of workers, in particular, their social situation, should be understood as an expression of the European Commission's attention to all workers, not just those who decided to make use of law as enshrined in primary and secondary standards of European law on freedom of movement of labour.

Various national rules of private international law, including norms indicating the appropriate determinants that determine the choice of the substantive law of the national system of labour had been classified by the European Commission to one of the two conflicting with each model law. According to the first, substantive labour law standards are in the majority of the mandatory nature of the rules, and for this reason are classified as *loi de police et de sûreté*, and this consequently makes the employment relationship is subject to the provisions of the Member State where the work is being conducted. From a procedural point of view, disputes about claims of workers with employment relationships involving a foreign element shall be settled by the competent courts for the place of work (*lex loci laboris*), in the jurisdiction where the claims were filed (*lex fori*). According to a differing view, which lies at the heart of the belief in the absolute nature of labour law, those labour relations, involving an international element should be regulated by labour laws of the Member State of the nationality of the parties which have established these legal relationships. In the absence of a common

determinant, critical for the proper indication of the national system of substantive labour law may be granted by the internal rules of private international law, one of the previously described determinants used by the Member State. According to the European Commission's first model of the conflict of laws used for resolving conflicts of national substantive labour law, which, because of the inclusion of a foreign element in these legal relationships, can be applied to regulate these relations and this leads to a choice between national systems set out under one of the determinants used in international private law.

According to the second model, the rules of private international labour law or private international law should ensure that the individual parties to employment relationships involving a foreign element have the right to choose the substantive labour law system. The choice of these rules may be limited to the rights associated with the employment relationship. Limiting the freedom of choice of law, which is accepted by the jurisprudence and doctrine of private international law or private international labour law, Member States may be allowed to choose the law governing the employment relationship. The term "the law governing the employment relationship" is a formula that indicates the law applicable in the place of work (*lex loci laboris*). National or international private labour law regulations may also indicate the individual parties to employment relationships involving a foreign element, of the substantive provisions of national labour law in force at the place of the employer in the country of the nationality or domicile by individual employment relationships, either in the country in which the parties entered into a legal relationship.

Of the four previously mentioned determinants deciding on the choice of a national system of substantive labour law involving an international element in a work relationship, the European Commission decided on the choice of place of work as a basic criterion for determining the choice of determinant with which one indicated an appropriate national system of substantive labour law. From this rule, the draft regulation introduced in 1976 provides exceptions formulated within the provisions of Article 48 of the Treaty and the provisions of Articles 7 to 9 of Regulation No. 1612/68 and Regulation No. 1408/71. These provisions of the international Treaties enforced in the EU and international organisations which preceded it, adopt a rule the application of uniform legal standards in the legal relations in a place to work. The basic principle of European social security law is to determine the social security relation with the employment relationship. The traditional concept of workers' social security under in which the insured (workers), the policyholder (the employer) and the policyholder (the state social security institutions), is based on work relations and the national social insurance obligations as introduced by state authorities. Historically speaking, it can be concluded that if there was no general obligation to cover the compulsory social insurance for workers, there would be no social security system. Historical relationships between labour relations and social security relations, expressing the same

events that underlie these two legal relationships, each of which is governed by the same or similar criteria, are such that the conditions determining the choice of the proper national system of substantive labour law composed of social security provisions should be identical. Most provisions being appropriate for regulating labour relations and social security provisions in place to work, meet this requirement. According to the above provisions of the European Commission, Member State nationals should regulate labour relations and social security of employees and insured persons. In the interest of uniform labour law application (including social security as is understood by the Commission) is that all legal relationships under which work is carried out, thereby covering employees by universal, compulsory social security schemes organised by the authorities of the Member States, have been uniformly regulated. This means, therefore, that the uniform rules applicable in the European Union should apply to workers in a work relationship, who are in fact third-country workers in EU Member States and are covered in that respect by the universal, compulsory system of social security benefits. According to the European Commission, the freedom of movement for workers between Member States of the European Union should be guaranteed by objective criteria, applicable to all users of equal protection – EU citizens and third country nationals legally residing in EU Member States. The principle of equal treatment of all employees of the European Union under contracts of employment or doing business or service on their own account should be in conformity with a uniform national approach to select appropriate rules of substantive labour law, which apply to binding relations with a foreign element. Presenting the proposal to regulate the rules of private international labour law, the European Commission is guided by the aspiration to ensure the uniform application of those same conflict rules on matters governed by labour laws that apply to binding relations with a foreign element. A necessary condition to achieve the intended purpose was to regulate in the same way within the European Union standards for conflicts of substantive labour law. The proposal formulated by the European Commission sought to achieve this by establishing firstly among the determinants, labour laws binding in the place of work. From the principle *lex loci laboris*, which – according to the Commission should take precedence over freedom of individual choice by the parties to employment relationships involving an international element – could be waived on an exceptional basis, subject to compliance with the requirements laid down in the Commission's proposed regulation, 1976. The freedom of choice of law should be limited to objective criteria, which also should ensure that if parties to a binding employment relationship decide to select different provisions, other than those standards of labour law in force at the place of work ensuring workers the minimum legal protection that are equal to those provided by the labour regulations enforced at the place the work is carried out. Minimum established standards *legis loci laboris* should be applied to employment relationships of non-EU citizens who are legally employed within EU Member

States. Failure by the Community institutions and authorities of EU Member States the principle of uniform regulation of binding work relationships – those in which they are nationals of a national employer, the citizens of other Member States and third country nationals employed in the country by domestic or by foreign employers – according to European Commission – is regarded as a highly negative condition, whereby the different national rules of substantive labour law are applicable to regulate labour relations in the European Union. The European Commission proposes uniform rules for resolving conflicts of national substantive labour law standards to ensure that all employees under labour relations in Member State countries of the EU have the same legal situation. This state of affairs can ensure *lex loci laboris*, the rules according to which labour relations in the Member States should be governed by provisions of labour law in force in those countries where the work is done. Uniformity of regulating binding work relations within the EU accounted for *conditio sine qua non* the existence of a common market. For this reason, the draft regulation submitted by the European Commission has applied without exception to all employment relationships. In fact, the Commission sought to eliminate all differences in treatment between the parties to binding employment relationships, irrespective of whether or not there were foreign elements present.

In the draft regulation, which consisted of eight provisions which contain the conflict of law rules governing conflicts of national substantive labour law, the principles were presented as follows. In Article 1 of the draft regulation it was decided universal application to all employment relationships was to be adapted, under which each party, regardless of nationality, is required to fill in the European Union Member State obligations under a contract of employment and labour law. The provision of Article 1 of the draft regulation of 1976 defines the scope of applying subjective and objective conflict of law norms. All, without exception, labour relations, in the typical and non-typical contracts and established on grounds other than a contract of employment, as well as labour relations, which occurred without grounds, designated under the provisions of labour law, for example, by engaging employees in the team of employees by a particular employer was subject to the provisions of this regulation. In particular, the proposed regulation would also regulate conflicts of legal norms in force in third, countries used for regulating labour relations in which they are nationals of these countries with any employer employing workers lawfully in EU Member States. In clarifying the content and meaning of the regulation used in Article 1 of the draft regulation, it clearly stated that neither the nationality of the individual parties to labour relations, nor the place in which the contract was signed are legally relevant. Of the aforementioned foreign elements, which require the employment relationship to the selection or use determinants to indicate choice of law rules that determine the proper use of national systems of substantive labour law is the most important location of the place of work. Workplace located in an EU Member State makes

the employment relationship, such as is a legal bond, i.e. between employee and employer, is governed by the substantive law of that Member State in which obligations under the contract and labour regulations are carried out. Provision of Article 1 of the draft regulation of 1976 does not pay attention to the fact of carrying out duties acute to the employment relationship. It sets out the obligations on the individual pages of the employment relationship. Since every employment relationship, in particular, the binding relation is based on reciprocal benefits, therefore, examining the provision of Article 1 could be applied only if the rights and obligations of parties to individual employment relationships have been carried out symmetrically in the same Member State. The obvious shortcoming of the proposed regulation was not to cover a uniform set of conflict rules of individual employment relationships, in which part of the obligations of the parties was made in another Member State or third country. As attempted to submit earlier, the rules of private international law, jurisprudence, doctrine of the European countries, aim to develop a characteristic indicator for contractual relations, the use of which allows for identification of a proper national system of substantive law. In Article 1 of the draft there was no mention of benefits, as the deciding element of the provision is its conflict of laws aspect, characteristic to binding work relationships. The use of the plural "obligations to be implemented" proves that two or more obligations of the draft regulation would only apply to those contracts of employment with an international element, in which the respective obligations of the legal relationship will be implemented in one Member State. Although the original intention of the legislature was to apply the provisions of the draft regulation to all, without exception, labour relations, exclusions would include any labour relations, in which the employee would be required to perform work on the territory of a Member State X, in return for which the employer would be obliged to pay that employee in the State of Y. It can be concluded that the regulation would not apply if it was enacted, to employees posted to work in another Member State or the other, temporarily perform ad hoc activities within the territory of another state.

Article 1 of the draft regulation uses the phrase "all employment relationships." Such a term may be treated as an indication that the bill intended to apply regulation conflict not only to the rules governing labour relations of obligations, but all legal relationships governed by labour law, irrespective of their legal basis. Despite the absence of a formal equality in official labour relations, characteristic of the legal relationships regulated by labour law is the equality of benefits. Workers employed in the public service in exchange for staying at the disposal of the employer and the job, provided they acquire the right to remuneration (salary) and other benefits regulated by relevant provisions, which determine the position of employment and workers' rights. In such official labour relations where there are elements of foreign conflicts, national legislation used to regulate the employment situation of civil servants, officers and other workers in the

labour relations, would be governed by the provisions of private international labour law, if the draft regulation of 1976 took effect in the European Union. Perhaps this was another reason not to adopt the draft regulation, since the previously existing rules of private international law contained almost exclusively standards governing the conflicts of law concerning binding work relations based on employment contracts. In support of the draft regulation it was noted that the project does not provide legal, autonomous definition of "labour relations." This meant that the authors of the European conflict of law rules intended to allow the authorities of the Member States the freedom of choice in labour relations, to which could be applied the draft regulation of 1976. This observation can be regarded as the reason that could result in a refusal of the proposed regulation, in an attempt to introduce uniform international private labour law rules. An attempt to interpret Article 1 of the draft regulation as the standard that the adoption could be used to regulate the conflicts of national standards, the substantive law governing the legal position of labour in the labour relations of civic workers, cannot be treated as a case *condratictio in adjecto* because the rules of private international law are also used to solve the conflict of public law. In the national systems of law such standards are more common than in private law (civil, commercial). In addition, Regulation No. 883/2004 issued in order to coordinate national social security law exists only for resolving conflicts between the provisions of public law. In this category standards include the social security legislation of the Member States.

The draft regulation is designed to allow the resolution of conflicts, which arise or may arise in employment relationships involving a foreign element among competing national systems of substantive labour law. In Article 2, paragraph 1 of the draft there occurs the term "labour law." Under the proposal, the concept of labour law fits all laws and administrative provisions applicable to labour relations, enacted by the authorities of the Member States and collective bargaining agreements entered into by the social partners. The term "labour law" included within its meaning of the provision judiciary analysis, in particular, precedent court decisions interpreting existing labour laws. This provision seeks to establish a legal definition of a national system of labour law. The system created not only the substantive provisions of labour law governing labour relations but also the provisions of collective bargaining agreements, enforced not as *erga omnes* but between parties who have entered into the agreement. In support of the draft regulation, the section devoted to explaining the grounds of legal regulations in Article 2, paragraph 1 of the proposed draft regulation highlighted the importance of the *common law* system in the UK and Northern Ireland. The importance of judicial interpretation was also underlined and the existing labour laws by the labour courts in the continental labour law system in other EU Member States. Because of the nature of collective agreements concluded by the social partners in the British system of labour law, in which the regulatory arrangements are

not legally binding, and their validity is solely due to their nature, which clearly reflects the English term "a gentlemen's agreement," in support of the provision in Article 2, paragraph 1 the draft regulation, particular attention was paid to the emphasis of this provision. It was noted that the collective nature of the sources of labour become labour law only when the parties of these agreements and other normative agreements are bound in the legal sense of the term.

In Article 2, paragraph 1 the draft regulation uses the phrase "labour law provisions applicable to employment relationships." They were therefore the scope of national standards, the substantive labour law, between which conflicts should be resolved in the manner indicated in this draft regulation. The European Commission as an author of uniform private international labour law sought to resolve conflicts of national standards within the scope of individual employment law. The legal status of labour standards within the meaning of this project were to be governed solely by the individual employment law.

The range of adjustment of the conflict of law rules did not include legal issues relating to legal capacity and capability to carry out legal acts regulated by national law of individual employment law. In particular, it did not concern the ability to enter into contracts of employment. Provision of Article 2, paragraph 2 of this draft regulation explicitly exclude from the scope of the proposed regulation of private international labour law the (capacity) of the parties to enter into contracts of employment. Conflicts of the substantive rules on matters relating to the definition of contracting capacity were to remain in the hands of the conflict of law rules of private international law, regardless of whether the case was governed by the above in labour law or civil law. The absence of legal capacity was to be governed in the same way with appropriate the legal consequences.

The considered Article 2, paragraph 2 of the draft regulation does not explain the rules by which they would be governed by the national conflicts of substantive labour law, laying down rules for the ability to establish formal labour relations. This situation may be interpreted as a conscious and intentional by the author who – due to the specific requirements for candidates for public service – left the matter to establish the capacity of formal labour relations governed by specific legislation, and not generally applicable norms and standards of civil law. Given the relatively large number of failures, committed by the Community in the conflict of laws project, one cannot rule out the mistakes made by the European Commission. Finally, the third version of the explanation proposed above for national legislation to regulate conflicts of substantive law (civil law or labour law), specifying certain aspects of legal capacity to perform certain legal acts (contracts of employment) may be explained by finding that the current draft regulation does not regulate conflicts of other national standards, individual substantive labour law beyond those that can be used to regulate the legal position of the parties in binding labour relations. Each of the three hypotheses is justified. In my opinion, the most likely hypothesis is the first. It remains the clearest and most

acute attempt by the European Commission at regulation in a uniform manner the conflicts of substantive labour law norms within the European Union.

The most important provision of the proposed Regulation is Article 3, paragraph 1. The provision regulated the priority of making use of the determinants by which the individual employment relationships involving a foreign element shall select the proper national system for the substantive labour law used to regulate the individual employment relationships. Priorities for the proper indication of the national system of labour law are closely related to specifying the place to work. In those cases where the workplace can be identified, as the principle outlined in the first paragraph of Article 3, paragraph 1, the draft regulation shall be adopted as a determinant of the proper place of work. The draft regulation of 1976 as the main determinant of the relevant national regime of substantive labour law is used as a determinant *lex loci laboris*. The applicable law shall regulate the relations involving a foreign element being the law of the country in which the person performing work under an employment relationship normally exercises their work-related activities. There is a certain slight difference between the wording of Article 3 and the first subparagraph of paragraph 1 of the draft regulation and the reasons for that regime. In the proposed rule the indicator used to decide upon the appropriate determinant are the national rules of substantive labour law of the Member State in which the employee with an employment relationship with a foreign element can "normally carry out their employment." In a document justifying the rules explained above, this indicates that the regulation elects the state in which the largest part is provided by the employee. This state of affairs is presented using the term "usually." The provision of Article 3, paragraph 1, first subparagraph states as the appropriate national labour laws of the state in which the employee normally carries out his work. As an illustration of this provision, the following example is given: a worker employed as a civil engineer at the plant operating in country A, supervises a building construction site twice a week for the same employer in country B. Due to the provision of work most days of the week in the workplace located in country A, the employment of the employee is governed by the provisions of labour law in force in that country, because its territory is where the employee usually carries out his work, i.e. is employed for most of the week's work time (normally is employed).

Workers employed on sea merchant ships under the flag of a Member State should be subject to labour laws in force in that country (Article 3, paragraph 1, point "b"). By contrast, workers in transportation by land or river are subject to the rules of labour law of the Member State where their employer has its registered head office. If international transport workers have established working relationships with the national agency or branch of international business, their relationships should be governed by the provisions of the labour law which apply in the country in which there is a seat or a branch of the international business (Article 3, paragraph 1, point "c"). Given the categories of the following workers: seafarers,

international river and road transport employees, the determinant deciding upon the proper national system of substantive law is the seat of the employer (*lex loci situs*). Labour laws in force in that country shall apply to the employment relationships of workers moving within the territory of other countries on the basis of *lex loci delegationis*. Exceptions to this rule may be made only by the provisions of European law that are applicable in international transport, or have been issued for the purposes of international transport (Article 2, paragraph 2).

Exceptions to the rule laid down in Article 3, paragraph 1 of the draft regulation, under which labour relations are subject to regulatory law of the country in which the employee habitually carries out his work have been identified in the provisions of Article 4 – Article 6. Describing the exceptions is exhaustive. In light of the applicable provisions of the regulation, which would be analysed as the project after its adoption by the European Council and because of the principle of uniform rules in force in EU Member States of conflicts of substantive labour law relations in work involving an international element, in which the work is performed on the territory of any Member State, criteria other than those stated in the provisions of Article 4 – Article 6 draft regulation could not be used. Exceptions to the rule laid down in Article 3 draft regulation, whereby the basis for regulating relations with a foreign element *lex loci laboris*, apply to workers temporarily posted to work in the territory of another Member State or other EU Member States (Article 4), employees in companies that have branches in two or more Member States (Article 5) and to employees, who usually provide work in the territory of two or more States, of which at least one is a member of the European Union (Article 6).

Provision of Article 4 of Regulation proposes, that those workers who are posted to work in other EU Member States be submitted to labour laws in force in the country where the employer has its established headquarters. The principle *lex loci delegationis* applied to workers posted to work in the territory of another Member State has been proposed for the European model of social security. In the light of Article 14, paragraph 1, point "a" and Regulation No. 1408/71 of June 14, 1971 on workers posted to work in another Member State for a period of 12 months subject to the provisions of an existing national social security system. The proposed adjustments to the regulatory framework in the field of labour law to the EU established rules for the continuation of the social security relationship regulated by the laws of a Member State, bring together two parts of one branch of law, namely employment law and social security law. This is evident when an employee or a self-employed person is under a social security scheme and when posted temporarily to another Member State to carry out work, the social security scheme relationship is not broken. In an attempt to avoid the adaptation of conflict of law rules of substantive labour laws to the standards, which coordinate separate national social security schemes, the draft regulation of the Commission of 1976. The Regulation does not provide a specific definition of posted workers.

In the light of this project, posted workers are employees, who have been granted such a legal status was given by the Regulation coordinating national social security systems. *De lege lata*, the legal definition of a delegation is set out in the above-mentioned Regulation No. 1408/71. After the enforcement of Regulation No. 883/2004, which was issued in order to coordinate national social security systems, it forms the basis for defining categories of workers posted to work in other Member States, who are still subject to social security laws enforced in the country from which they are posted. Article 12, paragraph 1 of Regulation No. 883/2004 on the employees employed by an employer established in one Member State posted to work in the territory of another Member State for a period not exceeding 24 months, continue to remain subject to existing laws of social security. This provision introduces an additional condition relating to the aim of a posting. Posted workers are still subject to the rules enforced in the country from which they are posted, if they were not sent to another Member State in order to replace another employee (Article 12, paragraph 1 *in fine*). The legal solution in the provision is not clear due to inaccurate determination of who is to replace the posted workers. The phrase "to replace another person" is a term that can be understood in two ways. It may relate to the replacement of another employee posted to work in another Member State by the same employer. May also include a situation in which, under an agreement entered into by the two employers, one with workers in the X country, the second in the Y country, the first employer posts a worker to the Y country in order to replace the worker in another country (Y) by the employer who operates their business within that country. Because of the business activity, each of these employers are obliged to cover the social insurance of employees. The legal situation of the insured persons is governed by the provisions of social security legislation in the country in which individual workers are employed. A special case of posting a worker may be considered when the post of an employee who is on leave is temporarily filled by a relief employee who is on a temporary work agreement employed by another employer who has their business entity in another Member State. This type of posting is not the type of posting as is understood by Article 12, paragraph 1 of Regulation No. 883/2004 and, therefore, does not result in the continuation of the social security scheme used up until that point under the national social security legislation enforced in the home country of the "posted" employee. The contract for replacement work is entered into between the "posted" employee and the new employer, who is obligated to use the social security system enforced in the particular country. For this reason, an employee hired to replace another person is subject to the provisions of social security, which have universal application in that country, in which they are currently carrying out work in. If in the home state, an employer who employs that employee on the basis of a typical contract (contract for an indefinite period, in which the employee carries out their work on a full-time basis) provides the worker with unpaid leave in order to replace the worker who is employed by another employer in another Member State,

this worker is also covered by two different national social security schemes. If a worker is active in the labour force in a particular Member State, he/she is entitled to social security benefits by social security legislation enforced in that country. In the home country the worker is treated by the national social security system as a person temporarily exempted from the payment of insurance premiums. Depending on the regulatory framework of specific national rules on social security in the home state, the period for not paying premiums by an employee and/or on behalf of the employee by the employer who employs them (granting unpaid leave) has a limited impact on the entitlement for future policy benefits. In this case, Regulation No. 883/2004 lays down rules of overlapping entitlements to insurance benefits. You may find that an employee using unpaid leave during the period of employment for another employer, domestic or foreign, does not acquire entitlements to insurance benefits because of the different insurance system that is regulated by social security law enforced in any of the Member States. In the latter case the issue of overlapping entitlement title insurance does not exist, which justifies the regulation adopted in Article 21, paragraph 1 of Regulation No. 883/2004, according to which employment in order to replace another employee in another EU Member State legislation prevents the use of existing social security force in the home state. However, an employee may be directed to work in order to substitute another employee by a temporary employment agency. More complex obligations between the three legal entities: the employing employer (a temporary employment agency), the user employer and the employee directed to perform work at the time required to replace another employee.

The case presented above applies to an exceptional situation. *Prima facie*, Article 12, paragraph 1 of Regulation No. 883/2004 has been introduced in order for national social security legislation not to apply for a period longer than specified in the provision (maximum 24 months) within the territory of another Member State. Freedom and pursuit of economic activities and freedom to provide services within the common market within the European Union is not subject to time constraints. Therefore, Article 12, paragraph 1 *in fine* of the Regulation is applied to the successive relief workers, led to work abroad by an employer who has established a permanent business entity in another country and is posting workers employed in the home state.

It seems that the exception to the principle according to which labour relations with a foreign element should be governed by provisions of labour law enforced in the place where the work is carried out (*lex loci laboris*) and *lex loci delegationis* should not be covered by the two above-mentioned categories of workers. Because the draft regulation of 1976 was not adopted, this dispute is academic. The earlier mentioned Directive No. 96/71, which is used as a determinant to indicate the applicable law for workers posted to work in another EU Member State *lex loci delegations*, lists modified minimum standards, which are more favourable for posted workers, enforced in the country in which the work is carried out.

Article 4 of the draft Commission Regulation 1976 applies only to employees. It does not apply to the self-employed. For those people who go to another EU Member State to pursue a similar occupation, Article 12, paragraph 1 of Regulation No. 883/2004 does not foresee restrictions applicable to employees.

In the case of workers employed in enterprises which have undertakings located in at least two Member States, the parties to an employment relationship establishing a relationship with the first undertaking may enter into an agreement whereby the applicable labour laws enforced in the location of the said undertaking will also be used to regulate the content of the rights and obligations of the parties once the transfer of an employee to another workplace located in another Member State occurs. Article 5 of the draft Commission Regulation 1976 gives the parties to an employment relationship with a foreign element the right to retain the provisions set out as appropriate in the case of a work relationship with the first employer, provided that the undertaking employing a worker is organisationally determinanted to other establishments belonging to the same owner. Article 5 of the draft regulation could be applied, if the regulation was enacted, if a multi-undertaking employer employed workers within its establishments. The transfer of the employee by the employer to another of its undertakings is not regarded as establishing a new employment relationship. It is also not considered as a "posting" of an employee who is to work in another workplace located within the territory of another Member State. Article 5 of the draft provision would apply only if the employee permanently transferred to another establishment – the organisational unit which is a part of the company, with which a work relationship has been established. At the time an employment relationship is established, the employment relationship does not have to necessarily exhibit the characteristics of a legal relationship in which there are foreign elements. Parties to that relationship can come from the same Member State. The work which is to be carried out by the employee in return for remuneration, may be performed in that State, which both parties are citizens of. The foreign element in this relationship can only be established when the employee transferred permanently to work in another workplace, situated in another Member State, as part of a multi-employer organization business, has established a working relationship with. Entering into an employment contract under the labour laws enforced in the country where work is carried out, the parties to the employment relationship in which there are foreign elements may sign an agreement for the application of labour laws enforced in their home state in the event of a permanent change of work. An identical agreement may be entered into by parties to an employment relationship with a foreign element. Entering into an employment relationship *lex loci laboris*, the parties may decide that the chosen law will apply to the employment relationship, irrespective of where the labour will be carried out in the future. It follows that a necessary condition to maintain the original characteristics of the national system of substantive labour law, is to establish a working

relationship with the employer having undertakings in different Member States. The agreement on the continuation of employment should be in writing. This is not a mandatory requirement. Parties may enter into such an agreement orally. In such a case the context of the agreement whereby the employment relationship is submitted to the national labour laws enforced in the country where the first place of work was located in, should be confirmed in writing. The solution proposed in the draft provision of Article 5 of Regulation seeks to ensure legal certainty in the work relationship established by the same parties. The only element which is subject to change is the place of work. Article 5 draft regulation proposed an alternative to *lex loci laboris*. The proposed legal structure was based on the concept used by *lex loci delegations*. In the absence of a basis for the application of this concept due to a permanent change in the place to work, it was necessary to propose an extension accordingly to the agreement entered into by the parties to the employment relationship, for all relevant national systems of substantive labour law of all Member States of the EU to follow, where work will be performed continuously. Reservation with respect to permanent employment was not specified in the analysed Article 5 of the Regulation. It was introduced as further and necessary condition for the validity of the contract for the support of the draft regulation. It could have possibly been used by a judicial body for assessing the appropriateness and legal use of a foreign labour law system designated by the parties of the employment relationship with an foreign element. The application of regulations proposed in draft Article 5 of the Regulation provides an interpretation of the system. Article 5 should apply to other cases than those specified in Article 4. In the latter provision it is proposed to extend the binding force – as is indicated by the determinant defined in the draft rules of private international labour law – of the national labour law so that they cover labour relations of posted workers to work temporarily in another Member State. Thus, through Article 5 the possibility could exist for the extension of the relevant national substantive labour laws to cover work relations, where the place of work has permanently changed. The weakness of the proposed regulation set out in Article 5 is the lack of guidance offered to distinguish between a permanent change in the place of work as a vital component of the employment contract. Posting of workers within the limits set out by applicable labour law does not require a notice replacing the employer. Significant change to the agreed elements of the employment contract is necessary only if a lasting change *essentialia negotii* is made. So to distinguish the posting of a permanent change in the workplace is possible in the national systems of substantive labour law, which include the workplace responsible for a significant component of the employment contract. From the solutions presented on the legal position of the workplace as a component of an employment contract, criticism can be drawn at justifying the draft regulation. According to the perceptions presented in support of the draft agreement to extend its power *lex loci laboris*, it may be applicable when transferring an employee to work in another Member

State for a period exceeding 12 months. Article 5 of the draft regulation uses the term "transfer." Article 4 of this project talks of "workers sent to carry out temporary activities." Neither in the first nor in the second provision of the draft regulation did the words "posting" or "posted" appear. A period for performing the tasks assigned to the employee in another Member State, is also not specified. Differences between legal arrangements applied in the two laws stem from the nature and circumstances of the post of the worker who is to carry out work elsewhere to the previously fixed place of work. In the case of posting an employee to work in another Member State, the rights of the employer are not subject to other legal restrictions beyond those which arise from the wording of Article 4 of the proposed regulation, that activities which the employer may ask an employee on the territory of another Member State should be determined in time. As I wrote earlier, the time limits of the posting shall be determined by regulations issued in order to coordinate national social security.

On the other hand, a "transfer" an employee from one workplace to another Member State, looks very differently to that of a posting. Because Article 5 of the proposed regulation does not mention the length of time of the transfer, it may be concluded that the subject matter of the provision is that the transfer of an employee for a period longer than the maximum period during which, may be regarded, according to the provisions of European labour and social security, as a posting. This does not mean, however, that Article 5 draft regulation could be applied (if the regulation was adopted) to cases in which the transfer of an employee to a job located in another Member State would be shorter than the 12 months mentioned. Adoption of the interpretation of Article 4 and Article 5 presented by the author of the project – the European Commission, would lead to a conflict with logic. To workers posted for short periods, not longer than 12 months, to work in another Member State would apply the existing rules as *lex loci delegationis.* In relation to the transferred employees for a period of more than 12 months *lex loci laboris* would continue to apply. The question arises, what provisions have to be identified as appropriate through private international labour law (presented as the draft regulation of 1976), when according to the original intentions of the employer, who permanently changes the workplace of the worker to work within the same company in another plant in another Member State, and before the expiry of 12 months, due to circumstances which cannot be predicted, re-employ him permanently in the same company in the first workplace. Based on the explanations of the authors, this case does not deal with a posting, as the actual period to work in another Member State is less than 12 months. It also cannot be treated as a transfer of work to another country within the meaning of Article 5 of the draft. Transfers are considered in the draft regulation only to be situations whereby the transfer to work exceeds the 12 month period. An obvious error is to adopt the bill as the sole reference point used for the differentiation between a "posting" and a "transfer" of an employee to work in another Member

State of the said period of 12 months. Despite the fact that the earlier presented provisions of Regulation No. 883/2004 of the posting period has been extended to 24 months, the introduction as "objective" criterion for distinguishing between a "posting" and a "transfer," which was established by the Community legislature a period of 12 or 24 months is incorrect. Notwithstanding the posting for the worker to work in another Member State, an objective indicator, which allows to determine whether there is a situation governed by Article 4 (posting) or the draft Article 5 of Regulation (transfer), is to ascertain the purpose for which the employee has been instructed by the employer to work abroad. Temporary contract workers fulfilling duties in another Member State may be exercised only within the posting, as regulated by Article 4 of the draft. By contrast, a referral to work permanently in another Member State may take place only on the basis of Article 5 of the draft. The indicator for determining the legal nature of the decision of the employer (transfer or posting) is a change in the provisions of a work agreement, in particular a change in the work place. If the above change is temporary, has been carried out on the instructions issued to the employee by the employer, it should be classified as a posting according to the meaning of Article 4 of the draft Regulation. A permanent change of place to work, made through the termination or through an amendment to the work agreement, means there is a case of transfer. This process depends on how the national systems of substantive labour law adopt the differences between the above-mentioned methods for change in the wording of the work contract or any other act considered by the labour law of the Member States as a basis for an employment relationship.

The agreement on the continuation of the first of the substantive labour law of one of the EU Member States may only be entered into when the second and successive undertakings are part of a multi-employer company located within the Union. This is clearly stated in the explanatory memorandum of the draft regulation of 1976 Article 5 of this project does not include this reservation. In the initial passage of the opening sentence of Article 5 of the draft regulation, the usual reservations are not mentioned, that the extension of the binding force of a Member State may only take place if the multi-employer company has establishments in one or more Member State. This binding extension is also possible in the case of employers who have establishments in two or more States. Due to the nature and scope of the regulation, which takes effect only within the EU, it can be argued the project has a limited scope in implementing the provisions Article 5. The above reasoning reinforces the interpretation of the aim. Article 5 of the draft regulation was to protect employment relationships established in the European Union before the invasion of substantive labour laws of third countries. Such protection is possible only if the employment relationship with an international element, in which the work is within the EU, does not allow the parties to the legal relationship to extend the binding force of the labour law of the third country to labour relations in EU Member States. It can

be deduced on the grounds of the draft regulation that the actual introduction of the prohibition to have an employment relationship succumb to the labour law of the third country, is done in order to protect the European area of justice and social systems from substantive labour law of least developed countries and less inclined to guarantee social protection to workers than those assured by the authorities of Member States within the Union. So if you move a permanent employee from the workplace of an employer employing workers in third countries and in EU Member States, from a third country into a Member State, the employment relationship of such an employee would be subject to national substantive labour law legislation of the Member States pursuant to Article 3 of the draft. Article 4 of the draft regulation would apply to the employment relationship in which the employee remains with an employer operating a multi-establishment company within the EU and outside of it, to the next permanent transfer of the said employee, provided that the transfer will take place within the EU. Depending on the type of activities carried out by the multi-establishment employer, with plants located in EU and non-EU countries, and the nature of work performed by employees subjected to permanent transfers, the relevant labour laws, which would apply to labour relations with a foreign element, if a draft regulation was adopted by the European Council would be the provisions of the State in which the work is usually provided. In the case of seafarers the provisions would apply of the State under whose flag the ship sails at sea in which the worker is employed. In the event of international transport by road or water – the relevant labour laws would apply, which are enforced at the headquarters, branch or agency of the employer.

Protection of the European social model and the tendency of the Community institutions for obligatory working relationships with a foreign element apply to national systems of substantive labour law shaped by European labour law, means that in the case of providing systematic work in a Member State and in a third country, parties to a contract of employment allowed for in Article 6 of the draft regulation of 1976 may select (within a limited scope) an appropriate system of employment law. This provision is partly modelled on Article 14, paragraph 1, point "c" Regulation No. 1408/71. Since the draft regulation contains a proposal for a European system of private international labour standards, conflicts of law of national systems of substantive labour law of the Member States and third countries have been regulated. Regulation No. 1408/71, however, only coordinates national social security systems of Member States, and therefore the concept of the Regulation No. 1408/71 needed to be modified. Article 6 of the project presents his modification. The aforementioned provision in the draft regulation would be used to regulate conflicts of national substantive labour law in cases of a conflict in the countries in which the employee usually carries out his work. Since not all of these countries belong to the European Union, it is therefore impossible to resolve a conflict on the basis of the aforementioned Article 3 of the draft regu-

lation. According to Article 6 of the draft regulation parties to an employment relationship with an international element, under which the employee is regularly required to work in two or more countries, of which at least one of the EU Member State may, at any chosen time enter into a written or oral agreement, which is then confirmed in writing submitting the employment relationship to one of the labour law regulations of one of the Member States, in which the worker is employed or where he/she resides. Parties may also decide to submit their employment relationship to labour laws enforced in the Member State in which the employer resides or in which the employer's headquarters is located. Provision of Article 6 of the draft regulation creates the possibility for the parties to an employment relationship to have the right to choose the one labour law system of one of the Member States. Freedom of choice is substantial, since in the analysed Article 6 four determinants were applied, which may indicate the applicable law in the place of work, the law applicable at the domicile of each party to the legal relationship (employee or employer) or law applicable to the headquarters of the workplace, in which the worker is employed.

Summing up the arguments on the draft Regulation of 1976 of the Commission, it should be noted that, in principle, it does not allow the parties to labour relations to make a free choice of appropriate national systems of substantive labour law. Protecting important values from the perspective of the European Union, including the certainty of the legal framework, predictability of judgements, the protection of social rights and the protection of the rule of law, examining the draft regulation allows the parties to an employment relationship (with a foreign element) to select one substantive labour law system enforced in the Member States, which may be suggested as one to be used when applying one of the abovementioned determinants. Exceptions to this rule may be made on the basis of agreements entered into by the parties to certain employment relationships with a foreign element. Those employees have the right to enter into such agreements who, because of the special position within the workplace or a particular type of work need not be subject to strict rules of legal protection and social services, provided for them by the Member State's labour law. In Article 7, paragraph 1 the draft Regulation provides the basis for exceptions to the principles described in the provisions of Article 3 – Article 6. There was no mention of types of work, nor indication of the criteria governing the classification of the work of a particular type to a special category, which justifies the complete freedom to choose the applicable law to regulate the employment relationship with an international element. Looking at Article 7, paragraph 1 of the draft Regulation with great detail, was carried out in Article 7, paragraph 2. For example, it listed two types of positions in the workplace – an employee employed in a managerial position and an employee acting as an adviser, who enjoys the full freedom to negotiate agreements with employers concerning the unlimited choice in selecting a national system of substantive labour law, which will apply to regu-

late the content of their relationship. By contrast, the special nature of the work as the second criterion set out in Article 7, paragraph 1 of the draft regulation was developed in Article 7, paragraph 2 of this project and described the types of work in which employees must demonstrate advanced professional qualifications. According to the views presented in support of the draft Commission Regulation of 1976, the exceptions to the principle of limited choice of law, applied by the parties to the agreement, to regulate the content of their relations involving work and deal with disputes about claims of these legal relationships cannot be regulated in any greater detail. Article 7, paragraph 1 of the draft regulation assures the parties to employment relationships to certain flexibility. For this reason, neither paragraph 1 nor paragraph 2 of Article 7 of the draft Regulation provides references for determining the level of governance over workplace issues in which employees could benefit from an unlimited choice of substantive labour law of any State, and not only one of the Member States of the European Union indicated by the application of the determinants listed in the provisions of the draft Regulation. Identical observations can be made in relation to two other criteria set out in Article 7, paragraph 2 of the draft Regulation: the position of the adviser and specialised nature of work. According to the justifications of the draft regulation, critical for determining whether employees can benefit from unlimited freedom of choice in a legal system, is to determine whether their position in the workplace because of the position held or the nature of the work carried out, allows them to negotiate on equal rights with the employer the choice of an appropriate system of employment law. The answer to the question as to the place of work for the employee as well as the employee's bargaining position, was to be given by the draft Regulation, which would determine the types of workers benefiting from the unlimited choice of national labour legislation. Granting the employee the right to decide jointly with the employer to choose a proper system of a particular substantive labour law used to regulate the employment relationship with an international element would allow the parties to respect the legal conclusion of a choice of law. This agreement, like the other agreements referred to in Articles 5 and 6 of the draft Regulation may be made in any form. Entering into an agreement without complying with the requirement for the agreement to be made in writing, commits the parties to reaffirm its conditions in writing.

Parties to the employment relationship with an international element, in which the worker is employed in a managerial, advisory position or performs specialised work, are not required to choose a system of labour law, which the employment relationship will be made subject to. Article 7 of the draft Regulation regulated solely the possibility of terminating the agreement by way of exception established by the rules laid down in provisions of Article 3 – Article 4 referred to the draft Regulation. Not making use of the powers referred to in Article 7 of the draft Regulation results in an indication of the substantive labour law of a Member State according to the determinants listed in Article 3 and 4 of this project.

Article 8 of the draft Regulation gives the necessary directory of the substantive labour law standards enforced at the place the work is carried out, forcing the parties to use the standards, whose labour relations have been subjected to national regulations of the substantive labour law, as indicated by the determinants in Article 4 – Article 6 of the said project. Article 8, paragraph 1 of the draft lists the ten categories of the necessary labour laws, which are part of a national substantive labour law system, which would apply to the employment relationship with a foreign element *lex loci laboris* if such a relationship was not regulated *lex loci delegationis* (Article 4) by the provisions enforced in the country where it was located in the first place to work – *primi lex loci laboris* (Article 5) or *lex loci laboris*, *lex loci habitationis* or *lex loci situs* of a EU Member State (Article 6). The provisions necessary – enforcing applicable standards set out in draft Article 8, paragraph 1 include:

- the standard weekly rest period, holidays recognised by the labour law enforced in the place of work being carried out for public holidays, time and labour standards during the night period;
- the maximum daily and weekly working time limits and provisions that allow for exemption from these standards;
- the minimum annual leave;
- the guaranteed minimum remuneration for work and payments made by the employer or other monetary benefits by way of employment and procedures for payment of wages;
- health and safety rules;
- prohibitions on child labour, restricting the work of minors, pregnant women, mothers bringing up small children, and protective provisions for certain categories of workers, particularly people with disabilities;
- the special protection of the permanency of the employment relationship of workers who perform a representative function in the workplace;
- the responsibilities set out for obtaining approval to dismiss certain categories of workers benefiting from increased employment stability;
- the applicable rules for accessing (hiring) employees to other employers;
- establishing sanctions in the event of unlawful employment restrictions on the freedom to work in a anti-competition agreements, competitive activities by an employee or introducing similar, inconsistent clauses into national labour laws.

Necessary provisions set out in Article 8, paragraph 1, points "a" – "i" also apply to employees eligible, on the basis of Article 7 of the draft Regulation, to the unrestricted right to choose the national system of substantive labour law (Article 8, paragraph 2). The purpose of the mandatory standards is to guarantee a minimum level of social protection, assured by the provisions enforced at the workplace. The necessary standards do not need to be applied when other national labour law systems are selected by the parties, providing that such provisions ensure the workers an enhanced level of protection.

It is impossible to provide reasons that have been responsible for the rejection of the draft submitted in 1976 by the European Council that was to create a uniform regulatory system within the EU in order to with the conflicts of law in national systems of substantive labour law. Most probably the failure to approve this draft regulation has been caused by other than the solutions previously used by the various European countries on the rules of private international law. The concept of the selection of determinants proposed in the draft Regulation of 1976 differed significantly from the legal structure used a few years later, in the Rome Convention ("Rome I"). Both domestic law and private international law described in a different manner than did the European Commission's proposal of 1976, the order of priority of the determinants used by the parties in binding labour relations involving a foreign element, used to indicate the relevant national labour law systems. In the draft regulation, the freedom of choice by the parties was presented as an absolute exception to the rule according to which – in order to protect the values important for the community – the nature of the current rules sought to give the labour laws of the State, where the place of work was located in, provided that these were the rules of a Member State of the European Union.

The Commission's presented draft project aimed towards the unification of conflict of law rules applicable to regulate conflicts between national systems of substantive labour law. Another advantage of this project was to separate the conflict of law rules in the international legal instrument concerning labour law. If the draft European Commission regulation of 1976 was adopted, for the first time conflict of substantive labour law would be regulated by the rules of private international law work, and not, as is currently is, by the rules of private international law.

Part II

Conflicts of law of individual labour law in the light of the Rome Convention of June 19, 1980 and Regulation of the European Parliament and the Council of the European Communities No. 593/2008 of June 17, 2008 on the law applicable to contractual obligations ("Rome I")

Chapter 1

Rome Convention

§ 1. Preparation of the Rome Convention

With an initiative to draft a convention regulating conflicts of norms of substantive law relevant to contractual obligations, was requested by the authorities of the Benelux. On August 8, 1967, the permanent representative of Belgium, acting on the authority of Belgium, Luxembourg and the Netherlands provided the Commission with the European Economic Community draft convention on the law applicable to contractual obligations with the proposed establishment of a commission of experts – representatives of other Member States of the EEC to take legislative work aimed at unification of different national rules of international private law. The opening meeting of the legislative work that led to the adoption of the Rome Convention ("Rome I") was held on February 26–28, 1969. In his opening speech, Chairman of the Governmental Experts T. Vogelaar, Director-General of the Commission on the common market and the adoption of the national laws of the Member States of the EEC, specified targets that should be implemented by the Convention.[29] In his opinion, the draft convention was to lead to full unification of conflict of law rules within the common market. The same conflict of law rules applicable to conflict resolution of the substantive rules relating to the obligations under the contract should be valid in six Member States of the EEC, not only in their mutual relations, but also the legal relations with third countries. Adoption of a common corpus of unified legal rules, regulating in an identical manner conflicts of national standards relevant to the substantive law of contractual obligations would increase legal certainty in binding relations and would contribute to improving the protection of vested rights in matters subjected to the regulation by private law. Legislative work aimed at the unification of conflict of law rules were initiated by the authorities of the Member States of the EEC and the EEC Commission, for representatives of these institutions and legal experts were aware that work on the unification of private international law would have acted faster than the national unification of substantive laws. The scope of work undertaken to merge six separate systems of private international law is much smaller than the unification of the different systems of substantive law. Internal standards of private international law rules

[29] See: M. Giuliano, P. Lagarde, *Report on the Convention on the law applicable to Contractual Obligations*, Official Journal of the European Communities, C 282, January 31, 1980, p. 1 et seq.

govern only conflicts of law. In addition, determinants used for resolving conflicts of national substantive law that could apply to legal relationships involving a foreign element, developed in the Convention can be used in a variety of binding relations of the various national systems of substantive law including employment law, civil law, family law and commercial law. The Rome Convention was adopted in order to allow free circulation of law within the common market for all its subjects. The beneficiaries of the Convention in the labour relations were to be both workers and employers remaining in labour relations, in which there are foreign elements. The systematic dismantling of economic barriers to legal transactions in the common market meant that there was a need to regulate conflicts of uniform substantive law, which could be used in legal relations involving a foreign element, among other things, not to encourage the parties to these relations to be subject to litigation under judicial court decisions, which in the opinion of the parties provide the quickest and best solution to the dispute. Preparation of the Rome Convention was adopted after the passing on September 27, 1968 of the Brussels Convention on Jurisdiction, Recognition and Enforcement of Judgements in Civil and Commercial Matters.[30] The Brussels Convention allowed the parties to contractual relations to choose the court for their matters to be heard in. Initiating legislative work on the Rome Convention aimed to develop an international legal act, which required all judicial authorities in the Member States of the EEC to use the same rules for selecting an appropriate national system of substantive law. Allowing the parties in legal relationships to choose a forum where the dispute would be heard, the authors of the Rome Convention tried to avoid for the differences in the content of substantive law not to influence the parties when deciding on the appropriate court. Such differences could impact on legal relations involving an international element. Standing in the way of finding the best possible system of substantive law, as defined by the authors of the report on the application of the law applicable to contractual obligations as "forum shopping," would ensure greater transparency, predictability and stability of the legal market in the common market. According to M. Giuliano and P. Legarde, those involved in legislative work, which led to the adoption of the Rome Convention, were guided by three objectives.[31] The first one was to achieve rapid establishment of uniform rules for the choice of a national system of substantive law, which would be used to regulate binding labour relations, in which there are foreign elements. The Commission experts who called upon the authorities of the six Member States were fully aware that the legislative work aimed at unifying the various national systems of substantive law was too ambitious an aim, and would consume too much time. Rightly so it was thought that it would be easier and quicker to harmonise the internal rules

[30] OJ, C 027, 26.01.1998, pp. 1–27.
[31] M. Giuliano, P. Lagarde, *Report on the Convention...*, p. 2.

of private international law, even if it was based on the necessity to replace the six national systems of private international law into one common international treaty. Private international law as a system of law, determined by the legal term "law standards" was a branch of the law which had smaller traditions of the different systems of private law, used to regulate labour relations, civil, family and business. According to the principle of territoriality underlying the application of various systems of substantive law, the authorities of individual states applied their own law to regulate social relations, work-related, trade, civil and family issues. Internal conflict of law standards were introduced later. They did not remain dependent on the cultural, civil, social and economic conditions, in which remain the provisions of the various branches of substantive law. So it was easier to depart from the principle of territoriality in legal relations in which there are foreign elements, especially if it is clear that this principle must also waive other countries included in the same international organisation coming into life, with a view to facilitate free movement of goods, and then services and people. Instead, efforts to harmonise the various national systems of substantive law, the authorities of the Member States and institutions of the EEC began the legislative process that led to the establishment of the European Union under the current system of uniform private international law.

The second objective was to ensure legal certainty as the most important for the development of a common market in binding relations involving a foreign element. Although at the time of initiating legislative work, which led to the adoption of the Rome Convention, the European Economic Community did not provide full freedom of movement for workers. Binding labour relations were recognised by the authorities of the Member States and EC institutions as important functions to the life of the common European market. Over time, the importance of legal regulation of social issues within the European Community and the European Union has increased. Because the perception of the European Union has developed not only as a single market, but also as a European social sphere, European labour law and social security has also gained in importance. The regulation of Article 6 of the Rome Convention concerning the conflict of substantive labour law, shows that labour relations were perceived by the promoters of the first uniform system of private international law as important for the functioning of the common European market.

The Commission preparing the draft of the Rome Convention had the imagination and showed a concern for protecting the rights and interests of workers. As a third reason for which the Commission deemed necessary to enact uniform provisions regulating conflicts of binding norms of substantive law, it listed actions taken to create and strengthen social cohesion within the European Economic Community. The authors reporting on the Convention on the law applicable to contractual obligations, did not fully recognise the importance of the Rome Convention for achieving the most important, from the perspective of labour law,

legislative work undertaken in the late 60s, which led to the creation of Europe's social sphere as it cared for social security entitlements, known as the "European social model."

Uniform conflict of laws standards laid down in the Rome Convention, in binding labour relations, prevent domestic and foreign employers employing workers, with the presence of foreign elements, to submit the legal relations to undergo regulations other than those of the Rome Convention on the internal rules of private international law. After the ratification of the Rome Convention by the authorities of all Member States of the European Union, and then after the transformation of the Convention on the Regulation No. 593/2008 on the law applicable to contractual obligations in the Member States, conflict of law issues will no longer be regulated by national rules of private international law. Employers from EU Member States, established in other EU Member States have a limited choice of other substantive provisions of national labour law, other than the labour law of one of the Member States. Only in the case of employment of workers who are nationals of third countries in a Member State, other than the country whose provisions apply to activities carried out by the employer or from a country not included in the EU, there would exist possibilities to have labour relations with a foreign element to be regulated by the national system of substantive labour law of another country than a Member State of the European Union.

The Rome Convention prevents the parties in contractual relations with a foreign element, to make, directly or indirectly, a suitable choice of appropriate substantive law of another country, other than those which will be indicated based on the conflict of law rules laid down by its provisions. This principle of exclusivity in resolving a conflict of substantive law, according to other rules than those which were formulated in the Rome Convention, was phrased indirectly in the provision of Article 15, excluding the reference standard to another system of private international law (exclusion of renvoi). The exclusion of passing on the relation to another internal system of private international law regarded as the law applicable to the country, is based on either the selection or indication of the conflict of law rules of private international law, which are stipulated in the Rome Convention as substantive provisions. Article 15 of the Rome Convention expressly excludes the application of national rules of private international law.[32] Parties to contractual obligations have a limited right to choose or indicate on the basis of determinants listed in the Rome Convention an applicable law regulating the legal relations in which there are foreign elements present. They can only select a national system of substantive law: labour, civil, family or commercial. Reference to other national systems of substantive law is also excluded when the

[32] G. Kegel, *Das IPR them Einfürungsgesetz zum BGB* [in:] Sörgel-Siebert, Kommentar zum BGB, Vol. 7, Munich-Berlin 1970, p. 173; H. Batiffol, P. Lagarde, *Droit international privé*, Vol. 2, Paris 1974–1976, p. 394.

contractual relationship would not benefit from the powers referred to in Article 3 of the Rome Convention and if the parties have not chosen the appropriate law.[33] In this case, the contract shall be regulated by the nation system with which the contract is most closely connected to (Aricle 4, paragraph 1). Article 4, paragraph 2 of the Rome Convention establishes a legal presumption that a contract involving a foreign element is most closely connected with the country in which the party, either has to carry out the performance where there is the usual place of residence, or – in the case of a company or a legal person – where it has its head office. Article 4, paragraphs 1 and 2 of the Rome Convention connect the liability associated with an international element to the national system of substantive law. The court hearing claims arising from such a legal relationship, is obligated to apply these provisions, even if they include a standard referring to the system of another country. A necessary condition for the application of domestic substantive laws in force in a country with which agreement containing foreign elements is most closely connected to, regulate this kind of relationship according to the provisions of the national system of substantive law, which was indicated by the Rome Convention as the applicable law.

In matters relating to the regulation of labour relations there is no chance that a country with which the contract of employment with a foreign element has the closest connection to, would allow for use of provisions of substantive labour law of another country. Therefore, even if the substantive provisions of national labour law, with whom a contract of employment with an international element is most closely connected to, two separate standards of regulation shall apply: one to labour relations, where there are no foreign elements, and the other where there is foreign element present, referring to labour laws of another State. A prohibition on referring to another State made in the Rome Convention requires the judicial authority to rule in matters of employment with a foreign element to be used in the legal relations of the provisions which apply to labour relations without an foreign element.

After several months of work, during the next meeting of the Committee of Experts on October 20–22, 1969 it was agreed almost unanimously that it is possible to achieve unification of private international law within the European Economic Community. Opposition to such unification was posed by Germany. The reason for these objections were concerns about the necessity of the withdrawal by the judicature and doctrine of German international private law from the principle of the binding legal relations in Germany and German law extensions of these regulations based on national emission theory to legal relations pursued abroad by persons subject to German law. The Commission established the scope for the unification of national systems of private international law.

[33] M. Giuliano, P. Lagarde, *Report on the Convention...*, pp. 35–36.

The Commission found that firstly in the unification process, the internal rules of private international law are to apply to solve the conflicts of law in cases involving property rights, obligations under contracts and other events, methods and evidence used to confirm the commitments and policy issues, such as legal capacity, means of representation of parties involved in legal transactions, maintenance of acquired rights, and the application of public order.[34] Behind the legal basis for legislative work towards the unification of private international, the law Committee adopted a provision Article 220 of the Treaty of Rome (Article 293 of the Treaty of Amsterdam). This provision in the first paragraph requires the authorities of the Member States of the European Communities to undertake negotiations on all matters to ensure the protection of its own citizens and to protect their rights and entitlements under such conditions as those which are provided in each Member States for its own citizens. The principle of equal treatment of nationals of Member States of the European Communities and not to make any difference between them on matters relating to the protection of their rights by reason of nationality, is stipulated in the said provision. This rule has been modified in Article 8 of the Lisbon Treaty, the standard requiring the EU to respect the principle of equal treatment of its citizens. European Union citizenship is a derivative term of the nationality of EU Member States. In Article 8, *in fine*, the Lisbon Treaty clearly states that European Union citizenship does not replace national citizenship. In the literature on European law discussing European Union citizenship and the relationship of citizenship to the citizenship of the EU Member States are subject to change. First, lawyers involved in European law thought that the concept that a single European Union citizenship did not exist.[35] Then they were of the view that European Union citizenship is a confirmation of the right to enter the job market in each Member State, "the market citizen."[36] In the end they came to the conclusion that European Union citizenship guarantees the use of political and civil rights set out in the Lisbon Treaty in Article 18 to Article 22[37] (freedom of movement – Article 18, former Article 8a, active and passive electoral rights, namely the right to participate in elections to the European Parliament, local elections – Article 19, formerly Article 8b, providing diplomatic and consular protection in a third country – Article 20, formerly Article 8c, and the right to petition the European Parliament and the right to request the Ombudsman – Article 21, formerly Article 8d).

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[34] Ibid., p. 2.

[35] N. Beenen, *Citizenship, Nationality and Acceess the Public Service Employment. The Impact of European Community Law*, Groningen 2001, p. 43 et seq.

[36] E. Marias, *From Market Citizen to Union Citizen* [in:] M. Marias (ed.), *European Citizenship*, European Institute of Public Administration, Maastricht 1994, p. 3 et seq.; M. Everson, *The Legacy of the Market Citizen* [in:] J. Shaw and G. More, *New Legal Dynamics of the European Union*, Oxford University Press, Oxford 1995.

[37] Point 36 of the Treaty of Lisbon provides that the text of Article 17 (ex Article 8) is stated in Part II, "Citizenship of the Union" in the Treaty on European Union, renumbered Article 28a.

The Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, December 13, 2007 (OJ of 2009, No. 203, item 1569) guarantees equality to citizens. An EU citizen is any person "holding the nationality of a Member State." Citizenship of the Union shall be additional to the nationality of EU Member States and does not replace the said nationality (Article 8). According to lawyers who specialise in the European law, the concept of "EU citizenship" can now not only be associated with the common market, the freedom of movement of people and goods and services, but with the single legal status of individuals – citizens of EU Member States and with the civil rights arising from it, "the union citizen[38]." Adopting "policies" as a decisive indicator for the analysis of the concept of European Union citizenship does not state whether the European Union citizenship guarantees the protection of fundamental rights on equal terms to citizens of EU Member States. Finding that having a European Union citizenship enables EU citizens to benefit on an equal footing with all laws does not solve the problem discussed in the latter part of this piece. The scope of use of social rights is in fact dependent on the granting of these powers. Several years ago it was clearly stated that the contemporary law of international organisations – the predecessor of today's European Union does not guarantee social rights to either the poor, or to those who are, as classified by experts in the field of social policy, in "marginalised communities."[39] Since that time, the European social law has not undergone significant changes. I share the sentiment expressed in legal literature that the basic social rights, recognised as fundamental human rights, are not considered by the primary Community law as an important element of European Union citizenship.[40] Article 6, paragraph 1 of the Treaty on European Union (formerly Article F), as amended by the Lisbon Treaty contains a declaration that the European Union recognises the rights and freedoms set out in the Charter of Fundamental Rights of the EU adapted on the December 12, 2007 in Strasbourg. This provision also emphasizes that the provisions of the Charter of Fundamental Rights "does not extend the Union's competences as defined in the Treaties." These assurances were repeated in the Article 6 of the Treaty amending the Treaty on European Union, on the December 13, 2007. Although Article 6 (3) of the Lisbon Treaty states that the fundamental rights guaranteed by the European Convention on Human Rights and Fundamental Freedoms, which joined the European Union, as part of Union law "as general principles of law," fundamental social rights are not afforded judicial

[38] V. O'Leary, *The Evolving Concept of Community Citizenship: From the Free Movement of Persons to Union Citizenship*, The Hague, London, Boston, 1996, p. 34 et seq.; J. Shaw, *The Transformation of Citizenship in the European Union. Electoral Rights and the Restructuring of Political Space*, Cambridge 2007, p. 47.

[39] R. Kovar, D. Simon, *La Citoyenneteté européenne*, "Cahiers de droit européen" 1993, No. 3–4, p. 299.

[40] N. Beenen, *Citizenship, Nationality...*, p. 61.

protection, because Article 6 in Part One of the Treaty on European Union, forms the basic principles of its functioning.[41] From the perspective of the debate on the conflict rules used for resolving conflicts between national legislation relevant to the obligations it should be noted that before the introduction of the concept of citizenship of the European Union, the Rome Convention establishing uniform determinants for the determination of the competent national system of substantive law provided guideline principles of equal rights of individual States of the European Communities. It obligated the Communities to the first paragraph of Article 220 of the Treaty of Rome. An additional argument for the use of this provision as the legal basis for making legislative work, which led to the adoption of the Rome Convention, was drafted as a directive in the fourth paragraph of Article 220 of the Treaty of Rome.

Adhering to the guidelines set out in the established standard of primary Community law, authorities of the Member States were required to undertake negotiations in order to simplify the formalities regulating the recognition and enforcement of judgements and arbitral awards. In the said provision, a point was made as to the clear determinant between the conflict of law rules of substantive law and procedural law. The thesis expressed in Article 220, paragraph 4 of the Treaty of Rome has been developed in section 4 of the European Parliament and Council Regulation EC No. 593/2008 of June 17, 2008 on the law applicable to contractual obligations ("Rome I"). Referring to the joint program of the Commission and the Council of the European Union, adopted on November 30, 2000 for the implementation of judgements in civil and commercial matters,[42] Regulation No. 593/2008, which the Rome Convention was transformed into, construing the unified conflict of laws issues as legal measures to facilitating mutual recognition of judgements. The conflict of procedural labour law is being covered in the last chapter of the second volume of this book.

At this point I seek to draw attention to the far-reaching perspective that guided the committee in question undertaking to work towards unification of national legislation used to regulate the substantive contractual obligations.

The proposals put forward by the expert committee were accepted by the Committee of Permanent Representatives of Member States of the EEC on January 15, 1970. The Commission for the unification of private international law began official operations at the meeting which was convened on February 2–3, 1970. The Commission started its work in four sections: property law, obligations, forms and evidence of legal transactions, and general matters.[43] There were eleven five-day ses-

[41] D. O'Keefe, *Union Citizenship* [in:] D. O'Keefe, P. Twomey (eds.), *Legal Issues of the Maastricht Treaty*, London 1994, p. 103.

[42] OJ EC C, January 15, 2001, p. 1.

[43] It was agreed that each section will appoint a rapporteur from among the delegations of the Member States of the EEC. Responsible for matters relating to the unification of private international law partly dealing with the substantive law was Prof. K. Arndt (Germany), for the obliga-

sions, during which were discussed the reports presenting the state of internal rules of private international law. National reports were prepared based on the forms prepared by the rapporteurs for each section. Following the accession in 1973 to the EEC of new countries (Denmark, Ireland and Great Britain), the Committee examined the status and conditions for the unification of private international law within the European Economic Community, in relation to contractual obligations. Consultation with the authorities of the new countries and the need to clarify the membership status of Great Britain to the European Community, resulted in the suspension of the work of the Committee for a period of almost three years. By the end of 1975 the Committee re-commenced its work. At its meeting in March 1978, the Committee decided to address the unification of conflict of law rules for contractual obligations, and the preparation of a draft convention on the law applicable to contractual obligations and on the law applicable to obligations that do not result from agreements. After 14 consecutive sessions, lasting from two to five days in February 1979 the Committee prepared a final draft convention on the law applicable to contractual obligations. On May 18, 1979 the draft convention was transmitted to the President of the Council of the European Communities. The report on the unification of binding regulations relating in part to the obligations under a contract, was prepared by M. Giuliano and P. Lagarde, and sent to the President of the Council of the European Communities by the chairman of the Committee on July 20, 1979. The Commission of the European Communities on March 17, 1980 passed a resolution on the draft Convention on the Law Applicable to Contractual Obligations, and published it in the Official Journal of the European Communities No. L 94 of April 11, 1980. Remarks were made by Belgium, Denmark, Holland, Ireland, Luxembourg, Germany and the UK. On January 16, 1980 the Committee of Permanent Representatives of Member States of the European Communities established an *ad hoc* committee to prepare a final version of the draft convention on the law applicable to contractual obligations. The task of the Committee, chaired by a represen-tative of the Minister of Justice of Italy, was to make reference to comments made by the individual Member States and to consider the power of the Court of the European Communities to interpret the Convention on the law applicable to contractual obligations. Final negotiations on matters concerning the relationship between the law applicable to contractual obligations and other instruments were made by the European Community and other international conventions, to which the parties were or would be EC Member States, ratifying the prepared Convention, took place during a special meeting of the Council of the European Union in Rome on June 19, 1980. The representatives of seven Member States of the European Community agreed on

tions Prof. M. Giuliano (Italy), for matters of form and proof of legal act Prof. P. Lagarde (France), and for the part of an overall unified private international law T. Van Sasse van Ysselt, director of the Dutch Ministry of Justice.

procedures for the ratification of the Convention drawn up on the law applicable to contractual obligations, prepared five joint statements on other issues of unification of conflict of law rules, granting Court power of interpreting the Convention, establishing periods for ratifying the Convention, on the accession of countries to the Convention, on amending the Convention, on exchanging information concerning judgements in Convention matters concerning the applicable law to contractual obligations by the national judicial authorities in Member States. Two protocols have been included in the Convention on the law applicable to contractual obligations, commemorate the place of the "Rome Convention" meeting.[44] The first protocol concerns the interpretation of the Court of Justice on the Law Applicable to Contractual Obligations. The second, confers on the Court of Justice the power to interpret the Convention. After making these arrangements the Council Officer, the Italian Justice Minister Tommaso Morlino announced that the Convention on the Law Applicable to Contractual Obligations shall be open for signature in Rome on June 19, 1980. On that date the said convention was signed by representatives of seven Member States of the European Union: Belgium, France, Holland, Ireland, Luxembourg, Germany and Italy.

§ 2. The approach of the Rome Convention to the other provisions of private international law rules regulating conflicts of law in obligations

In a report prepared by M. Giuliano and P. Lagarde it was stated that among the nine Member States, only Italy applies its rules of private international law rules in conflicts of substantive law to the extent to which the committee has completed the preparation of the legislative work of the Rome Convention.[45] In other Member States conflicts of law are resolved on the basis of customs, judicial precedents and the position of the doctrine of private international law and private international labour law. Authorities of the five Member States of the European Economic Community (Belgium, Denmark, Holland, Luxembourg and Germany) included conflict of law norms of the Convention to their internal international private law.[46] In relation to other treaties and international conventions, the Rome Convention does not interfere with the other conflict of law rules formulated in the legislation of the European Communities.

In Article 20 of the Rome Convention it was decided that this Convention accepts the primacy of the conflict of law rules of Community law and the internal

[44] OJ 2008, No. 10, item 57.

[45] M. Giuliano, P. Lagarde, *Report of the Convention...*, p. 5.

[46] S. Krebber, *Conflict of Laws in Employment in Europe*, Comparative Labour Law and Policy Journal, 2000, Vol. 21, p. 501 et seq.

standards issued by the authorities of the Member States in implementation of obligations arising from the necessity to introduce into domestic conflict of law rules laid down by the European Communities. The authorities of the Member States and the European Communities declared that they will not take action to introduce into the law of the European Communities regulations conflicting with the rules of conflict of laws formulated in the Rome Convention. A report by M. Giuliano and P. Lagarde stated that the principle of primacy of Community law in relation to conflict of law rules formulated in the Rome Convention refers to the Community provisions, which were issued in the period preceding and following the entry into force of the Rome Convention.[47]

The statements is contained in the provision of Article 21 of the Rome Convention, under which the analysed Convention does not prejudice the application of other international conventions to which the parties are or will become Member States of, having ratified the Rome Convention cannot be interpreted in isolation from the provisions of Article 24 and Article 25 of the Convention. In Article 24 the requirements for Member States are set out which, after the entry into force of this Convention, they intend to join another multilateral convention whose principal aim or one of its main objectives is to establish rules of private international law rules governing conflicts of law in any of the matters regulated by the Rome Convention. Article 24, paragraph 1 of the Rome Convention defines requirements for Member States that have ratified the Rome Convention and intend to join other international conventions to which the parties are countries that have not ratified the Rome Convention. From the above it can be deduced that Article 24, paragraph 1 of the Rome Convention does not govern the relationship between this Convention and other conventions that are "competitive" with the Rome Convention. The competition between these conventions, the Rome Convention and another multilateral convention adopted in order to resolve a conflict between national legislation governing the contractual obligations could be written about, if both parties to these conventions were the same countries. Despite the overlapping planes of legal regulation (law applicable to contractual obligations), it is conceivable that, without harming the interests of citizens of a Member State which, under the European Communities is required to comply with laws rules formulated in the Rome Convention, and in legal relations with third countries is obligation to comply with the rules of conflict of laws laid down in other multilateral convention. The object of the legal protection assured by the Rome Convention, Article 24, paragraph 1 is of legal certainty, in which individuals are involved and other legal entities acting on the basis of national substantive laws of the Member States. Unification of the conflict rules of substantive law applicable to contractual obligations forces the Member States of the European Communities to the exclusive use of the rules set out in the Rome

[47] M. Giuliano, P. Lagarde, *Report of the Convention...*, p. 37.

Convention in the legal relations in which the relations of the EC Member States and third countries are its citizens and entities taking part in legal relations that are subject to the competing obligations regulations. The legal good protected by the Rome Convention is the transparency, predictability, efficiency and the identical nature of the regulations used in obligation relations involving a foreign element. The consultation procedure laid down in Article 23 of the Rome Convention applies, *mutatis mutandis*, to cases in which a Member State bound by the Convention, intends to depart from it and ratify another multilateral convention, which regulates conflicts of substantive law applicable in obligation relations involving a foreign element.

Although neither the Polish or the English text of the Rome Convention makes use of the term, it is possible to conclude that Article 24, paragraph 1 of this Convention regulates derogation procedures. It applies in all situations where a Member State relating to the Rome Convention will replace the convention by other multilateral conventions.

One should consider whether the procedure laid down in Article 23, which should be used in cases relating to the replacement of the Rome Convention by another multilateral convention must be applied even if the country has ratified the Rome Convention but intends to accede to a bilateral convention. Grammatical rules of interpretation of Article 24, paragraph 1 of the Rome Convention does not give rise to extend the obligation to conduct consultations with other Member States that have ratified the Rome Convention concerning goals related to the ratification of a bilateral convention. Teleological interpretation of the rule also does not require to carry out such consultation. The good of the European Communities, protected by the Rome Convention (uniformity, transparency, predictability and effectiveness of the conflict rules) are not jeopardized in the event of accession by the Member States of the European Communities to bilateral conventions which may govern in a different way to the Rome Convention rules. This observation could not be repeated, however, if the conclusion of a bilateral convention was entered into between two Member States or if many bilateral conventions are entered into between Member States and third countries.

In my opinion, the legal values protected by Article 24, paragraph 1 of the Rome Convention shall be depleted in all cases when Member States of the European Communities enter into any convention, including bilateral agreements with other countries – either with members of the EC or third countries.

Article 24, paragraph 1 of the Rome Convention establishes a procedure for which the authors report on the Convention on the law applicable to contractual obligations called "freedom under supervision."[48] Signatories of the Rome Convention through the above procedure, enable authorities of Member States, parties to the Rome Convention, to ratify a multilateral convention with prior

[48] Ibid., pp. 38–39.

notification – via the Secretary General of the Council of the European Communities.

Within six months of notification of this intention, each Member State may request the initiation of the consultation procedures in order to reach agreement on the admissibility of the intention to complete the ratification of other multilateral conventions regulating the conflicts of the substantive rules on matters referred to in the Rome Convention. The intention of ratifying other multilateral conventions by the Member State can be achieved if other countries – signatories of the Convention do not require consultation within six months from the date of notification of the Secretary General of the Council of the EC, or if during the year following the notification, the Secretary-General carries out consultations between the authorities of the Member States concerned, which do not lead to the conclusion of the relevant agreement. Having the appropriate application of Article 23, paragraph 2 of the Rome Convention, the provision does not comment on the admissibility of any other multilateral convention ratified by the Member State which also ratified the Rome Convention. The provision provides that if the implementation of this intention, the Member State which has become a party to other multilateral conventions may change its rules of private international law.

There is no obligation to use the procedure laid down in the Article 23 of the Rome Convention, if one of the Member States, a signatory of the Rome Convention has also been during that moment a ratifier of another multilateral convention, or if any other multilateral convention has been ratified by a country (a party to the Rome Convention) intending to revise the multilateral convention to which the country acceded before ratifying the Rome Convention. There is no need to bring information and consultation procedures as governed by Article 23 and Article 24 of the Rome Convention where a Member State, party to the Convention intends to ratify the convention of other multilateral treaties establishing the European Community (Article 24, paragraph 2).

As it was mentioned above, the good protected by the Rome Convention is the unification of conflict of law rules used by Member States to designate the law applicable to the obligations arising from contracts involving a foreign element. Authorities of each Member State which has ratified the Rome Convention may invite the Secretary General of the Council of the European Communities to arrange consultations between the countries – signatories of the Convention if it considers that the unification of conflict of law rules made by the Rome Convention is in danger as a result of the accession of a particular Member State or States to another or other multilateral conventions established or establishing a separate order of private international law on matters referred to in the Rome Convention (Article 25). This provision does not oblige the Secretary General of the Council of the EC to initiate the consultation procedure. It does not specify the powers of European institutions over Member States which have ratified the multilateral conventions indicating the law applicable to the obligations arising from con-

tracts involving a foreign element. The consultation procedures between Member States which have ratified the Rome Convention are widely used not only in matters related with the intentions of ratifying other multilateral conventions.

In the annex to the Rome Convention it was agreed that Member States carry out consultations before deciding on the ratification of this Convention by any member, including the Member States of the European Communities. The Rome Convention does not contain legal standards that hinder or make it impossible for Member States decided upon the adoption into their national system of unified private law conflict of law rules used to indicate the relevant national regime of substantive law for the obligations arising from contracts involving a foreign element.

It also does not contain the standards for determining legal consequences in accordance with the legal order established by that convention, ratified by a Member State – a party to the Rome Convention and to other multilateral conventions, establishing a different legal order of private international law of contractual obligations, in which there are foreign elements.

The Secretary-General of the Council of the European Communities, using the discretionary powers granted to him by Article 25 of the Rome Convention may not respond to the request of the authorities of a Member State, which considers that the ratification or any other multilateral convention ratifications represent a threat to the uniformity of conflict of law rules. However he may call for consultations, which may cause a change in attitude of the authorities of certain Member States to resolve a conflict of law in contractual obligations, according to the different standards of private international law. From a strict legal point of view, the Member States may decide to modify the content of the conflict of law rules laid down in order to resolve the conflicts based on agreements in which there are foreign elements. Application containing the request to revise the Rome Convention may be made by the authorities of each Member State which has ratified the above Convention. Such a request is addressed to the Chairman of the Council of the European Communities. Article 26 of the Rome Convention requires the Chairperson of the EC to convene a conference for the revision of the Rome Convention. The decision to change the system for resolving conflict of law applicable to the obligations arising from contracts involving an international element is taken up by the Member States at the conference.

At the core of international regulatory policy adopted by private international law in international organizations prior to the European Union is the principle of voluntary settlement of a conflict of substantive law relating to the obligations arising from contracts involving a foreign element to one, unified international legal regime. The same rule should apply in the event of a decision to revise the provisions of the Rome Convention. Although no Member State of the EEC, EC and the EU demanded the convening of a conference on the revision of the Rome Convention, this Convention until its replacement by European Parlia-

ment and the Council of the European Communities No. 593/2008 of June 17, 2008 on the law applicable to contractual obligations ("Rome I") may be amended only by a unanimous decision of the authorities of all Member States which have ratified it.

Although no provision in the Rome Convention contains the wording concerning "competing" multilateral conventions, in commentary contained in the Convention, lists the conditions for determining the conditions of implementation of the consultative procedure prior to the possibility of ratification by a Member States – a signatory of the Rome Convention of another multilateral convention whose principal aim or one of the main objectives is to establish rules of private international law relating to any of the matters governed by the Rome Convention.[49]

The system of "controlled freedom" in selecting multilateral conventions used in the Rome Convention, allows Member States to ratify the multilateral conventions that do not regulate conflicts of substantive law relating to obligations not arising from contracts and conflicts of provisions other than the standard of obligations (Article 24, paragraph 1). In Article 24, paragraph 2 of the Rome Convention there were further restrictions included on the use of the consultation procedure. This provision provides the legal basis for the differentiation of multilateral conventions, such that without risk to initiate the consultation procedure may be ratified by the Member States which have ratified the Rome Convention and the multilateral conventions to which Member States may join after the exhaustion of the consultation period. The purpose of this is to maintain and ensure a uniform, universal within the European Communities system for resolving conflict of substantive law regulating the conflict between the contracts with foreign elements.

§ 3. The scope of the Rome Convention

THE USE OF UNIFORM CONFLICT OF LAW RULES IN RELATION TO CONTRACTUAL OBLIGATIONS INVOLVING AN INTERNATIONAL ELEMENT

The scope of the Rome Convention is specified in the provisions contained in Chapter I of the Convention (Article 1–Article 2). According to Article 1, paragraph 1 of the analysed Convention, it applies "(...) to contractual obligations in any situation involving a choice between the laws of different countries." The English version, to a greater extent than the Polish version of the Convention, stresses the role of the Rome Convention – to resolve conflicts of substantive law

[49] Ibid., p. 39.

relating to contractual obligations and its application to legal relations, having its source in the contractual obligations in situations that involve the need to choose the law, and therefore need to take the decision to submit the legal relationships governed by one system of two or more different competing countries.[50] The provision of Article 1, paragraph 1 of the Rome Convention may conclude that the obligation to apply uniform standards in situations of conflict of laws, which oblige the legal relations arising from a contractual obligation to choose one of two or more national systems of substantive law that are applicable in the contractual relations with a foreign element.

According to M. Giuliano and P. Lagarde, Article 1, paragraph 1 of the analysed Convention, establishes its main purpose, namely to solve a conflict of substantive legal matters relating to contractual obligations.[51] The cited authors acknowledge that the practice of private international law often takes place in situations in which courts are obliged to apply the law to the contractual relations with a foreign element argue that there are serious discrepancies between the rules governing the foreign relations of obligations involving a foreign element and the system of substantive law in force in the forum to which courts are obliged to interpret and apply foreign law.

In their view, the unified substantive law rules adopted in the Rome Convention permit in a uniform way to resolve conflicts of rules of substantive law.[52]

Conflict rules allow you to resolve conflicts occurring between the national legislation in the process of applying the law. For this reason, some authors dealing with private international law argue that Article 1, paragraph 1 of the Rome Convention is the standard applied by the courts of Member States obligated to settle disputes arising from contractual relations involving a foreign element.[53] In Article 1, paragraph 1 of this Convention one can conclude that the obligation of the judicial authorities is to apply uniform conflict rules in cases of disputes between parties to legal relations having their own source of obligations under the agreements.

Emphasis placed in Article 1, paragraph 1 of the Rome Convention, that the uniform conflict rules are applied in case of conflict of norms of substantive law of "different countries" as a reason for the difference of opinion in the literature of private international law and the obligation to make use of the Convention and its standards to resolve conflicts of laws enforced in the territory of one country. According to M. Giuliano and P. Lagarde, unified rules of private international law apply to all conflicts between two or more systems of law.[54] The above senti-

[50] The rules of this Convention shall apply to contractual obligations in any situation involving a choice between the laws of different countries.

[51] M. Giuliano, P. Lagarde, *Report of the Convention...*, p. 7.

[52] Ibid.

[53] M. Bogdan, *Concise Introduction to EU Private...*, p. 116.

[54] M. Giuliano, P. Lagarde, *Report of the Convention...*, p. 7.

ment is grounded in the functional interpretation. Uniform rules on conflict of laws have been established to resolve conflicts between the systems of substantive law relating to the regulation of contractual obligations. As a rule, due to the principle of territoriality of law, national systems of contract law are in force in the territory of each Member State.

However, if a State has two or more territorial units, as is the case, for example, in federal political systems, and each of such territories has its own rules of law concerning the contractual obligations, then – in accordance with Article 19, paragraph 1 of the Rome Convention – each territorial unit is regarded as a state within the meaning of Article 1, paragraph 1 of the Convention. For this reason, conflicts between the standards of English law, Scottish or Welsh and the law of another Member State shall be governed by the provisions of the Rome Convention on the Law Applicable to Contractual Obligations.

M. Bogdan[55] believes that the Rome Convention provides uniform rules on conflict of laws allowing to resolve conflicts between standards of Member States. He indicates that in the concept of a state one must also include administrative units of Member States, which according to Article 19 requires that unit to be treated as a state, if it has a right to enforce legal norms governing the relations of contractual obligations, and if such regulations issued by these units remain in conflict with the provisions of substantive law of other Member States or agencies of those States authorised to enact legal norms.

Despite the different emphasis in the interpretation of Article 1, paragraph 1 and Article 19, paragraph 1 of the Rome Convention M. Giuliano and P. Lagarde and M. Bogdan reach the same conclusion that the collisions of the substantive rules of Member States and others territorial and internal organisational structures, operating in these countries are governed by the provisions of the Rome Convention, since the uniform conflict rules apply to all cases of conflicts of law applicable to the particular territory of each Member State. In the case of countries that do not have a uniform system of positive legal norms, are considered by the Rome Convention as having the laws of a Member State. The main difference in the case of conflict of laws of a territorial unit and an organisation of a Member State which does not have the legal status of a country in international relations, but has the power to enact separate laws in matters concerning contractual obligations with the contract law of another Member State or its responsibility to make the law applicable to contractual obligations and the case of a conflict of contractual obligations laws issued by the territorial units within one country. Article 1, paragraph 1 applying in relation to Article 19, paragraph 1 of the Rome Convention requires to solve conflicts of the substantive rules applicable to settlement of obligations arising from contracts on the basis of uniform rules of private international law as laid down in this Convention.

[55] M. Bogdan, *Concise Introduction to EU Private...*, p. 116.

However, in the event of "district" collisions of the substantive rules, the Member States with different territorial units that are competent to legislate law and have their own legal standards, are not obliged to apply the Rome Convention to conflicts of laws applicable to contractual obligations solely between the laws of such units (Article 19, paragraph 2).

Argumentum a contrario, allows the authorities of Member States consisting of autonomous territorial units, where the administrative authorities have the right to enforce laws applicable to contractual obligations, to use the Rome Convention to resolve a conflict in substantive law of contractual legal relationships governed by the provisions of the "districts."[56] Illustrating the arguments outlined above with examples, it should be noted that collisions between the Scottish provisions of contractual obligation and the laws enforced on Faroe Island, part of the territory of Denmark, are regulated by the Rome Convention, which must be applied to the conflict exists between the English and French obligation laws. By contrast, the Rome Convention can be used with the consent of the United Kingdom authorities to resolve the conflict of law applicable to contractual obligations that exist between the relevant provisions of the English and Scottish laws. According to M. Bogdan, the Rome Convention applies to contracts that do not have an international dimension.[57] The above statement is misleading because the author does not consider international agreements, where all elements are determinanted exclusively to one state, foreign or the forum state.

As I wrote in the Part 1 of the book, the rules of private international law or international labour law apply to regulate conflict of law in labour relations with a foreign element. So in obligatory labour relations, where both parties are nationals of one country or live in the same country, while the workplace is situated on the territory of another state, it is necessary to regulate conflicts of substantive labour law due to competition between the provisions in force in two countries – a country whose citizens are parties or in which the parties reside and the country where the workplace is located. Parties to labour relations involving foreign element, such as is the workplace, may enter into an agreement to apply to the legal relationship a different law than the *lex loci laboris*. In this case, it will be necessary to consider which of the three competing systems of substantive labour law will apply in case of disputes between the parties to the labour relations, which, because of having the same nationality or residence or office did not enter into a contract, which could be qualified as an international agreement. Private international law, however, can be applied to employment relationships involving an international element, and such elements are present both in contracts under the government regulations enforced in one country, as well as in international agreements. In Article 1, paragraph 1 of the Rome Convention it was not decided

[56] Ibid.

[57] Ibid.

that this act applies to international agreements, but it clearly stated that the provisions of this Convention shall apply to the factual content of contractual obligations, which are related to the laws of different countries. Thus, it is not the international nature of obligatory contracts, but the determinants of any such agreement that form the legal basis for the use of conflict of law rules in the obligatory legal relations involving an international element.

THE UNIVERSAL NATURE OF THE CONFLICT OF LAW RULES

Conflict of law rules of substantive law applicable to conflicts between the contractual obligations, have a common application in the sense that they can be used to resolve a conflict of substantive law in force in any country, not just the Member State whose authorities have ratified the Rome Convention. Reciprocity in recognising the conflict of law rules used to resolve conflicts between the laws of obligations of any country in the world, is not a necessary condition for the application of the Rome Convention. Therefore I share the sentiment expressed by M. Giuliano and P. Lagarde that the provision of Article 2 of the Rome Convention emphasises the "universal nature of the unified rules of conflict of laws."[58] The universal character of this Convention, stems from the unrestricted freedom of choice of law by the parties to contractual relations with a foreign element. Article 3, paragraph 1 of the Rome Convention, which will be analysed in detail later in this volume allows the parties to contractual relations with a foreign element to have the contract covered by law chosen by the parties. Authors of the report are right to point out that the Rome Convention on the applicable law to contractual obligations does not apply only in cases where the legal relationship of obligations shows any relationship with the system of law of a Member State whose authorities have ratified this Convention.[59] Only when the parties to the legal relationship do not make use of the unrestricted freedom of choice of law, a contract involving a foreign element is subject to the law of the country, with which it is most closely connected (Article 4, paragraph 1).

In the case of work agreements involving a foreign element, the closest connection with the contract as the second most important determinant used to indicate the proper national system of substantive labour law has been preceded by determinants that allow to identify a proper national system of labour law provisions enforced in the country which the employee usually carries out his employment or the rules of the country, where the company (workplace) employs the worker (Article 6, paragraph 2, points "a"–"b").

Only when the circumstances as a whole conclude that the contract with a foreign element is closely connected with the law of another state, the determinant

[58] M. Giuliano, P. Lagarde, *Report of the Convention...*, p. 10.

[59] Ibid., pp. 10–11.

commonly used to indicate an appropriate system of substantive law, referred to in Article 4, paragraph 1 of the Rome Convention applies to contracts of employment involving a foreign element by determinants mentioned in Article 6, paragraph 2, points "a"–"b").

The universal nature of the provisions of the Rome Convention is not in contradiction with the question of exemptions specified in Article 1, paragraph 2 of the Convention analysed. From the perspective of the conflict rules of substantive labour law used to indicate the relevant national labour laws governing labour relations of obligations, the Rome Convention applying to contractual relations does not matter. The Convention allows to exclude other legal relationships that are not obligatory in nature from the conflict of law rules laid down in this Convention. This exclusion is essential for regulating the methods of identification of the relevant national labour laws, which are used to regulate the conflict of legal systems used in individual countries to identify the relevant provisions of the contractual obligations. For this reason, in social relations governed by the substantive provisions of national labour law, the Rome Convention ("Rome I") does not apply in matters relating to regulating the capacity of obligatory labour relations and the parties' liability for unlawful acts (accidents at work, illegal collective shares, strikes or lockouts). Conflict of the substantive labour law standards used in different countries is governed by the determinants listed in the European Parliament and the Council of the European Communities No. 864/2007 dated July 11, 2007 on the law applicable to non-contractual obligations ("Rome II").[60] In the literature on private international law it is noted that the Rome Convention does not contain a legal definition of a contractual obligation.[61] It also highlights that some of the commitments to which the Rome Convention does not apply, are contractual obligations in their character (Article 1, paragraph 2, points "a"–"b"). It is true that Article 1, paragraph 2, point "b" of the analysed Convention excludes obligations arising not from contracts but from unilateral actions, such as gifts, for example, or inheritance distribution. Conflict of laws governed by the Rome Convention also do not apply to arbitration agreements and agreements on valid jurisdictions (Article 1, paragraph 2, point "d"). Excluding arbitration decisions from the regulating scope of the Convention was based on the argument that all matters relating to disputes with contractual relations are procedural in nature.

Meanwhile, the Rome Convention sets out methods for the selection or designation of standards applicable to substantive law. In addition, techniques for determining the definition of procedural rules used to resolve disputes between the parties to contractual relations with a foreign element, is closely connected

[60] Oficial Journal of the European Union L 199/40, July 31, 2007, p. 1 et seq.
[61] M. Bogdan, *Concise Introduction to EU Private...*, p. 117.

with the public policy clause in the Member States rather than the freedom of parties to choose the national system of substantive law applicable to disputes.

According to M. Giuliano and P. Legarde, meriti courts have a duty to assess the decisions taken by the contractual relations with a foreign element for selecting an appropriate authority competent to hear disputes under the provisions of the forum, rather than procedural standards selected by the parties. Given the far-reaching differences between national regulations on dealing with an indication of the competent body for settling disputes between the parties to contractual relations with a foreign element is not possible to establish uniform legal rules.[62] Thus the inclusion into the Rome Convention matters arising from contracts, would be in conflict with its primary goal – unification of the rules governing the resolution of a conflict of substantive law relating to contractual obligations. In addition, the rights of the parties to choose an arbitration court or tribunal competent to hear contested cases, are governed by the provisions of other international conventions.

Conflicts of procedural norms of labour law are presented in the last chapter of the book.

The committee which prepared the draft of the Rome Convention was not unanimous in its perceptions on issues relating to the regulation on contracts entered into by parties in matters relating to defining the characteristics of arbitration bodies. Cited were the arguments for the application of conflict of law rules relating to contractual obligations to contracts entered into by the parties to submit disputes for settlement of the arbitration. One of them pointed to the similarity of these contracts to other obligation agreements. The second was largely a formality. It was emphasised that some international conventions governing conflicts of norms of procedural law, in which the rights of the parties were governed by contractual relations with a foreign element to submit disputes to a chosen court do not apply to arbitration bodies. In addition, it was pointed out that not all Member States of the European Communities have ratified the international conventions to regulate conflict of procedural law in cases of disputes relating to the contractual relations with a foreign element.

Finally it was stressed that international conventions governing conflicts of norms of procedural law are not generally applicable in the sense in which these words were used in Article 1, paragraph 1 of the Rome Convention.[63] Arguments for encompassing contracts were mainly raised by representatives of the UK. Representatives of France and Germany were against the use of the Rome Convention in respect of contracts and the determination of arbitration bodies. They believed that the multiplication of legal regulations in matters relating to the resolution of a conflict of procedural law is not conducive to transparency in inter-

[62] M. Giuliano, P. Lagarde, *Report of the Convention...*, p. 8.
[63] Ibid.

national trade law. It was argued that the principle of the "closest tie" between the rules of substantive law and procedural law, used to settle disputes in obligatory contract relationships heard by the courts, cannot be used to submit such disputes to international arbitration bodies.

Since the committee adopted as a fundamental principle of legislative work the full compliance of opinion on matters relating to conflict of law rules regulating the national substantive laws on matters relating to contractual obligations, therefore, in Article 1, paragraph 1, point "d" of the Rome Convention, it was decided that both provisions for arbitration and jurisdiction bodies resolving contractual disputes are excluded from the scope of the Convention. Commenting on the decision, M. Giuliano and P. Lagarde stressed that the exclusion from the scope of regulation of the Rome Convention of clauses reserving the submission of such disputes and where such clauses are treated as an integral component of a contract, has no legal consequences for matters relating to the conflict rules laid down in the convention analysed in relation to the other provisions of the contract obligations.[64] In matters of obligatory labour relations involving an international element to the dispute against these contracts are subject to the Member States labour courts, or courts – in the first instance – conciliatory bodies organised and administered by the state authorities.

In Poland, disputes concerning worker claims may be heard by a conciliation committee if a request for the hearing of such is made by an entity authorised to initiate such proceedings. In the UK and France in the courts of first instance of labour relations, disputes are resolved by the conciliation (Justice of the Peace/ Juge de Paix) – Industrial Tribunals and the Conseil de prud'hommes.[65] For this reason, provisions for arbitration stipulation into contracts with foreign elements are rarely used. In these labour agreements parties generally abide by the obligations respected by other contractual relations in which disputes are resolved by state judicial authorities, as disputes should be heard by the courts under the provisions of procedural law of that State, whose substantive law will be chosen by the parties or designated as appropriate using the determinants specified in national legislation on private international law or international private labour law.

EXCLUSIONS FROM THE SCOPE OF INTERNATIONAL CONFLICT OF LAW RULES

The Rome Convention does not contain a legal definition of an obligation, which means that lawyers specialising in private international law, expressing views that conflict rules laid down in this Convention shall apply to the different types of

[64] Ibid., p. 9.

[65] See: A. de Roo, R. Jagtenberg, *Settling Labour Disputes in Europe*, Kluwer Law and Taxation Publishers, Deventer–Boston 1994, p. 91 et seq., p. 117 et seq.

obligations, including those that have their origin not in the contracts, but also in unilateral legal actions made in relation to third parties.[66] In labour relations these problems do not occur. Therefore, in this volume I concentrate solely on the presentation of legal issues to which the conflict of law rules laid down in the Rome Convention do not apply. In Article 1, paragraph 2, points "a"–"h" of the analysed Convention lists the several categories of legal institutions associated with the obligatory relations to which the conflict rules of substantive law do not apply.

Legal capacity and the capacity to legal actions

In matters governed by the substantive provisions of labour law, the Rome Convention does not apply to determining the legal capacity and legal capacity of natural persons – parties to the relationship of individual work (Article 1, paragraph 2, point "a"). This means that national rules of private international law applicable in the Member States that have ratified the Rome Convention shall apply to the resolution of the conflict of laws regulating the legal capacity and legal capacity to act of natural persons acting in obligatory labour relations as workers and employers. From this rule, an exception is made in relation to contracts between individuals who reside in the same Member State. Article 11 of the Rome Convention is the legal standard issued to protect the interests of the individual who in good faith enters into an agreement with another natural person, believing the person to have full capacity under the civil law of that country where the contract was entered into and then making a claim as to the lack of such a legal capacity or the capacity to act arising from the legal regulations enforced by the law of another country. The grounds for the lack of legal capacity or lack of capacity to perform legal acts can be effectively raised in contractual obligations involving a foreign element only if at the time of entering into the contract the other party was aware of the lack of legal capacity of the other contracting party or should have known, and did not know about it only because of their own negligence. Application of Article 11 of the Rome Convention is subject to three conditions. The first of these is applicable to the relations between natural persons, who during the moment of entering into the agreement are in the same country. The second refers only to a situation in which the substantive law enforced in the two countries have different regulations concerning the definition of legal capacity to act in contractual obligations. In the case of labour relations, the differences must be based on the participation of natural persons (workers and employers) in a legal context subject to substantive regulations applicable to labour relations. In employment contracts with an international element, the national rules governing the legal

[66] J. Meeusen, M. Pertegás, G. Straetmans (eds.) *Enforcement of International Contracts in the European Union. Convergence and Divergence between Brussels I and Rome I*, Antwerp 2004, p. 175 et seq.; M. Bogdan, *Concise Introduction to EU Private...*, p. 117.

capacity or the ability to perform legal acts applicable in the event of a conflict of substantive law must differ in matters relating to the establishment of conditions for the participation of individuals in the course of legally regulated labour laws. The third most important condition for implementing the provisions of Article 11 of the Rome Convention is for the national substantive law regulating the contractual relations with a foreign element in a diametrically different manner, set out the legal capacity to the legal action of individuals involved in the legal transactions.

Due to the unified national labour laws of the Member States of the European Communities (now the European Union) and the legal regulations of participation of parties in labour relations, there are rare cases of different conditions regulating the acquirement of the legal capacity to act.

Thus, the scope of the provision in Article 11 of the Rome Convention, setting standards for an exception to the rule does not apply in international conflict rules to assess the legal capacity and legal capacity to act, as laid down in Article 1, paragraph 2, point "a" of the present Convention.

The authors of the report on the Rome Convention are of the opinion that in principle the three conditions of the exceptions provided for in Article 11 of the Convention are sufficient to prevent a natural person who does not have the legal capacity to act and who is engaging in contractual obligations with a foreign element regulated by the substantive law applicable in the one country, having legal capacity to act in light of the laws in force in another Member State, from making a claim as to this former lack of capacity. For the safety of other party to the contractual relationship with a natural person who does not have a uniform legal status in the light of the substantive law applicable in different systems of law of two Member States, the Rome Convention in Article 11 makes provision to raise the admissibility of a plea of lack of legal capacity and lack of ability to legal action from the state of knowledge and awareness of this lack of the other party.

Article 11 of the Rome Convention was drafted in such a way that it obligates a natural person, who is a party to a contract involving a foreign element and is claiming the lack of legal capacity or incapacity to legally act, must prove the other party to that contract knew about this lack of or could have found out about it, and did not do so because of their own negligence.[67] The burden of proof used in Article 11 of the Rome Convention sets up the natural person, who is a party to a contract involving a foreign element, claiming a lack of legal capacity or power to act, in a proactive position in legal proceedings. However, in respect of a work agreement involving a foreign element, the application of this provision may lead to the activation in the proceedings of the other party. Analysing in Volume II of the book on national rules of private international law, I pointed out that in individual employment relationships, national systems of labour law bans

[67] M. Giuliano, P. Lagarde, *Report of the Convention...*, p. 32.

employment of children as well as establish and determine the requirements act in a legal sphere regulated by labour law in order to protect the rights of workers. Using the burden of proof rule in Article 11 of the Rome Convention in an employment contract with a foreign element, a person applying as an employee would be required to carry out the proof of the absence of legal capacity or incapacity on the basis of rules of substantive law, applicable in the Member States.

The necessary condition to start the procedure of the conflict of law rules laid down in the Rome Convention is to demonstrate a legal interest by the employee, claiming that lack of legal capacity or power to act and the resulting inability to obtain the above capacity, seeks for the employment contract to be governed by the substantive laws of the Member State by which he could not acquire the legal status of an employee. Referring to the existence of impediments to the legal actions regulated by labour laws, an employee is required under Article 11 of the Rome Convention to carry out the proof that the state of knowledge and awareness of employers of the above could occur in the absence of proceedings aiming at the termination of the contract of employment on the basis of the provisions in force in country, according to which entitled the worker to a legal capacity to act. But he would have to have a legitimate interest in taking legal action seeking the annulment of the contract concluded. It is difficult to identify the benefits of the possible termination of the employment relationship, which can be solved by an employee without restrictions. National systems of individual labour law of the Member States of the European Union now provide legal protection for the employee and not the employer.

The provision of Article 1, paragraph 2, point "a" of the Rome Convention applies to contracts in which the foreign elements concern the personal status of natural persons occurring in obligatory labour relations as workers and/or employers. An employment contract concluded in the country X by persons, one of which is a worker (Y), and the other the employer (Z), whereby the employer hires a worker who undertakes to perform work in a third country, such a contract may be considered null and void due to the absence of legal capacity or incapacity of the employee, the employer or both parties of the employment relationship. According to the burden of proof stipulated in Article 11 of the Rome Convention, each of the individuals derived from the legal consequences of the theorem relating to knowledge and awareness of the other in the binding relationship, that at the conclusion of the contract, the other party was aware of the legal obstacles that prevented or precluded their participation in legal actions, or could in the above circumstances have taken notice and did not do so because of their own negligence. In those cases where the employer is an organisational unit, either a company, association or legal person, the application of conflict of law rules prescribed by the Rome Convention does not apply in matters relating to the legal capacity of legal actions of the employer (Article 1, paragraph 2, points "e" and "f").

In contrast to the regulations stipulated in Article 11, the Convention does not foresee the possibility to show in a separate proceeding that the employee entering into an employment contract was aware that the organisational unit employing him could not have failed the legal requirements regulated by company law, associations and legal persons enforced in another country to enter into an employment contract.

Presumptions of Law

Others items listed in Article 1, paragraph 2 of the Rome Convention preclude application of the Convention to contractual relations regulated by family law, civil law, commercial and civil procedure. I address the latter issue, as a rule, proceedings in matters of employment law are governed by separate regulations. The provision of Article 1, paragraph 2, point "h" states that the Rome Convention does not apply – subject to the wording in Article 14 – to evidence and to procedure. As a rule, the procedural matters are governed by the provisions in force in the county and are applied by judicial authorities who are responsible for the application of local law. In contractual relations with a foreign element, it is therefore the principle of respect for the rules set out in the *lex fori*. Article 14 of the Rome Convention provides no exception to this rule. It includes only strictly selected issues of civil procedure in matters of evidence. It requires parties to contracts involving a foreign element and the judicial authorities of the resolution of disputes arising from these agreements to apply the conflict rules laid down in the Convention only in matters relating to legal presumptions referred to national legislation in relation to contractual obligations. It also obligates to use the conflict rules applicable to resolving conflicts between national systems of substantive law used to regulate contractual relations in matters relating to the distribution of the burden of proof.

Article 14 of the Rome Convention consists of two normative units. The first of them (Article 14, paragraph 1), applicable to the legal presumptions and the distribution of the burden of proof determinants, defined in the Rome Convention, is used to indicate the proper national system of substantive law which is applicable to the contractual relations with a foreign element and is also the obligation to decide on the use of legal presumptions, and to comply with the law of the rules of evidence. In Article 14, paragraph 1 of the Rome Convention it was an established principle that the law governing the contract, as indicated in the event of a collision of two or more national systems of substantive law, applies in so far as is indicated by the determinants listed in the Convention indicating a system of law of a country establishing a presumptions of law or determining the burden of proof.

Legal presumption excuses the party on whose behalf it was established in law to pursue evidence of the circumstances relevant to the contractual relationship. In the case of labour relations presumptions of law may relieve the injured party

to an employment relationship. The employer for example, may be relieved from the obligation to prove that the employee whom the employer entrusted with property assets and with the responsibility to return it, from the requirement to carry out evidence indicating that the injury was caused by the wrongful act or omission of an employee responsible for the protection of entrusted property. In case where the provisions of labour law establish legal presumption the employer is obliged to prove the damage and the fact of entrusting the property under a written contract to the business. Legal presumption exempts the employer from the obligation of proving that the property damage was caused by the employee and that between the employee's conduct and the damage caused, there is an adequate causal determinant.

According to the authors of the report on methods of resolving conflict of law in contractual obligations involving a foreign element, the presumption of legal norms belong to the category of substantive law. It permits the parties to determine the extent of contractual obligations. So they can not, therefore, be separated from the substantive provisions governing the contents of each contractual obligation.[68] The defendant employee may be released in whole or in part, from liability for damage which arose in the property which has been entrusted to him by the employer. But must prove that the damage is a consequence of the circumstances on which the employee (entrusted with the property) had no influence. An employee is also required to demonstrate that, during the care of the entrusted property he exercised due care to ensure that no damage occurred.

Rules of evidence

The legal presumption established by the national substantive law are closely determinanted to the rules determining the burden of proof. Substantive provisions of labour law, which establish a presumption of liability for damage by employee to workplace property entrusted to him by the employer define the rules for the distribution of the burden of proof. The employer is obliged to prove that he possessed the property, entrusted it to the employee, to care for it and that during this entrusted period damage was done to the property and that property. The damage is treated by the legislature as a sufficient indication that the employee failed to fulfil the duties prescribed by labour law in the employment contract and in the agreement for material responsibility for the property entrusted to him by the employer. The employee to be relieved of liability must prove that the injury was caused by reasons independent of him, caused either by the employer, a third party or external circumstances. Provisions of national labour laws governing foundations and principles of liability for property entrusted to the employee by the employer did not make this responsibility or the fault of an employee, nor

[68] Ibid., p. 34.

the degree of culpability breach of official duties. By entering into an agreement with the employer concerning material responsibility, the employee is responsible in part on the basis of some risk. The boundaries of these risks are calculated on both sides of the contractual relationship, when entering a work agreement. The employer bears the risks arising from personal mistakes in selecting a candidate for a particular job. The employee bears the material risk due to the possible inability to comply with obligations arising from the nature of the work specified in the signed contract. The burden of proof in matters relating to material liability for the property entrusted to the employee by the employer was found in the provisions of national substantive labour law. The legal presumption, and closely related to it, the burden of proof, in matters relating to material liability of the worker entrusted with property to him by the employer, are bodies of substantive labour law. Therefore, Article 14, paragraph 1 of the Rome Convention governs these bodies under the collision standards established by the Convention. Legal presumptions and the burden of proof concerning contractual obligations governed by the substantive law defining the scope of these obligations in a contract involving a foreign element in the event are subject to conflict of law applicable to the contract. Arguing *a contrario*, the above claim formulated in Article 14, paragraph 1 of the Convention should be analysed to conclude that the legal presumptions and rules of the burden of proof is not governed by the substantive law, not related to contractual obligations are excluded from the scope of the Rome Convention.

In the event of a conflict of substantive law applicable to conflicts between two or more national systems of contract law under the contract, in which there are foreign elements or part of the contractual relations, or the courts of the dispute settlement arising from contracts involving a foreign element does not apply the provisions of Rome Convention in matters relating to the determination of the competent national system of procedural law, because Article 1, paragraph 1 of this Convention expressly provided that the conflict rules of substantive law are only applicable to contractual obligations in any situation involving a relationship with the substantive laws of different countries. I share the sentiment expressed by the authors of the report on the Rome Convention, in Article 14, paragraph 1 the formulated restriction in the application of provisions on regulatory issues of legal presumptions, and the distribution of the burden of proof. According to M. Giuliano and P. Lagarde, legal institutions, legal presumptions and the distribution of the burden of proof in matters relating to obligations under the contracts "are not wholly subject to the provisions of the contract law of obligations."[69] They form part of the law governing the contractual obligations in so far as substantive law governing this agreement establishes this presumption, and determine the burden of proof. Crucial to legal presumption and the burden of proof

[69] Ibid.

and the legal nature of the institution of substantive law are therefore two factors. The first is the formal reference to the location of regulating these legal institutions. Legal presumptions and evidence obligations are classified as institutions of substantive law, if they are governed by the provisions of this law. In the system of Polish labour law of legal presumption of full liability for damage caused by an employee to the property entrusted to the employee by the employer was explicitly stated in Article 124, paragraph 1 of the Labour Code. Workers assigned responsibility for the property based on the premise of the breach of the obligation of due diligence in the protection and care of property entrusted to the employee by the employer. The burden of proof when trying to evade material liability rests entirely on the employee. The provision Article 124, paragraph 3 of the Labour Code states that the worker may be exempt from liability for damage arising in the entrusted property, by proving that the damage occurred from causes beyond his control. One of the reasons, for example, as indicated by the legislature in that provision is to demonstrate that the cause of the damage was the employer's failure to provide conditions for safeguarding the property entrusted to the employee. Adoption by the legislature in the Labour Code of the presumption to the brought about damage to the property entrusted to the employee, greater responsibility is placed on the worker in the court proceedings for payment for damage, the claim made by the victim, the employer rather than the employer, who in the proceeding is a plaintiff. The plaintiff need only prove to that the property has suffered damage which has been properly assigned to the employer. With this presumption of law is closely determinanted to the burden of proof laid down in Article 6 of the Civil Code. This provision is applicable to labour relations in conjunction with Article 300 of the Labour Code. Established rules require the party seeking claims in civil proceedings to prove facts from which derive legal consequences. Legal presumption, which allows the court to consider certain facts as established causes shifting the burden of proof on the employee responsible for protecting the assets entrusted by the employer. Legal presumption laid down in Article 124, paragraph 1 of the Labour Code change the basic rule of evidence laid down in Article 6 of the Civil Code. The provisions have an important impact on the content of contractual relations, which the parties remain in the employment contract, which also are entered into for material responsibility for the assets entrusted to the employee by the employer. Legal presumption laid down in Article 124, paragraph 1 of the Labour Code is a rebuttable presumption. As a type of *presumptiones iuris tantum* may be by the defendant employee successfully challenged. In this case, the rule of evidence as laid down in Article 6 of the Civil Code used in labour relations in conjunction with Article 300 of the Labour Code is revived and the employer of an employee seeking damages for property that had not been assigned to the employee, but over which the employee had custody under a general duty of care that resulted from the obligation to care for the welfare of the workplace (Article 100, paragraph 2, point 4 of the Labour

Code) must prove all the facts, if seeking from the employee compensation for the damage, therefore deriving legal consequences. In accordance with Article 227 Code of Civil Procedure, subject of the evidence are the facts relevant to the case. In the case related to material liability for damage caused to the employer's property by the employee. Circumstances for material liability of an employee are non-performance or improper performance of duties, fault, damage and the causal determinant between the content of duties inconsistent with the employee appropriate behaviour – the person causing the damage and the damage caused (Article 114 of the Labour Code). Presumption in law takes on a different nature when regulated by procedural law in civil cases. Presumptions of law does not exempt parties from the burden of proof. It assists the parties in the evidence process. It allows them to carry out the evidence based on the existence of facts. The subject of evidence in civil proceedings are the facts relevant for the outcome of the case (art. 227 of the Civil Procedure Code). Legal presumption, based on the circumstances are the facts recognised by substantive law superseding in civil proceedings evidence in fact, from which the party to the dispute draws its legal consequences. In matters of the employer's action against an employee for compensation for destroyed property, entrusted to the employee, the agreement on property liability and the fact the material evidence of the damaged property entrusted to the defendant employee replaces the need for evidence that the defendant employee is liable for damages. The purpose of a legal presumption is the enhanced legal protection of certain legal relations. For this reason, the presumption of law is governed by the substantive law and not by procedural law. Presumptions of law because they prove an important impact on the content of contractual relations. The result of such procedural rules of the presumption of law institutions are bound by the presumptions of the court, hearing the contested case. Article 234 of the Civil Procedure Code provides that the presumption established by law (legal presumptions) binds the court. They may be overthrown if the law does not exclude such a possibility. Presumptions of fact are different in nature. Regulations contained in procedural law grant power to the justice authorities to determine the existence of certain facts which cannot be directly proven by other established facts. In the Polish rules of civil procedure that provision is Article 231 of the Civil Procedure Code. The standard is based on the logical relationship between facts, which can be proved and the opinions of other facts relevant to resolve the matter. In the chain of evidence the presumption of fact has the legal status of an indirect logical piece of evidence. An example of the presumption of fact may be the silence of one of the parties involved in civil matters relating to claims of the opposing party. Article 230 of the Civil Procedure Code grants the court power to recognise the facts presented by the other party, being of great relevance to the case and its resolution. Such presumptions are not legal presumptions. They do not bind the court. They authorise the court only to conclude, based on the results of the whole case, despite an absence

of direct evidence for the existence of facts relevant to resolution of the case, rejecting the defendant's entry into the dispute and make representations on the facts presented by the plaintiff, confirms the validity of reason and the plaintiff indirectly demonstrate the presence of facts which are important for resolving the matter in their favour. Presumption of fact cannot be and are not considered by the provision of Article 14, paragraph 1 of the Rome Convention and interpreted in conjunction with Article 1, paragraph 2, point "h" of the Convention as the legal presumptions. They do not constitute a component of obligations as are governed by the substantive law. Polish substantive law and procedural law establish two types of allegations, the legal and the factual. Both presumptions are "presumptions of law," because they are regulated by national law. However, only those which are regulated by rules of substantive law are legal presumptions within the meaning of Article 14, paragraph 1 of the Rome Convention. Were it otherwise, in a report by the legislative committee members M. Giuliano, P. Lagarde, they would not write about the legal presumptions, some of which are part of the substantive law and legal presumptions, which are part of procedural law.[70] Presumptions of law regulated by procedural law are part of the provisions of this law[71] and therefore cannot be treated as part of contractual relations within the scope of the provisions of the Rome Convention on the Law Applicable to Contractual Obligations.

Insurance

The Rome Convention does not apply to insurance contracts concluded in the event of realisation of risks covered by various types of personal insurance, social and economic within the Member States of the European Economic Community (Article 1, paragraph 3). This exemption does not apply to reinsurance contracts (Article 1, paragraph 4). In all matters relating to insurance, where the risk is located outside the European Economic Community conflict of laws governed by the Rome Convention apply. The decision on the locating of the insurance risk is taken up by the national courts in matters relating to insurance in the individual Member States of the European Economic Community. In making these decisions courts apply national law (*lex causae*). Within the European Union in matters relating to social security, the relationship between the national social security provisions are governed by European Parliament and the Council of the European Communities No. 883/2004 of April 29, 2004 on the coordination of social security systems. By contrast, social insurance in cases of labour accidents and occupational diseases is regulated by Regulation No. 867/2007 of the Euro-

[70] Ibid.

[71] Ibid. Authors write that these presumptions are classified as "presumptions of law, which clearly are part of procedural law." They believe that such a presumption "does not form part of the law of contract."

pean Parliament Council of July 11, 2007 on the law applicable to contractual obligations ("Rome II"). Conflict of laws regulated by the aforementioned provisions are presented in the latter part of this volume.

LEGAL FORM

The Article 14, paragraph 2 of the Rome Convention declares that the proof of the legal action may be carried out by any means permitted under the law of the court (*lex fori*), or in accordance with the provisions of Article 9 of the Convention set up, which sets out the directives on retaining legal form by the parties to contractual obligations involving an international element. According to Article 9 of the Rome Convention, legal action is important because of the form, if it complies with laws in force in the relevant country or state in which the contract was contained, or in the country which is representative of the contracting party (Article 9, paragraphs 1–3). The condition of validity of retaining the form of an unilateral act relating to the contract is conditional on compliance with the provisions of applicable law or the laws of the State in which the above operation was carried out (Article 9, paragraph 4). Separate rules for determining the behaviour in the form of legal contractual obligations apply in the case of making bilateral or unilateral acts regulated by the consumer contracts (Article 5) and the contracts which are the subject of rights *in rem* in immovable property or in the right to use the property. Parties to the contractual relations are guaranteed a limited right to choose the method of proving the legal action undertaken. The parties may use evidence regulated by procedural law applicable in the judicial sphere (*lex fori*), where the action is carried out or the provisions of national legislation referred to as appropriate in accordance with Article 9 of the Rome Convention. Article 9 of the Rome Convention contains rules for determining the formal point of view in accordance with the law and the validity of legal acts. This provision does not define "formal validity" of bilateral and unilateral acts. It applies to all types of contractual obligations, with the exception of those listed in Article 9, paragraph 5 (consumer contracts) and clause 6 (contracts relating to rights *in rem* or right to use property). According to this provision, the formal validity of legal acts is dependent on the position of the legal action. The condition of validity of the contract concluded between persons who are in the same country is complying with the requirements of form specified in the rules of substantive law as recognised by the Rome Convention as applicable to the contract obligations. The formal validity of contracts regulated by the substantive law is chosen by the parties or designated as appropriate on the basis of the conflict rules of substantive law governed by the Rome Convention (Article 9, paragraph 1). This provision of the Rome Convention introduces an alternative possibility to study the formal validity of contracts involving a foreign element, and unilateral acts relating to contracts and agreements to be entered into. An alternative in relation to the

substantive law chosen by the parties or designated pursuant to the provisions of the Convention in the case of an agreement concluded by parties residing in a particular state with substantive laws enforced in the country where the contract was concluded (Article 9, paragraph 1, *in fine*). Agreements concluded by the parties (natural persons), located in different countries are important if they meet the requirements of form laid down by the provisions of the applicable substantive law chosen by the parties or designated by the conflict rules laid down in the Rome Convention, or if they comply with the formal requirements laid down by law of one of the countries in which the parties reside (Article 9, paragraph 2). In cases of contracts by proxy, by persons resident in one country or different countries, as a reference point for determining the applicable law according to which it is reported that the formal conditions are met, deciding on the validity of the agreement, is the residency of the representative of the contracting parties at the time the parties enter into the contract (Article 9, paragraph 3). The condition of validity of unilateral acts, concerning the concluded or planned contracts, is the conformity of the provisions of substantive law, by which to assess the validity of the formal agreement. It is clear from the provisions of Article 9, paragraphs 1–3 of the Rome Convention, unilateral legal acts must meet requirements relating to the form of the legal action as defined by the substantive law which, according to the choice of law rules set out in the Rome Convention have, or would apply to contracts involving a foreign element or the substantive laws in force in the country in which the said act is performed (Article 9, paragraph 4).

A necessary condition for the admissibility of evidence to make a unilateral act under the laws of the country indicated on the basis of Article 9 of the Rome Convention is made in connection with the act carried out with reference to or with draft agreements involving an international element. In the report prepared by M. Giuliano and P. Lagarde it was clearly stated that a unilateral legal act that is not associated with the contractual obligation with "the facts showing the relationship of the laws of different countries" does not fall within the scope of Article 9 of the Convention.[72] Article 9 of the Rome Convention applies to all legal transactions, including transactions effected in the form of a deed, considered by the substantive law of some Member States as "public acts." According to the authors of the report, Article 9 of the Convention deliberately omitted from the bilateral and unilateral legal acts carried out at the completion of the requirements of a particular form, such as for example a notarial deed.[73] This was achieved, because not all national substantive law gives these acts a special nature of the form. The notary is a person of public trust. In this sense, a notary carries out a public function, certifying the legality of legal acts performed by individuals and other entities acting in the course of the law. However, the contracts and

[72] Ibid., p. 26.

[73] Ibid.

unilateral acts, made before a notary cannot be regarded or treated on a par with public acts, since the notary does not fulfil public office formally, nor does he/she make individual decisions of governmental authority, but acts only as a figure of public trust with regards to actions committed by other persons and entities. Reaffirming the legal transactions, participating in the "issue" of actes juridiques, the notary is obliged to comply with the laws in force in the country in which the notary operates. Therefore legal action by private individuals and other legal entities involved in legal transactions carried out in the form of notarial deeds must be in accordance with the provisions in force in the country where the contract was entered into or a unilateral legal act had been completed. Provision of Article 9, paragraphs 1–4 of the Rome Convention makes the formal validity of legal acts dependent on the place in which they were made. In the case of legal actions made before a notary, who is responsible for compliance with the law enforced in the place where the legal action took place (the only requirement to validate the act is stipulated in Article 9, paragraph 1 of the Convention), the contract entered into between the persons which are in the same country must comply with the conditions on the form specified by the law of the country in which it was entered into. In the case of unilateral acts of a contract either entered into or being prepared to be entered into, Article 9, paragraph 4 of the Convention requires the law of the country in which these operations are to be made be respected. In both cases referred to in Article 9, paragraphs 1 and 4 of the Rome Convention, legal actions carried out by way of notarial deed are performed in accordance with the provisions in force in the country in which the notary pursues a professional activity. In the remaining cases regulated by the provisions of Article 9, paragraphs 1–4 of the Convention, the alternatives to the "appropriate," that is the suggested national substantive laws in the case of legal acts carried out before the notary by a person or representatives that are not present when the agreement is entered into or the unilateral act is undertaken in the same country, make it necessary to comply with the laws in force in each country. This is not an excessive requirement, because the notary is obliged to comply with applicable laws. However, in Article 9, paragraph 1–4 of the Rome Convention it is a clear obligation for the legal actions to comply with the rules of one of the countries in which one of the parties resides and is involved in the legal actions and not in all the countries in which at the moment the legal act is carried out, the parties are either residing or staying in at the time. This is an important exception to the legal requirements laid down in Article 9, paragraphs 2–4 of the analysed Convention. As discussed earlier, adherence to the legal system of one country is regarded as a prerequisite for meeting the requirements concerning the form of legal actions relating to contractual obligations involving a foreign element regulated by national laws elected or designated in accordance with the conflict of law rules of substantive law regulated by the Rome Convention.

The analysed Convention contains no definition of the legal form of legal action. The report written by M. Giuliano and P. Lagarde, fulfilling *de facto* a role of the first comment to the Rome Convention states that the form of the legal action regulated by Article 9 of this Convention shall apply to any manifestation of externalizing the will of the person or persons taking binding actions (operations) regulated by contract law.[74] Labour law considers these to be actions establishing, amending or terminating an individual employment relationship.

An alternative method of assessment of the legal actions carried out in contractual obligations in compliance with the *lex cause* or the *lex loci actus*, has been regulated by Article 9 of the Convention without any indication of priorities, which should be applied in the first place by national legislation. At first these rules have been chosen by the parties or referred to using the conflict of law rules laid down in the provisions of the Convention. Subsequently, these rules have been in force in the country where the contract was entered into (the case for co-residence in the same country by both parties) or one of those countries (the case applicable to a situation in which the parties or their representatives during the time the agreement was entered into, were present in different countries). *Mutatis mutandis*, the above rules apply to unilateral acts on the already signed contract or agreement to be entered into in the future. However, the order specifying the relevant national rules of substantive law by which the assessment is a formal legal validity of the parties to the contractual relations, does not hold any relevance, according to M. Giuliano and P. Lagarde.[75] In light of the regulations adopted in Article 9 of the Convention, an act is valid if it can be considered valid under the provisions of substantive law in force in the country whose standards have been chosen or identified as appropriate for the adjustment of the contractual obligations, in which there are foreign elements or rules of law of the country where the act was carried out by the party of the contract or its representative. The Commission preparing the draft of the Rome Convention did not deal with the matter indicating the law according to which legal action should be determined by, aimed at the annulment of the deficiency of formal elements in the agreement or in the unilateral act of a contract involving a foreign element. In the report of M. Giuliano and P. Lagarde this problem has been solved, although the legal issue was presented and illustrated by the example of the limitation period taking the necessary measures to formally annul the breaching legal action.[76] I do not share the perceptions expressed by the authors referred to the above in the report. I do not think that from the rules of private international law one could deduce the principle of protection of the rights of parties to the agreement entered into in breach of the requirements of the formal legal action made in breach of the rules

[74] Ibid.
[75] Ibid.
[76] Ibid.

governing the form set out in legislation which apply to carried out legal actions. In my opinion, the provisions specified by Article 9 of the Rome Convention shall apply as appropriate in all matters concerning the form of legal action made, so in matters that both complement the requirements laid down by the competent national system of substantive law and the conditions and procedures of termination of an act concluded with the violation of the above requirements. Since Article 9 of the Rome Convention only shows which law should be appropriate for regulating all matters connected with the making of formal legal action relating to contractual obligations involving an international element, therefore, choosing or designating a national system of rules of substantive law should apply not only in matters determining the appropriate national legislation, but also in all cases relating to contest the validity of legal acts carried out in terms of its compliance with the requirements set out in that national system of law.

In M. Giuliano and P. Lagarde's report, the relationship between the provisions of formal validity and substantive validity of obligations of the contract requirements was debated over. It was found that in the event of a conflict of substantive laws applicable to determine which of the above obstacles to the validity of the contract or other legal action relating to a contract involving a foreign element are more important legal decision as the provision of Article 3, paragraph 2 of the Convention, which provides that a voluntary change in the selected or indicated as an appropriate national system of substantive law under the provisions of the Rome Convention "(...) not affect the validity of the contract due to the form within the meaning of Article 9 (...)."[77] It is possible to deduce from the above, in the case of a conflict between the elected and the indicated provisions of national laws concerning the content or form of contractual obligation, in matters relating to the forms made of the legal action, rules laid down in Article 9 of the Rome Convention shall apply, regardless of the choice and suggestion by the conflict of law rules laid down in the Convention in matters relating to the merits, meaning the content of a contractual legal relationship. Another indication is given by Article 8, paragraph 1 of the Convention. This provision requires the assessment of the existence and the validity of that agreement or one of its provisions by law, which in accordance with the Rome Convention would be appropriate, assuming the contract or its individual provisions were adequate. According to the authors of the report on the Rome Convention, this rule should be applied by analysing the formal validity of legal actions made. This is permitted under Article 9 of the Convention, a provision which in the case of a conflict requires the use of the substantive law applicable to contracts established under the Convention or the law of the state or states in which the contract was entered into. This means that the Convention requires collisions of law to be settled in matters concerning the content of the contractual obligation

[77] Ibid., p. 27.

involving a foreign element based on the rules regulating conflicts of substantive law. Conflicts of law in matters concerning the formal validity of contracts and legal actions relating to these contracts are settled in accordance with the rules laid down in Article 9 of the Convention. The basic principle expressed in that provision may be expressed by the formula *locus regit actum*. This principle is accepted in the substantive law of the Member States of the European Union today. A fundamental problem in contractual obligations comes into existence when the parties entering into a contract are in different countries. In those cases where a contract was entered into by representatives of the parties, the provision of the Rome Convention, Article 9, paragraph 3, as a decisive indicator of the point of entry into force, sets out the country in which the representative was in whilst entering into the contract. This means that the applicable law to determine the formal validity of the contract for the law of the state in which one party or each of them was represented by an agent. Article 9, paragraph 3 of this Convention requires the application of Article 9, paragraphs 1 and 2 of the Convention to take into account the law of the country in which the representative of a party at the conclusion of the contract was in. Since both parties to a contract cannot be represented by the same agent, provision of Article 9, paragraph 3 of the Rome Convention applies to cases where one party enters into the contract themselves and the other party is represented by an agent and if both parties are represented by agents. The agreement entered into by the parties, whose representatives are in the same state is subject to the same rules that apply on the basis of Article 9, paragraph 1 of the Convention, in the event the contract is entered into by individuals who at that moment of entry are in the same country. An agreement entered into by the parties in the same state, acting through agents located at the conclusion of the contract in the various countries are covered by the principles formulated in Article 9, paragraph 2 of the Rome Convention. This implies the existence of the same complications associated with the determination to exert the effects of the agreement, which takes place in the event of agreement by the parties living in different countries. Establishing the country of which the rules apply to the contract, where the place of conclusion cannot be clearly defined due to lack of co-residence of the parties or their representatives being in one country at the conclusion of the contract. Because national and international private law requires to determine precisely the place, and thus indicate the national system of private law in force in the country in which the place of contract is, therefore, the civil law of individual countries are used as determinants of the place of contract, functioning as aids relating either to the place where the party resides or resides its representative making the offer or the place where the party or its representative accepts the offer made. The Rome Convention did not accept any of the aid solutions presented. The Commission preparing the draft of the Convention believed that in private law there are important differences between the formal requirements for the validity of the entire

contract and its various elements to be negotiated by the parties or their representatives in the various stages of the proceedings initiated on the basis of an offer and its acceptance.[78] The Commission considered that, in matters relating to the formal validity of the whole contract, the provisions of a national system of substantive law should apply. Therefore, the committee had a choice between two extreme requirements related to formal evaluation of the contractual obligation involving an international element. The first one was defined by the authors of the report prepared on the basis of this Convention as liberal, allowing them to assess the form in which the contract was concluded, from the perspective of both the national systems of substantive law and the recognition of the validly of the concluded contract in the event of completion of the formal requirements set out in relevant substantive legislation of at least one of these countries. The second option was considered to be rigorous, as it is assumed as a condition for the formal validity of the contract for its compliance with the provisions of law in both countries, which at the time of the contract either party or its representative are from.[79] In the particular normative provision of Article 9 of the Rome Convention both options have been applied. However, the method with which the Commission adopted the proposal for developing the Rome Convention defines it as liberal. As discussed earlier, depending on whether both parties are present at the time of its conclusion in the same country, or are in different countries, the Convention allows the agreement to be considered valid from a formal point of view, if it complies with the regulations concerning the form of a national system of substantive law: the State in which the contract was concluded (Article 9, paragraph 1) or at least one of the two countries, which are present at the time of the conclusion of the parties or their representatives (Article 9, paragraph 2 in connection with Article 9, paragraph 3).

This liberal method of determination of the competent national system of substantive law governing the formal requirements of contracts involving foreign element may be excluded by mandatory provisions, in Poland, called "necessary standards of application," as defined in Article 7 of the Rome Convention. Contributors to the report of the Rome Convention predicted that some of the rules governing the formal requirements for contracts may be mandatory in nature.[80] For this reason, courts applying the rules chosen by the parties or indicated using a choice of law rules may be required to "grant the effectiveness" of the rules, due to a stronger determinant between the facts of the legal mandatory standards in another country. By way of example, these are national labour laws governing the formal requirements for contracts for non-competition and competition clauses. Conflict between individual labour law provisions enforced in the place where the

[78] Ibid., p. 28.
[79] Ibid.
[80] Ibid.

non-competition contract or contract with a competition clause was entered into by way of writing, otherwise deemed void, and the regulations existing in another country where the work is carried out, in accordance with which such contracts may be concluded orally, properly illustrates the problems relating to the application of the standards required (mandatory provisions), if the said contracts are not entered into by way of writing should be treated by the court adjudicating on the basis of individual employment law in force in the country which requires the sanction invalid, that these contracts have been concluded in writing. Article 7, paragraph 1 of the Rome Convention provides the legal basis for granting effectiveness of the rules of another country rather than those selected or identified by using the conflict rules, with which the facts of the case regulated by the provisions show the relationship, if the rules of other countries – in accordance with the law force in that country – apply to the actual relationship regardless of which law regulates the contract with a foreign element.

At the end of the debate on the scope of the Rome Convention, certain specific provisions concerning the form of consumer contracts (Article 5) should be pointed out and the formal requirements of validity of the contracts mentioned, which is essential for presenting a conflict of labour law issue applicable to individual employment relations (Article 6). In contrast to consumer contracts, the formal validity is governed by law, in which the consumer has his usual residence (Article 9, paragraph 5 *in fine*), the Rome Convention does not govern in Article 9 of the formal requirements contracts, although consumer contracts and employment contracts were by it classified into one category called "weak party contracts."[81] This justifies a separate classification regulation of the conditions for these agreements. The Commission preparing the draft of the Rome Convention rejected the idea of separate regulations in Article 9 requirement for contracts. In the report prepared by M. Giuliano and P. Lagarde, there is no information on the reasons for this arrangement. Because neither Article 9 nor Article 6 of the Rome Convention regulates the formal requirements which must be applied to contracts of employment, the question arises whether the form of these agreements is subject to the general requirements, or to the provision of Article 6 of this Convention, which is regulated by the requirements applicable to individual employment relationships involving a foreign element being given any indication of the formal requirements of validity of contracts of employment on the basis of obligations which are established in working relations with the foreign agent or agents. The provision of Article 6, paragraph 1 of the Rome Convention is clear that whatever the parties' choice is of individual labour relations of the national labour laws used to regulate the content of the rights and obligations of parties to individual employment relationships and the institutions of labour law, cannot result in depriving the employee of protection as is entitled to him under the

[81] M. Bogdan, *Concise Introduction to EU Private...*, p. 129 et seq.

mandatory provisions of labour law that would apply under Article 6, paragraph 2 of the Convention. Further parts of this volume will remark upon the choice of national labour law by the parties to contracts of employment with a foreign element and the other determinants mentioned in Article 6, paragraph 2 of the Rome Convention. At this point I just want to indicate that, in Article 6, paragraph 2 of the Rome Convention collision of national standards for substantive labour law is regulated by using two determinants: the place to work (point "a") or place of business in which the employee is usually employed (point "b"). These determinants are not irrevocable standards and may be replaced by other, undefined determinants, suggesting a stronger association of the employment contract with an international element with the national substantive labour law enforced in another country (Article 6, paragraph 2 *in fine*). The above shows that the formal validity of contracts shall be subject to the provisions of the national system of substantive labour law, which will be chosen by the parties to an employment relationship with a foreign element, or identified with one of the determinants specified in Article 6 of the Rome Convention. Employment agreements are usually entered into in any form. Without imposing a legal requirement to comply with the written form, national legislators in various countries require employers to confirm in writing the conditions of employment of employees in a work agreement. This legal construction is to protect the rights of the worker as the "weaker" party to the work agreement. The regulations established in the provisions of the applicable formal law of the requirement of an employment contract to be in writing, if claimed as invalid if not conducted in the written form, will have negative consequences only on the worker's part. For this reason, a written employment contract (*ad probationem*) plays an important role in the evidence brought by the employee in order to determine the existence of an employment relationship in cases where the employer disputes the existence of such a relationship, and argues that the work was done on the basis of one of the civil contracts (freelance contracts, the work or the agency contract), or requesting that the plaintiff establish the existence of an employment relationship, they worked on in the course of a business or service, and an entrepreneur for whom the worker supplied work was determinanted into legal relationships only governed by private commercial law. Failure to comply with legal obligation to confirm in writing the existence of the contract and its terms, both established by the legislature (*essentialia negotii*) and agreed by the parties (*accidentalia negotii*) can be, and usually is protected by penal-administrative provisions. The advantage of this is only sanctioning those employers who fail to fulfil formal legal requirements of contracts, which, due to the protective function of labour law are not regarded as formal and legal terms of validity of an employment contract. Entering into the contract orally or by conclusive acts (*facta concludentia*), then failure to confirm the fact, content and conditions in writing in an employment contract, merely create negative legal consequences for employers.

Since the Rome Convention does not provide specific formal requirements for contracts of employment with an international element, Article 6 of the Convention submits all issues related to the form of a work contract to the national rules of substantive labour law chosen or designated by the parties to the contract of employment. In the case of the introduction of certain specific requirements by the country concerning the form of contracts, the only legal mechanism set out in this Convention for the protection of the requirements are the necessary norms, which based on the procedure laid down in Article 7, paragraph 1 of the Convention could enforce their use. In labour relations this provision may apply only to contracts involving a foreign element, subject to the provisions of the substantive law of the labour force in another State, only if the worker performing work on its territory, the authorities have introduced specific requirements in matters relating to forms of employment contracts. This argument can be illustrated by the following example. An employment contract entered into by an employee, a citizen of country A with the employer, subject to the provisions of the law in force in country B, operating in the territory of country C provides that the obligatory employment relationship will be regulated by the provisions of individual employment law in force in the country D. The provisions of labour law in force in country D permit the parties to enter into employment contracts in any form. By contrast, the labour law in force in country C (*lex loci laboris*), inapplicable to this relationship legislates that employers should enter into an employment contract (under the threat of penal and administrative sanctions), in writing. Undoubtedly, due to the location of the work in country C, the contract of employment with an international element and created under the agreement of the contract employment relationship, subject to the provisions of labour law in force in D, there is a close relationship. Because of the inapplicable to the factual state, *lex loci laboris* assures the worker on the basis of a contractual relationship more effective protection than the rules chosen by the parties, the use of state D labour law meriti by the court adjudicating in country C or in any other country, with the exception of country C, can give effect to the laws of the country C, since the situation has a close connection with the employment relationship, under which the worker performs his work in country C. Analysing the above, I ignored the possibility of a court applying the laws of country C because the dispute against the background of this relationship is recognised by the courts of country D. There are rare cases in which courts of the country are bound to apply the law of that country to benefit from the opportunities offered by Article 7, paragraph 1 of the Rome Convention, and apply, as a necessary law, a foreign labour provision.

Chapter 2

Resolving conflicts of substantive labour law in the Rome Convention ("Rome I")

§ 1. Freedom of choice

The first sentence of Article 3, paragraph 1 of the Rome Convention stipulates that "the contract shall be governed by the law chosen by the parties." Thus, the most important provision of the Rome Convention approved the achievements of the internal rules of private international law of the Member States of the European Economic Community. Freedom of the contracting parties with an international element to choose the law applicable to regulate the content of the rights and obligations of labour relations has a long tradition in Europe. The authors of the report commenting that provision of Article 3 of the Rome Convention, draw attention to the established since 1910 judicial French doctrine of autonomy *de la volonté*, freedom of choice of law enshrined in 1896, in German law, and even before, because already in 1865 formulated the implementing rules for the Italian Civil Code, the principle of freedom of contract under which the parties have the legal contractual relations with a foreign component of the national system to choose the substantive law applicable to regulate the rights and duties of these relations.[82] In precedents mentioned in the report, including international treaties, national legislation, the English and Scottish court decisions support the contention that in the Member States of the European Economic Community, there was full compliance of opinion that parties to contractual relations should have the assurance of full freedom of choice of the national system of substantive law under which all rights and obligations will be determined.[83] In private international law literature it was expressed that the Rome Convention does not prescribe to the parties to contractual relations with a foreign element for any specific requirements for the choice of a national system of substantive law which will apply to legal relationships that have been concluded.[84] I do not share this opinion. Its legal basis is Article 3, paragraph 4 of the Rome Convention, the standard which requires the application of its national system of national law for

[82] M. Giuliano, P. Lagarde, *Report of the Convention...*, p. 11.
[83] Ibid., p. 12.
[84] M. Bogdan, *Concise Introduction to EU Private...*, p. 122.

assessing the validity of the contract or its provisions (Article 8), the formal requirements (Article 9) and the ability of parties to conclude such a contract (Article 11). These factors are crucial to the validity of that agreement with an international element. But they may not constitute the legal basis for the assessment relating to the choice of a national system of substantive law, which is crucial to the (formal and substantive legal requirements) content of the rights and obligations of the parties to that agreement and other institutions of the national system of substantive law applicable to this contract. Article 3, paragraph 1 of the Rome Convention does not mention a demand for the parties to contractual relations with a foreign element to be subject to selected national laws. Provision of Article 3, paragraph 1 of the Rome Convention consists of three sentences. The first formulates the complete freedom of choice of law. The second includes the directive to make the above choice. The third upholds the full freedom of the parties, stressing that the choice may refer to either the whole contract – or, its individual parts. In this provision there is no mention of what could support the hypothesis put forward by M. Bogdan,[85] who claims that the Rome Convention accepts the choice of law made by the parties, provided that it complies with the requirements laid down in the national system of substantive law, which was chosen. In Article 8, paragraph 1 of the Convention, national substantive law apply in cases of the existence and validity of the contract or its provisions. Article 9 and Article 11 of the Rome Convention, concerning the formal validity of the signed contract and legal capacity to act on selected contracts have been previously analysed. These are the standards used to evaluate the contractual obligations and agreements not to choose a national system of substantive law which, in accordance with the wishes of the parties will be applicable to the contract involving a foreign element. Therefore it is not without reason that the report's authors commenting on the Rome Convention, stated that the provision of Article 3, paragraph 4 "refers only to decide about issues related to the existence and validity of the agreement of the parties to select an appropriate national system of substantive law to the provisions of Article 8, 9 and 11." Despite the announcement that there would be a return to questions about how to choose the national system of substantive law on the occasion of discussing the issue of substantive importance in a contract, in terms of its compliance with the formal requirements of national legislation and the legal capacity to act of the parties, the commentary to Article 8, 9 and 11 of the Rome Convention does not provide discussion on the requirements to be met in order to conclude that the parties to the contract with a foreign element benefit from the freedom to choose one of two or more systems of substantive law, which can be applied to contractual relations, which, owing to the presence of foreign elements may be given control of substantive laws in force in more than one country. Choosing the appropriate national system of substantive law is an

[85] Ibid.

action which follows the entering into the contract, which – due to the presence of foreign elements – should undergo one of two or more competing national systems of law. It may eventuate that a contract cannot be considered valid in light of the successful national system of substantive law that would apply to it if it had not been affected by major drawbacks from the standpoint of the law. The contract entered into with an international element may not meet the formal requirements laid down in legislation in the countries in which the parties or their representatives reside. Finally, both parties who have entered into a contract or one of them may not meet the legal requirements for participation in legal transactions regulated by law of contract in the absence of a legal capacity to act or an incapacity. The question therefore arises whether parties to a contract involving a foreign element, or one of them that does not meet the requirements prescribed by the national substantive law set out under the provisions of the Rome Convention is able to choose the applicable substantive law, which will be used to regulate the legal relations created by the agreement. It may indeed prove that the obstacles to concluding an obligatory contract by certain parties do not interfere in the choice of applicable law, by which the validity of the substantive element will be assessed, a formal signed contract and the parties' ability to enter into such an agreement. No identical set of criteria of validity of a contract with a foreign element was established in any of the provisions (Articles 8, 9 and 11) referred to in Article 3, paragraph 4 of the Rome Convention. There is no legal basis to accept the hypothesis of M. Bogdan, who claims parties to a contract choosing a national system of substantive law should be consistent with all national legislation "mentioned" in the provisions Articles 8, 9 and 11 of the Rome Convention, which, owing to the presence of a foreign element in the agreement are in conflict, and participate in a sort of competitive procedures, which should result in a choice of one national system of substantive law, which will be evaluated according to the legal relationship between the parties to these agreements. I write the word "mentioned" in quotation marks because in any of the following provisions of the Rome Convention it is not directly mentioned in the national rules of substantive law by which you would evaluate your contract with the national standards. The Rome Convention contains conflict of law standards allowing to indicate the relevant national law. Thus, the term "mentioned" refers to the provisions of these regulations, which will be indicated as appropriate on the basis of the conflict rules laid down in the Convention. Therefore I uphold the claim that the Rome Convention does not contain requirements relating to the conclusion by the parties to a contract involving a foreign element to make an agreement on the selection of the proper national system of substantive law. The validity of this claim is also expressed by M. Bogdan, that the requirements of the provisions of national substantive law selected using the determinants listed in Articles 8, 9 and 11 of the Rome Convention may not conflict with those set out in Article 3, paragraph 1 of

the Convention.[86] It is of concern that Article 3, paragraph 1 of the Rome Convention does not set any requirements for an agreement to exist for parties to a contract involving a foreign element in matters relating to the choice of substantive law. In my opinion, the parties to a contract may not meet the legal conditions to enter into that agreement in light of certain rules of substantive law. It does not impede, however, if the parties select the national substantive law system validly and effectively according to which the contract will be evaluated. The above assertion is justified by the following first sentence of Article 3, paragraph 1 of the Rome Convention: "This agreement shall be governed by the law chosen by the parties."

In the second sentence of Article 3, paragraph 1 of the Convention it is stated that "the choice must in a clear and reasonable certainty result from the contract or the circumstances of the case." From the above the authors of the report on the Rome Convention bring the proposal that the choice of a national system of substantive law by the parties to a contract with a foreign element should be firm, categorical (express), or made so as to ensure reasonable certainty to which the national system of substantive law shall be subject to this legal relationship.[87] Examining the provision of the Rome Convention it is clear it contains no guidance on matters relating to the form in which the contractual relationship should demonstrate its decision to submit the legal relationship chosen by each party the national law system. The provision of Article 3, paragraph 4 of the Convention included a reference to Articles 8, 9 and 11, requiring the parties to submit to an agreement on the choice of the substantive requirements of law and formal legal rules that set a national system of substantive law, which parties shall apply to contractual relations with a foreign element. These requirements may not be in contradiction with the rule expressed in Article 3, paragraph 1 of the Rome Convention.[88] The above sentiment is unclear, since in the second sentence of Article 3, paragraph 1 of the Convention, the Community legislature used the open method of coordination, allowing the parties to the contractual relationship the freedom to choose the law, provided that this choice should be made clear. However, Article 3, paragraph 4 allowed the authorities of the Member States constituting the legal standards governing the various relationships of obligations, not only to specify the requirements that should be applied to various types of contracts where there are foreign elements, but also to make requirements for the agreements on choosing the law applicable to regulate the contractual relationship with a foreign element. This means that if the parties to a contract of employment or to another obligatory contract, intend to select as the relevant provisions of labour law or other appropriate division of law, before they enter into an ap-

[86] Ibid.

[87] M. Giuliano, P. Lagarde, *Report of the Convention...*, p. 13.

[88] M. Bogdan, *Concise Introduction to EU Private...*, p. 122.

propriate agreement, should familiarise themselves with the requirements set out in the legal system, which they intend to select and apply the requirements set out in the decision to conclude an agreement on the subject of a contract or other agreement of commitment to the provisions of the labour law or any other branch of law governing the appropriate relationship of obligations. The requirements set out in the national system of substantive law should not restrict the freedom of the parties. In assessing the dependence found between the standards of Article 3, paragraph 1 and Article 3, paragraph 4 of the Rome Convention should conclude that the requirements laid down in national legislation should only assert the general definition set out in Article 3, paragraph 1 of the second sentence. A clear, categorical statement about the selection of the national system of substantive law responsible for regulating certain contractual relations is based on the agreement that the parties submit their contract to be regulated by the labour, civil, commercial law of country X. Parties to a contractual relationship need not so clearly choose a particular law. They may use the standard forms, which are characteristic to a particular legal system of a country. For example, parties to an employment relationship need not decide that the legal relationship is subject to the provisions of US law, if they formulate a contract in a manner indicating complete freedom to each of them, including the employer's termination of this agreement without notice or need to provide a valid reason. Lawyers specialising in labour law without difficulty will realise that entering into this concept of employment at will, particular only to American labour law, the parties emphasise that the employment relationship will come under the provisions of the labour law of that country. Use of specified legal wording in the contract, occurring in the labour law of the country is perceived in the literature on private international law as sufficient indication of the decisions taken by the parties to choose the system of substantive law from which these terms are taken.[89] Another indication, which is applicable to the routine contracts, for example, specified period of work contracts, concluded between the same parties, is a clear statement to submit the first of these agreements set out clearly mentioned to the system of labour law in that country. In such cases where the subsequent contract for a specified period of time is entered into, and the parties do not bring this choice of law clause, it can be assumed that the earlier choice is still relevant[90] especially when the circumstances of the case show that no major changes have been made to the relations between the parties. Choosing the right law may be made indirectly. The parties may, for example, provide that in the event of a dispute about a claim arising from the employment relationship concluded on the basis of a contract of employment with an international element, the disputed matter shall be resolved under the laws of the labour law in the country in which the work was performed

[89] Ibid.

[90] M. Giuliano, P. Lagarde, *Report of the Convention...*, p. 13.

normally, or where the seat of the employer is located, or where there is residence, or where the plaintiff or the defendant is located. Reference made in a contract to certain provisions of the labour code of country X may be a clear indication that the relationship has come under the labour law of that country. In some situations, the choice of court may indicate that the parties intend for the contract to be governed by the laws of that country, whose courts have been designated by the parties. However, in this case, because of separate regulations of the conflict rules of procedural law, the lawyers specialising in private international law, recommend caution, since the conflict rules allow parties to contractual relations on a separate choice of law and the court forum in which the disputed matter will be conducted. Although it is natural that a court adjudicating in the country applies the most familiar to it substantive laws in force in the country, distinguishing between the substantive law and the courts applying the law chosen by the parties, means the forum in which any dispute is to be considered, should be supported by additional circumstances which confirm the choice of substantive law applied by the court hearing the disputed case.[91] In the event that the parties decide upon the inclusion of a clause concerning the applicable arbitrary tribunal, or arbitration board or arbitrator for resolving any disputes arising from this legal relationship and the parties simultaneously or subsequently agree that the elected body empowered to exercise justice in certain contractual relations is permitted to use the substantive laws of the country where the arbitration has its seat, becomes a clear indication to which system of substantive law as part of the legal relationship the signed contract is submitted to. Although the second sentence of Article 3, paragraph 1 of the Convention of Rome obligates the parties to the contract to expressly select a system of law, due to the introduction of additional factors, such as the provisions of the agreement or the circumstances of the case, the literature on private international law favours the silent selection (tacit choice of law). Selecting an appropriate system of substantive law may be made, as well as legal action, in a formal way in writing or in another way that is sufficiently clear expressing the common will of the parties to the legal relationship in which there are foreign elements.

In Article 3, paragraph 1 of the Rome Convention parties to a contract with a foreign element have the absolute freedom to choose the applicable substantive law of the national system. In contrast to the internal rules of private international law of some countries such as Poland, allowing a limited choice of law, limited by Article 32 of Polish Act of November 12, 1965, that the parties may submit statutory law of their choice, provided that it remains, therefore, a legal relationship in the analysed provision of Article 3, paragraph 1 of the Rome Convention and does not set any restrictions on the parties to contractual relations, and therefore also to labour relations in matters relating to the selection of

[91] Ibid.

any national system of substantive law in the world. I share the views expressed in the writings on private international law, that freedom of choice of the national system of substantive law guaranteed by Article 3, paragraph 1 of the Rome Convention is in no way limited to laws related in any way with the relationship of the contract with a foreign element, which can be governed by the law of one of two or more countries.[92] Acting in accordance with the said provision of the Convention, the parties to the contract are allowed to choose any modern national system of substantive law in force in any country. When deciding on the choice of an appropriate system of substantive law the parties may be guided by any reasons such as, for example, knowledge of the functioning of a particular law, for example, UK law, German or French, or the widespread perception of the neutrality of a particular law, such as, for example, a system of law in force the Nordic countries. As a rule, however, the parties to the contract shall decide on the selection of a national system of substantive law which will apply to regulate the contract with a foreign element on the basis of the degree of knowledge of law, which the above system is made up of. Although Article 3, paragraph 1 of the Convention has no legal basis for the construction of this thesis, the literature on private international law adopted a rule that the decision of the parties to a contract should relate only to the current legal system.[93] This means that when the parties choose the law applicable they should be confined to indicating the current law in one country of the world, and then apply the choice of the legal system in such a way as will be permitted by amended acts chosen by the legal norms. The above restriction does not deprive the parties of powers to the choice of artificial rules or rules which are not in force or which never became law in any country. Various international organisations and institutions have ambitions to "codify" the various branches of law. These standards may be used by the parties to regulate the conditions of that agreement only to the extent specified by mandatory provisions of the applicable law in the country. Standards, not to the nature of law generally applicable to the status of self-regulation of obligations of the contract, in which there are foreign elements (self-regulating contracts). They are important and effective, and can therefore be used to regulate the contractual relations with a foreign element, provided that such regulations are not designed to support the sanctions of state power or are not inconsistent with the universally applicable rules.

Freedom of choice by the parties to a contract with a foreign element defined and guaranteed in Article 3, paragraph 1 of the Rome Convention firmly opposes to empower judicial authorities to apply the provisions of exerting any influence on the part of those legal relations to persuade them to take certain decisions or

[92] M. Bogdan, *Concise Introduction to EU Private...*, p. 122.

[93] Ibid.

make changes to earlier decision on selecting an appropriate national system of substantive law.[94]

Article 3, paragraph 1 sentence 3 of the Convention provides the parties with a foreign element with the full freedom of choice of law for the entire contract or only part of it. The provision in question regulated one of the most important legal institutions of private international law – the power of the parties in employment relationships to split the contract into "parts" and adjust the individual components of such a contract according to different national legislation. *Dépeçage*, splitting or severability, meaning the division of each institution of obligations entered into a contract in which there are foreign elements into parts, and then regulating isolated parts according to laws of different national substantive law systems, has a long tradition in private international law. However, no internal rules of private international law regulate the freedom of the parties in contractual relations to make the splitting of contractual relationship to the same degree as seen in Article 3, paragraph 1, third sentence of the Rome Convention. In the literature on private international law there were views expressed that every contractual obligation should be governed entirely by the appropriate provisions laid down by the national system of substantive law.[95] The above sentiment is expressed with a view to preventing the exclusion of mandatory protective legislation. In the labour relations with a foreign component these concerns are understandable, because, although basic, established on the basis of international standards, the canons of protection of labour and social rights, the national laws of individual countries can work to varying degrees and protect the fundamental and social rights of workers. Therefore it is possible to create on the basis of compilations of various institutions of labour law regulated by the existing labour laws of the selected member states, an artificial system of substantive labour law, in which the protective measures taken by the legislators of countries will be replaced by the provisions requiring fewer demands for employers in matters concerning the protection of labour and social rights. M. Giuliano and P. Lagarde try to discredit this assertion. They cite Article 7, paragraph 1 of the Convention,[96] which empowers the authorities of the State in whose territory the site is located at work, which shows the work of employees engaged under contracts of employment with an international element to the granting of mandatory provisions of national labour law status of the standards required, which may enforce their use in cases where they are chosen by the parties as the relevant provisions of one foreign or several foreign systems of substantive law and do not

[94] M. Giuliano, P. Lagarde, *Report of the Convention...*, p. 13.

[95] P.M. North, J. Fawcett, *Chesire and North's Private International Law*, London–Dublin–Edinburgh 1992, p. 476; A. Kozakiewicz, *Industrial Relations in the Rome Convention on the Law Applicable to Contractual Obligations*, "Private Law Quarterly" 2004, s. 4, Vol. XIII, No. 4, pp. 1036–1037.

[96] M. Giuliano, P. Lagarde, *Report of the Convention...*, p. 13.

guarantee workers the legal protection comparable to what is assured by *lex loci laboris*. This argument, however, has little value. By giving obligatory labour law provisions a mandatory status, forcing their application by the parties and the judiciary in solving employment disputes, is subject to several conditions, such as the decision of state authorities to grant certain national labour law status of the standards required and retaining a close relationship between the employment agreement (with an international element) and the national employment law in force in the country of work. When making a decision on the choice about the mandatory rules of a foreign legal system, the relevant authority is obliged to take into account the nature and purpose of regulation and the possible legal consequences of the use or non-compliance of these provisions (Article 7, paragraph 1). This last fact makes it necessary to consider the possibility of not applying to the work agreement the standards required by the foreign country by the parties to the agreement and the administrative authorities, supervising compliance with labour laws by employers and the judicial authorities exercising jurisdiction in matters of employment law in the event of disputes initiated by the parties to these legal relations. Article 7, paragraph 1 of the Convention uses the impersonal wording: "In applying the law of a country under this Convention, effect may be given to the mandatory rules of the law of another country..." Departing from the indication of a person authorized by the Rome Convention for the granting of the mandatory rules of substantive law the status of necessity, the international legislature has left ample room for maneuver to lawyers involved in the interpretation of the conflict rules contained in the rules of private international law. Significantly, the relatively sparse literature shows a lack of opinion about who is entitled to classify local regulations, which are mandatory within the workplace, considered as necessary, their use mandatory. Application of labour laws are dealt with by the employer, by the state labour inspection authorities, by the trade unions (subject to the granted power by the legislature) and the judicial authorities exercising jurisdiction in contentious cases. All of these entities could then be considered qualified to assess whether the place chosen by the foreign labour law should not apply the *lex loci laboris*. Such an interpretation of Article 7, paragraph 1 of the Rome Convention would be in contradiction with the principle laid down in the third sentence of Article 3, paragraph 1 of the Convention. According to the expressed wording of the provision, the contractual relations with a foreign element are guaranteed the right to "make the right choice for the entire contract or only part of it." According to M. Giuliano and P. Lagarde, a forum court adjudicating in a case concerning a contract involving a foreign element, which was subjected by the parties only partly to foreign law regulations, will not have reason to conclude that the selected standard should be applied in matters relating to those parts of the contract

which were not stipulated by the parties.[97] The position of the authors of the report – commentary to the Rome Convention is not in direct view of the freedom of parties in matters relating to the distribution contracts into parts and the use of different parts according to different national rules of substantive law. Indicating that some, giving a clear distinction between parts of an employment contract with a foreign element, which are subject to labour laws of the country X, can only be interpreted as an indication that the parties to this agreement have decided its decision not to choose a national system of substantive work in matters relating to the regulation of other components of this agreement. In this situation, the application of the provision is Article 4, paragraph 1 of the Rome Convention. The contractual parts of contracts to which the rules chosen by the parties do not apply shall be governed by the laws of that country with which the contract is most closely connected. The provisions of the Rome Convention rules allow the conglomeration of standards selected by the parties and determined by the determinants listed in the regulations. There is no reason to believe that the analysed rules of the Rome Convention are contrary to a symbiosis of the substantive rules derived by the parties from the various legal systems of different countries. *Dépeçage* can be used without restriction by the parties to the contractual relationship with a foreign element. Professional literature emphasises the functional advantages of "splitting/parting" the contracts and subjecting them to the regulations of separate national systems of substantive law when the contract in which there are foreign elements consists of separate parts, each of which could be a separate entity.[98] This hypothesis may not apply in individual employment relationships. An employment contract that is based on the structure of mutual benefits deriving from the Roman rule to determine the content of the *ut des* mutual and equivalent obligations of employer and employee. In return for a fixed salary, the employee agrees to carry out work of a certain type. Often, however, contracts are supplemented by additional clauses that may have a separate legal status agreement regulated by labour law. Non-competition agreements during or after termination of employment, a contract of material liability for the property entrusted to the employee by the employer, a contract satisfying the specific needs of the employee, for example in matters relating to health, professional qualifications or completion of general education, to meet housing needs of the employee and his immediate family are those agreements, which, depending on arrangements made by the parties to the labour relations involving a foreign element, may take the legal form of a separate clause in the contract of employment or other agreement. Subjecting each of the clauses contained in an employment contract under separate substantive provisions of labour law, can be used in practice, therefore, each of these clauses can function as a separate agree-

[97] Ibid.

[98] M. Bogdan, *Concise Introduction to EU Private...*, p. 123.

ment. One must remember to separate the formal requirements that the different national systems of substantive labour law may apply to employment contracts and separate from this agreement to non-competition agreements, to material liability for the property entrusted to the employee contracts, and taking extra health insurance, and to cover the costs of training. Polish labour laws require that some of these agreements be concluded in writing, otherwise be deemed void. Such a requirement was formulated in the Labour Code provisions concerning non-competition agreement (Article 101^3 of the Labour Code) and the Agreement on material responsibility for the assets entrusted with the obligation to reimburse the employee or reimbursement (Article 125 of the Labour Code). These above-mentioned requirements of the contract of employment with an international element, such clauses have been introduced and may not be exempt. An employment contract made orally will be considered valid, but if it includes in it the non-competition clauses, and the material responsibility for entrusted property, the contract shall not acquire legal force if it is subject to a state law, which – like Poland – makes the validity of such contracts dependent on being made in writing. So depending on what system of national labour law is chosen by the parties, the same contract of employment or some of its components, entered into by the parties by way of clauses, may be considered invalid as not complying with the formal requirements laid down in the selected legal system. It should be noted that the interpretation of the grammar of Article 3, paragraph 1, third sentence of the Rome Convention allows the parties to make use of *dépeçage* of all the elements of the employment contract, not just those parts which gave legal status of the autonomous clauses, due to their ability to self-existence in legal actions as a source regulated by the substantive law of the work of individual states. In the literature on private international law attention is drawn to the right parties to contractual relations with a foreign element to make the choice of different national systems of substantive law to govern the various legal problems of contracts under which these legal relationships are created. An example of *dépeçage*: the chosen system of substantive law of country A to regulate the substantive legal validity of contracts, laws of country B defining the rules for the interpretation of the provisions of that agreement, and the provisions of country C used to determine the legal consequences of the failure on the part of legal obligations set out in the signed contract.[99] In my opinion, you cannot stop at sharing a part of contracts involving foreign element for regulating only those legal problems related to the substantive legal validity, interpretation and legal consequences of failure of the parties agreement. The example presented by M. Bogdan as an example of *dépeçage*, in reality does not mean the agreement is divided into "prime factors" and in isolating the agreement's constituent elements, and subjecting each of these components to the substantive

[99] Ibid.

law of different countries. In the case of an employment contract governed by the provisions of the Polish labour law are required to determine the five components of the employment contract: the type, location, time, time of commencement and pay for work corresponding to the type of concerted work (Article 29, paragraph 1 of the Labour Code). Each of these elements may be regarded by labour law and enforced in different countries. In addition, other labour laws can be chosen by the parties to employment relationships to form and content of the legal regulation, the powers and duties of the parties concerned, and property liability, limitation of the employment relationship and other institutions of individual labour law. Unlimited freedom of contracting parties assured by the third sentence of Article 3, paragraph 1 of the Rome Convention is then in full choice of a separate legal system work for each of the components of a contract of employment and each individual labour law institution. The structure of the individual employment relationship is limited to how the contract was entered into, the amendment and termination of the legal relationships according to labour law. Labour laws also shape the content of the individual employment relationship. They regulate the content of the rights and obligations of the legal relationship. They determine the scope and principles of liability for the breach of the obligations regulated by labour law. Within the limits prescribed by the individual labour law liability of the employment relationship in which there are foreign elements may provide that each component of the employment contract, and any institution of the individual labour law may be governed by separate national rules of substantive labour law. A characteristic feature of the principle of free choice of the legal labour system for the whole of the contract or its individual parts is guaranteed in the provision of Article 3, paragraph 1, third sentence of the Rome Convention, with full legal pluralism of selecting the national system of labour law for the formation of the individual components of a contractual relationship.

The provision of Article 3 of the Rome Convention does not indicate the time frame with which the contract of employment with an international element should choose the appropriate national system or national labour law. There is a lack of rules within the Convention that are analysed and expressed in the literature on private international law, concerning that when an employment relationship with an international element is entered into, the rule should require parties to choose the applicable law when making a contract.[100] This criticism is not apparent from the finding stated at the outset of Article 3, paragraph 2 of the Rome Convention, that "the parties may at any time agree that the contract shall be governed by other than that which the contract was previously appropriate on the basis of the earlier choice of law made in accordance with this Article or under other provisions of this Convention." This may be concluded, in my opin-

[100] Ibid.

ion, that the choice of the appropriate system or systems of national employment law of obligations of the parties to a contract involving a foreign element may be made at any time, regardless of whether the relationship of obligations that bind them are regulated by rules or previously selected provisions set out under one of the determinants specified in the provisions of the Rome Convention. Analysing the reasoning of M. Bogdan, it is possible to conclude that formulated in Article 3, paragraph 2 of the Convention the freedom to make changes to previously agreed national system of substantive law may be amended by the parties to contractual relationship. In order to institute changes, it is necessary to pre-select or identify an appropriate system of law which is subject to change. The hypothesis formulated by M. Bogdan is based on a legitimate determination of a time sequence between the original and the next selection. A weak point in Bogdan's legal argument lies solely in finding that the initial choice should be made at the time of an agreement. In my opinion, neither Article 3, paragraph 1, nor any other provision of the Rome Convention prohibit the parties to choose before, during or after entering a contractual relationship. As the only accurate statement that can be considered, the choice of a national system of substantive law should be made in connection with the intended establishment of a contract in which the foreign element will occur. Parties intending to conclude such an agreement are fully aware that the foreign elements will be forced to use the provisions of the Rome Convention applied to solve the conflict of law. The parties may before entering the agreement, agree on choosing a national system of substantive law. Whether this agreement on the choice of law will be implemented will be determined only by the fact of the contract entered into. The agreement on choice of law can also be concluded after the contract has been entered into. No provision of the Rome Convention, including Article 3, paragraph 1, defines the relationship between the agreement on the selection of law and the contract, which comes under the national system of substantive law specified in that agreement. Article 3, paragraph 1, *in fine*, decides that a change in the agreement on the definition of the relevant national legislation made after the contract has been entered into, cannot affect the validity of that agreement because of its form within the limits of Article 9 of the Rome Convention. The change of this agreement may not violate the rights of third parties. According to M. Giuliano and P. Lagarde, these restrictions on freedom of the parties contractual relations in matters relating to the selection of a new national system of substantive law applicable to regulate the content of contracts involving an international element are justified in preserving legal certainty. Reusing the conflict rules laid down in the Rome Convention cannot constitute grounds for doubt in any contractual relationship, both parties and third persons in matters relating to the validity of the commitments entered into, and their preservation.[101] To protect these val-

[101] M. Giuliano, P. Lagarde, *Report of the Convention...*, p. 14.

ues it should be considered whether the contractual relationship with a foreign element may choose to change the law if the parties find that the contract, according to the selected provisions of the contract, is vitiated by defects and cannot constitute the legal basis for the emergence of contractual relationship. The above-cited Article 3, paragraph 2 of the Rome Convention applies to a situation in which an important element of a contract involving a foreign element under the national new system of substantive law is assessed as not fulfilling the formal requirements. It also refers to the case of an amendment agreement on the choice of substantive law of the national system, which leads to a loss of rights by third parties or expectation or acquired under that contract and is recognised by the previously chosen national system of substantive law as valid and effective. This legal problem concerns the possibility of amendments made in order to be able to choose the national law system for a defected agreement. This therefore refers to the possibility of healing the contract. Speaking positively about the possibility of refurbishing the agreement, one should consider whether the adaptation by selecting the applicable law to regulate the legal relationships established under a contract concluded with the participation of the foreign element is affected *futurum* or *ex tunc*. There is no doubt that the agreement concluded in accordance with the commitment by the laws that apply to it have legal effect from the moment when it occurred. However, this statement should be modified in relation to contracts involving an international element to be assessed in terms of their substantive formal and legal validity, only after the settlement of a conflict of substantive law. Thus, in such agreements, it is clear that they have legal repercussions from the date on which the relationship of obligations having arisen under such agreements, are regulated by the law chosen by the parties or designated by means of determinants provided in the rules of private international law. The Rome Convention and the internal rules of private international law do not authorise or prohibit the Member States to determine the starting point of the application of national rules of substantive law to the contractual relations under or subject to legal regulation of these provisions. Substantive provisions of national law shall come into force on the date chosen by the legislature. From this day the law shall apply to contractual relations previously regulated by the applicable rules of substantive law and to the agreements that will be entered into. The basic principle *lex retro non agit* applies to contracts involving an international element due to the will of the parties or due to the application of factors used to regulate conflicts of substantive law subjected to the provisions of any other national system of substantive law. A contract, in which there are foreign elements seen as flawed by the parties or indicated by the conflict of law rules of country X, becomes legally valid in the event of its submission by the parties to the provisions of country Y, provided that the new rules govern differently from the previous condition to the validity of the contract. This shall be made possible not from the date the contract is entered into, but from the date of submission

of the contract for evaluation of a new national system of substantive law. The question of whether the contract is null and void can be cured retroactively (*ex tunc*) using another choice of a national system of substantive law, by which it is assessed, should be answered in the negative.

Parties to a contractual relationship with a foreign element, which have to choose the substantive law may not be aware that, in light of the chosen law, that agreement that has been entered into is faulty. The parties' ignorance to this fact can be caused by insufficient knowledge of the rules and practices of the application by the judicial authorities in the country in which these provisions are universally applicable. In the event of such an agreement between the parties to the dispute, they may agree that it will be resolved according to rules of substantive law which apply in the forum country. Consent to submit to the evaluation of the *lex fori* may be expressed through implied activities. If a dispute arises in a contract regulated by the provisions of country X, and a party files a claim to the forum court in country Y (making its claim according to the substantive laws in force in that country), assuming that it is in the party's best interests to subject a contract to a system of substantive law that is most familiar to the judiciary, and the defendant in response to the claim enters the dispute on the merits of the case, regarding the allegations and arguments based on the rules of substantive law in force in country Y and does not raise the issue of inappropriate jurisdiction, there is reason to believe that the parties have amended the choice of substantive law, on which they want to settle the contested case. In private international law literature it is expressed that the above proceedings of the parties may in certain circumstances be imputed to make arrangements to submit a contractual relationship with an international element to the provisions of different national systems of substantive law.[102] The author ruled out a similar assessment of the will of the parties in the case when the court deciding in the forum country, on its own initiative, applies the substantive law in force in the forum country to the for a contract regulated by foreign law provisions. I agree with the above claim, although I would raise some questions that may arise from the attitudes of both parties in civil proceedings. The situation is most clear when both parties have consistently argued that the issue should be decided on the basis of selected foreign substantive law provisions deemed appropriate. This clarity does not interfere with the fact, when one party or both parties realising that the judicial authority shall evaluate the contract on the basis of foreign substantive law provisions not chosen by the parties, but *lex fori* "as a precautionary procedure," enter into polemics, citing provisions that they believe do not apply in the case. However, if both parties agreeing to the convention imposed by the court, their behaviour can be seen – depending on the circumstances of the case – as a new, implied action, choosing the appropriate substantive law that applies in a forum country. However – in my

[102] M. Bogdan, *Concise Introduction to EU Private...*, pp. 123–124.

opinion – neither in the first case in which there is no doubt to be a case concerning a change of national substantive law provisions that are applicable to the contractual relationship between the parties with an international element, nor in the second case, when the circumstances depend on the actual opinion, whether the parties have a choice of law, no legal grounds to apply the new rules of substantive law in force in another country, even if these are the *lex fori*, due to the previously presented obstacle in applying the choice of law retrospectively.

The provision of Article 3, paragraph 3 of the Rome Convention applies to cases in which all factual elements of the contractual relationship when making the decision on the choice of law are located in one country. In assessing this situation, on first impression there would be grounds to conclude that the agreement entered into, in which all parties and components are located in one country, does not have the characteristics of a contract in which there are foreign elements and therefore cannot be classified as a contract to which you can apply the conflict rules laid down in the Rome Convention. Under the conditions of provisions of the Rome Convention, it shall apply in the event of a conflict of substantive law within one country, i.e. when all components of the agreement (primarily time and place of performance of the obligation – place of work) are determinanted to the system of law of one country. However, even in this case foreign element may occur in the contract (like citizenship, residence, location of the headquarters), to justify the submission of this agreement by the competent national regulatory system for the substantive law chosen by the parties or designated by the determinants established in the Rome Convention. As an argument confirming the above theory, the literature on international law lists the rights of the parties to choose the court in cases in which the exclusive domestic jurisdiction is not reserved for the exercise of judicial courts in the country. Titles II–IV of Part III of the Polish Code of Civil Procedure do not refer to matters arising under the contract, among other matters, in which the Polish courts have exclusive jurisdiction guaranteed. Article 1105, paragraph 1 of the CCP expressly provides that in the obligations of the contract, business entities may agree in writing to exclude the jurisdiction of Polish courts to foreign courts, if such a change of court is effective under the laws of the country whose courts are to replace the Polish justice system. The right of the parties to choose the court is looked at closer in the last chapter of this volume.

At this point I wish to present the argument put forward by M. Bogdan, who writes that the conclusion of the submission of disputes arising from the contractual relationship does not make the contract subject to the jurisdiction of national courts of the international agreement.[103] Enriching this arguments it should be added that the choice of a foreign court cannot be regarded as subjecting the dispute to a court of international law. The court chosen by the parties to the con-

[103] Ibid., p. 124.

tract retains the status of a national court, albeit one operating abroad, and therefore is considered foreign. According to M. Bogdan, guaranteed by Article 3, paragraph 1 of the Convention on the freedom of the parties contractual relations with a foreign element, the provision does not follow the rules of party autonomy guaranteed by private international law, but is only an expression of freedom of contract formulated by the national substantive law.[104] These position is particularly visible in cases where there are contracts with no foreign elements. Freedom of parties to contracts is limited in this case to the choice of the national system of substantive law that governs the contractual obligations in the country. By contrast, the existence of the contract with one or more foreign elements is such that the relationship is a natural bond with the legal provisions of the applicable substantive law to regulate the contractual obligations in two or more countries. Parties to this relationship therefore benefit from the right to choose a national system of substantive law, since the said freedom is an inherent component of freedom of contract. The presented interpretation of the origins and legal considerations of freedom of choice of law to regulate contractual relations, in which there are foreign elements would make sense if it was presented in a monograph devoted to discussion on the internal system of private international law. Polish Act of November 12, 1965 – Private International Law is a good example to illustrate this critical argument against the concept of unilateral rights of the parties according to the contractual relations guaranteed by the national substantive law including the freedom of contract. The earlier presented Article 32 of the Act of November 12, 1965 allows the parties to labour relations to make a limited choice of law in the event of a conflict of national systems of substantive labour law. Selection is limited only to those foreign labour laws, which are directly related to the foreign elements present in the work contract. Due to the limited nature of the foreign elements in the employment contract, this choice allows you to submit a contractual relationship with the participation of foreign elements into the assessment of the national substantive labour law system, which corresponds to the nationality, place of residence of the individual parties to an employment relationship, the location of the employer or the place of work performed. Adoption of the internal provisions of private international law rules for the limited right to choose the national system of law in the event of a conflict undermines the argument presented in the literature on private international law concerning the domestic legislation of the substantive source of law by the parties to resolve a conflict of substantive law of their choice. Article 3, paragraph 1 of the Rome Convention provides parties in a contract to an unlimited choice of the national system of substantive law which, in view of the legal relationship of the parties should govern their obligations. In my opinion the principle established in Article 3, paragraph 1 of full freedom of the parties to contractual rela-

[104] Ibid.

tions has its legal basis in both the rules of private international law and the freedom of parties to negotiate and enter into contractual obligations. Conflict rules laid down in the Rome Convention do not apply to obligations which do not arise out of the contract. Only after the contract has been entered into may the parties choose the national system of substantive law. Entering into an agreement resulting in the establishment of obligations is a necessary condition to exercise the right to choose the applicable substantive law of the national system. Objectively, however, this source of power is the provision of Article 3, paragraph 1 of the Rome Convention, the standard adopted in order to enable the parties to contractual relations with a foreign element resolving conflict of law. This interpretation is consistent with the rule, according to a national system of rules of substantive law chosen by the parties contractual relationship are applicable irrespective of whether they constitute a relatively standard force, unilaterally mandatory or obligatory. The above distinction is important because mandatory rules chosen by the parties to contractual relations must be regarded as mandatory, provided that these do not conflict with mandatory provisions, which are obligatory in another country with which the contract has a close connection. The Rome Convention does not define the rules used for resolving conflicts of the mandatory rules of substantive law chosen by the parties to the standards necessary – regulations which execute the application of its use in a country with which the situation has a close relationship. One may conclude from Article 7, paragraph 1 of the Rome Convention that in the event of a conflict of laws chosen by the parties to a contractual relationship with the necessary standards, or mandatory rules in a country with which the situation has a close relationship, the latter shall apply before the selected provisions by the parties. The principle of unrestricted choice of a national system of substantive law as expressed in the rules of private international law has been revised by the limited choice of law rule, as formulated in the previously existing internal rules of private international law. Making use of the mandatory rules in a country with which the factual case involving a contract has a close relationship, the contractual relationship may take action to circumvent the mandatory provisions of the Member States of the European Union by using a less demanding mandatory provision of a third country with which the case has a close relationship. The European Union has 48 hour weekly working time limits, and 35 hours weekly recreation standards supplemented by 11 hours of rest during the day. These provisions are mandatory standards. They apply to the European Union Member States. Using the full freedom of selection of the relevant national substantive labour law system, the parties to the contract, which has a close relationship with the labour laws of three member states of the European Union – the country of the employee's nationality and where the employee resides, the country where the employer's headquarters are situated, choose as appropriate for regulating the employment contract the provisions of the substantive labour law of the country where the workplace is located. The rules governing

daily and weekly working time limits, to the detriment of workers exceeds the relevant standards applicable in the Member States of the European Union. As a rule, as formulated in Article 7, paragraph 1 of the Rome Convention it is clear that less favourable to workers, mandatory labour law of a third country that is more favourable to workers can replace the mandatory rules of the European employment law and in accordance with their national laws work in two Member States whose provisions are in such close connection as with the third country in which the workplace is located. The above argument is being solved by the authors of private international law who are attempting to solve its contradiction through grammatical interpretation. Article 3, paragraph 3 made the necessary standards dependent upon the mandatory use of the location of the actual contract with a foreign element in the time of choice of a national system of law in one and the same country. In the above example, an employment contract with a foreign element is determinanted to the labour laws of two Member States of the European Union. Locating the places of work in a country outside the European Union, enters into this agreement an additional, third, foreign element. It should be considered, whether mandatory provisions of the third country to EU standards and the mandatory provisions of two EU member states have priority due to the adjustment referred to in Article 7, paragraph 1 of the Rome Convention. M. Bogdan, using the technique of grammatical interpretation of Article 3, paragraph 3 of the Convention believes that a collision of substantive standards relating to a contract with a foreign element, which is regulated by the same or similar rules of substantive law of each of the two Member States of the Union may be dissolved in benefit of mandatory provisions of a third State which is not part of the European Union, where some components of the facts, for example in the case of a contract of employment, place of work will be located in a third country.[105] Thus, higher standards of protection of labour rights and social legislation introduced to European labour law will be replaced on the basis of Article 7, paragraph 1 of the Rome Convention, of mandatory rules in a third country, even if these provisions are less favourable for workers. According to the cited author, this disadvantage for automatic adjustment of workers caused by application of the standards required can be avoided by treating the relevant substantive law of the Member States of the European Union as a single system of law, the authorities of the Member States are obliged by virtue of membership in the European Union to adapt substantive national laws to international standards shaped by the EU directives.[106] I have reservations about this proposal. In matters governed by labour law directives by the Community institutions aimed at using the "open method of coordination" to implement the national rules on employment in Member States of the Union is not identical but comparable standards for the

[105] Ibid., pp. 124–125.
[106] Ibid., p. 125.

protection of workers' rights and welfare. The Member States continue to apply national labour law systems, which, despite the harmonization of EU institutions show differences in the regulation of certain institutions of labour law.[107] An incomparable range of regulatory matters in the field of labour law at a national and transnational level in the European Union makes the proposal put forward by M. Bogdan unreal. In my opinion, the legal fiction cannot be used in private international law, which claims that the 27 national systems of substantive labour law should be treated as a single system of regional international organizations of the European Union. There is no obstacle, however, to European Union law to limit the parties' freedom to choose the relevant provisions in force in member countries. The earlier discussed provision Article 20 of the Convention, giving priority to Community law, provides that this Convention does not affect the application of the contractual obligations on specific issues that are or will be contained in the legislation of the European Communities or in acts issued in the Member States under the responsibility of harmonization with the standards laid down in European law. In the judgement handed down in Ingmar v. Eaton Leonard Technologies, the European Court of Justice agreed to limit the freedom of parties in a contractual relationship.[108] It ruled that the mandatory provisions of the Directive No. 86/653 of December 18, 1986 on the coordination of national laws of Member States regulating the activity of the self-service self-employed as sales representatives[109] should be respected not only by the Member States, the administrative authorities of those countries, as well as all entities and persons engaged in economic and service sectors in those countries. This finding also applies to the contracting parties who enter into an agreement to submit such agreements by the law in force in a country outside the European Union. This ruling was cited by M. Bogdan in his book. The author, with whom I fully agree, stated that the European Court of Justice was not authorised at the date of the judgement of Ingmar to interpret the provisions of the Rome Convention, and that the issued verdict is consistent with Article 20 of the Convention.[110] The competence of the Court of Justice to interpret the Rome Convention, has been granted by the Protocols, the first and second, agreed by the parties concerned being the Member States of the European Communities on December 19, 1988. On this day, eight Member States of the European Union ratified the Rome Convention. Authorities of those countries were required to comply with the principles formulated in Article 20 of the Rome Convention of the primacy of Com-

[107] As an example, a statutory body may assist in the termination of employment contracts in the Member States of the European Union. Cf. Termination of Employment Relationships: *Legal Situation in the Member States of the European Union, European Commission – DG for Employment, Social Affairs and Equal Opportunities*, EU Brussels 2006.

[108] C-381/98, 2000 ECR I-9305.

[109] OJ 1986 L.382, p. 17.

[110] M. Bogdan, *Concise Introduction to EU Private...*, p. 125, footnote 31.

munity law on the conflict rules governing conflicts of norms of substantive law. Therefore there was a lack of legal grounds for the application of the laws required of third countries with which agreements entered into by the parties obliged to comply with European law and national substantive laws in force in the Member States of the European Communities in the factual content of the case demonstrating a close relationship with the law of a third country.

According to the authors of the report-commentary to the Rome Convention, Article 3 paragraph 3 was introduced to the Convention on the basis of a compromise between the advocates of a limited choice of national systems of substantive law in the event of a conflict of material and between the supporters of full freedom of choice.[111] The provision serves as a sort of "safety valve." It can be applied in exceptional cases, such as the deliberate choice of a particular system of substantive law because of lower than average standards for the safeguarding of one of the parties contractual relationship. This argument has particular weight in contractual relationships, such as consumer contracts and individual employment contracts due to separate settlement of a conflict of substantive law that apply to these contracts because of the particular, enhanced protection of the "weaker" side of these relations.

§ 2. Law in the absence of choice

In the event of failure by the parties to a contractual relationship to choose a national system of substantive law to regulate contracts involving a foreign element, the provision of the Rome Convention Article 4, paragraph 1 states the applicable law. In literature on private international law, it is stressed that such cases of failure to choose are relatively frequent.[112] The reasons for this as provided by the authors are as follows: ignorance in matters of conflict of substantive law, ignorance of the rules for applying the law applicable in contracts involving an international element, the reluctance to negotiate on the choice of a national system of substantive law because of concerns that negotiations in this case could have a negative impact on negotiations on matters relating to the basic contract.[113]

The rules of private international law applicable in the Member States of the European Economic Community are generally not governed by the principles for resolving conflict of law. I attempted to demonstrate in Part 1 of Volume 2 of the book the above matter has been left by the state and judiciary to the doctrine of private international law. The case of Belgium, France, and Germany indi-

[111] M. Giuliano, P. Lagarde, *Report of the Convention...*, pp. 14–15.

[112] R. Plender, M. Wilderspin, *The European Contracts Convention – The Rome Convention and the Choice of Law for Contract*, London 2001, p. 109 et seq., A. Kassis, *Le neuveu droit européen de contrats internationaux*, Paris 2006, p. 285 et seq.

[113] M. Bogdan, *Concise Introduction to EU Private...*, p. 126.

cates that the courts of any disputed matters arising under the contract, in which there were foreign elements, strive to establish a hypothetical willingness of the parties. Based on such findings the courts drew the conclusion that there was an expressed intention of the parties to submit to the substantive contract law in force in the country.[114] The German judiciary and private international law doctrine has sought the hypothetical consent of the parties (*hypothetischer-Parteiwille*), which is based on facts or circumstances that can be verified.[115] Jurisprudence in the UK was of the view that if the parties do not express a clear desire to have the relationship succumb to the national rules of substantive law applicable to the contract, the provisions of the legal system, which remains with the contract for the "closest and most real connection" prevails.[116] Slight exceptions to this rule were evident in the Italian Maritime Code provisions, which, in the case of a conflict of national substantive labour law, the employment contract with a foreign element comes under the law of the country under whose flag the ship is sailed, or the country where the vessel was registered. Outside Italy, the Benelux countries in Article 13 contained in the 1969 Benelux Treaty decided to solve the conflict of substantive laws problem by selecting the national system of law, which was most related to the contract.[117]

Legal certainty demanded the adoption of uniform rules for deciding on the choice of law in case of conflict of norms of substantive law of two or more national systems, which could be used to regulate contractual relations with a foreign element in those cases where the parties of the relationship have not waived their right to choose the applicable law. The deciding determinant in indicating the appropriate legal system adopted in Article 4, paragraph 1 of the Rome Convention is so far unspecified, that it guarantees the court freedom in resolving disputes arising from the contract issues involving an international element. It is limited by legal presumptions formulated by the provisions of Article 4, paragraphs 2–5 of the Rome Convention.[118] Prior to the analysis of presumptions laid down in Article 4, paragraph 2 in connection with paragraph 5 of this Convention, the construction of the *dépeçage* referred to earlier, is also possible if the parties to the contract do not have to choose the law. In such cases where the various parts of the contract exhibit an equally intense "closest relationship" with the substantive law of two or more countries, part of the contract, which can be separated

[114] H. Battifol, P. Lagarde, *Droit international privé*, Vol. 2, Paris 1974–1976, p. 236 et seq.

[115] G. Kegel, *Internationales Privatrecht*, München 1964, p. 257 et seq.

[116] See: decision relied on by M. Giuliano, P. Lagarde, *Report of the Convention...*, p. 42, footnote 36.

[117] Ibid., p. 16.

[118] A. Kozakiewicz, *Industrial Relations...*, p. 1038 writes that "As a rule, the principles contained in Article 6 paragraph 2 of the Convention are just allegations, and these general rules do not apply where the circumstances indicate that the contractual relationship is more closely associated with another country."

from the rest of this agreement, demonstrating a closer relationship with the law of another state, may be granted an exception to be governed by the provisions in force in that country (Article 4, paragraph 1 *in fine*). "Part of the agreement" listed in that provision should be distinct in nature from other parts of the contract. Separability can be understood as that part of the contract, which meets the requirements regulated in Article 4, paragraph 1 of the Convention obtaining the status of a separate agreement. Such was the nature of the contract clauses entered into the contract of employment for non-competition agreement, and on material responsibility for entrusted property agreements. Contracts bearing the autonomous clauses that can be treated as a separate agreement is an exception to the generally accepted practice, therefore, the intention of the legislature must be upheld that any part of the agreement could be considered as a separate contract. In such a case when this separate part is submitted to therefore separate provisions, these parts cannot enter into conflict with the other provisions of this contract.[119] The proposal to divide the contract into parts is consistent with the provision of Article 3, paragraph 1 of the Rome Convention and the *dépeçage* concept. According to the Convention parties are free to separate the contract into parts by deciding that each of the separate parts will be governed by separate regulations of different Member States. The only difference in the contract, which I see between the provisions of Article 3, paragraph 1 and Article 4, paragraph 1 of the Rome Convention, is expressed in the attitude of the European legislator to the possibility of separating a contract of obligations. According to the provision of Article 3, paragraph 1 *dépeçage* is treated as a rule. By contrast, Article 4, paragraph 1 of this Convention shall be construed as a distribution agreement to have an exception to the rule of contract law across the country indicated by using the determinants specified in that provision. Provision of Article 4, paragraph 1 of the Convention gives no indication of how the authorities would apply this standard to determine the law most closely associated with the contract to the law of a specific country. Had this provision not been completed by the standards containing a directive enabling them to identify the basis of this relationship between contracts involving a foreign element and the provisions of national law which, because of appearing in a contract with the foreign element in conflict with the standards of other national legal system may be considered that the collisions of standards of the substantive law of the Rome Convention are governed by the same method, used by the British courts, which require that between the provisions of applicable law and contracts there were the closest and most real relationships. In Article 4, paragraph 2 of the Convention presumptions were formed – with reservations under Article 4, paragraph 5 of the Convention – to be careful of contracts most closely connected with the law of the state, according to which the party is resident requiring that party to meet the characteristic per-

[119] M. Bogdan, *Concise Introduction to EU Private...*, p. 126.

formance of that agreement. If this obligation rests with the company, association or legal person, an indicator used by Article 4, paragraph 2 of this Convention is the location of the head office of one of these entities. In such cases where a contract has been entered into by an entity or business party, obligated to fulfil the characteristic performance, Article 4, paragraph 2 of the Convention requires to be aware that such an agreement is most closely connected with the law of the country in which is located the principal place of business of the party responsible for the implementation of the characteristic performance. Where, in accordance with the provisions of the contract for specific performance is to be fulfilled by another company, Article 4, paragraph 2 of the Rome Convention takes the position that the contract is most closely connected with the country in which that company is located. The presented presumptions, indicating the closest relationships within the meaning of the legislature between the place of residence, the seat of the principal place of business and location of businesses required to fulfil the characteristic performance under the particular agreement, facilitates the parties and dispute settlement bodies under that agreement to use the provisions of a particular national systems of substantive law that meets the requirements laid down in the conflict of law standards without having to make an individual assessment (individualising method), which would take the form of analysis of various factors indicating the existence of associations or their lack of agreement with one of two or more competing countries. Presumptions of law laid down in the Article 4, paragraphs 2–4 of the Convention, relieve the parties and the court of the obligation to make such an analysis.

A decisive determinant for the selection of the national system of substantive law specified using one of the allegations as listed in Article 4, paragraph 5 of the Rome Convention, is the closest relationship entered into with the party on whose duty it is to fulfil the specific performance. The concept of characteristic performance of a regulated contract of obligations, in which there are foreign elements is used in the Swiss private international law.[120] However, for many authors dealing with private international law, the concept is strange, because the doctrine of the law considers that a contract involving a foreign element should be governed by national legislation of the country in which the obligations under this agreement are being implemented.[121] This approach is an important innovation in the private international law and the authors of the report – commentary to the Rome Convention are aware of this. They write that the grounds on which the concept of "characteristic performance" is based, are not entirely unknown to some experts. This commentary, however, is not endorsed by any footnote. The authors are trying to make their own assumptions of this legal structure. The concept of "characteristic performance" is associated with a more general idea that a more

[120] See: F. Vischer, *Internationales Vertragsrecht*, Bern 1962, p. 89 et seq.
[121] M. Bogdan, *Concise Introduction to EU Private...*, p. 127.

valid role should be allocated to the function of the agreement and how it fulfils that function in the economic and social life of the country. In their view, the concept of "characteristic performance" combines a contract of obligations and the legal relationships created on the basis of the social and economic environment. According to M. Giuliano and P. Lagarde, the agreement and the relationship of obligations are part of that environment.[122] Since the report's authors did not develop the argument, it is difficult to know what assumptions are being put forth when attempting to analyse the characteristic performance of the various types of contract obligations. The same authors of the report admit that the concept of characteristic performance does not provide major difficulties in analysing obligations arising from unilateral acts. However, the Rome Convention ("Rome I") is governed by the principle of resolving conflicts arising out of the substantive rules of contractual obligations. In contracts usually based on the principle of equivalence of benefits in response to one of the parties is the payment in cash for operations already performed, services performed, and tangible or intangible goods produced. The principle adopted in the law is the obligation to pay remuneration for activities that the report's authors regard as the "essence" (centre of gravity) of the socio-economic functions performed by the specified contract of obligations. M. Giuliano and P. Lagarde, with effect emphasise that the remuneration paid in exchange for the execution of the provision stipulated in the contract cannot be any point of reference for identifying the characteristic features of the obligations. Indeed remuneration is paid in all cases of various obligations performed. This means that the basis for determining the characteristic performance can only be specified in the contract by the obligations of either party *in rem*. This eliminates the possibility of using determinants as defined in Article 4 of the Convention to such agreements, when both parties are required to carry out on their behalf certain services or benefits of a particular type. Each of the performances made for the other party under the contract has a definite monetary value. It is taken into account when making the settlement agreement between the parties. However, none of the parties to such an agreement are required to make cash payments to the other party for services rendered or goods supplied. Barter trade, involving the supply of goods of a specified value in exchange for another commodity which has a similar value, used in contracts in which there are foreign elements could not be governed by the conflict rules laid down in Article 4 of the Convention because of the difficulty in establishing which single party bears the obligation of characteristic performance. Since the parties to such an agreement do not use currency in trading, exchanging instead goods and/or services that are usually treated by their trading partners as the core of the socio-economic function, to solve conflict rules

[122] The concept of characteristic performance essentially determinants the contract to the social and economic environment of which it will form a part. M. Giuliano, P. Lagarde, *Report of the Convention...*, p. 17.

of substantive law it would be appropriate to use other determinants than those listed in Article 4, paragraphs 1 and 2 of the Rome Convention. The contract has a close relationship to the law of both countries, and the presumption set out in Article 4, paragraph 2 of the Convention cannot be used to establish which relationship is the "closest" because each party is required to meet the characteristic performance. Indeed, none of the parties is required to pay in cash for the performance carried out by the other party of the contract in which there are foreign elements. A lack of possibilities to make use of the presumptions laid down by the international legislature in Article 4, paragraph 2 of the Rome Convention, obliges the contracting parties and the courts to determine which of the parties of the contract has a stronger relationship with the law of one of the two countries. Arguments presented are not establishing the value of the determinant listed in Article 4 of the Convention. Presumption laid down in Article 4, paragraph 2 of the Convention need not be strictly applied. The provision of Article 4, paragraph 5 of the Rome Convention relieved the entities responsible for resolving disputes from applying Article 4, paragraph 2 of the Convention if the characteristic of the obligation to provide a regulated agreement cannot be determined or where as a whole it is made obvious that the contract is more closely connected to another country. The arguments presented above apply to agreements, where each party is required to render services or goods for the other party, and also in part to pay remuneration for services and delivered goods. Article 4, paragraph 2 of the Rome Convention does not in practice apply to contracts concluded within Member States that are not expressed at all or partially regulated in cash.

An employment contract, in which there are foreign elements always defines the employer's obligation in cash, in the form of remuneration for work performed by the employee. For this reason characteristic performance may occur in the obligation entailed in the contract of employment the employee has entered into. Specific features of the employment relationship, distinguishing the work provided under the contract of employment, working or professional activities involving the provision of certain services is subordinated to personal performance of a particular type of work as agreed to in the contract of employment for employers and at the risk of the employer, and under his direction at the time frame set by the employer. From the above definition that the characteristic feature of the obligations specified in the contract of employment, in which there are foreign elements, the worker is required to perform work personally for the employer and under his direction, in a place designated by the employer and within the time frame set by the employer. The most characteristic features of the obligations of a regulated contract of employment is the worker's obligation to carry out work as instructed. If Article 7, paragraphs 1 and 2 of the Rome Convention was applicable to labour relations, a critical determinant to identify the relevant national regime of substantive labour law in the event of a conflict of this branch of law would be the usual residence of the employee. Depending on

whether the employee performs his work at the place of residence or whether he regularly travels between the town in which the employee resides in and the place he works in, the appropriate labour law, which regulates the employment contract, is the law of the place of residence or place of work. In obligatory labour relations involving a foreign element there could never be the application of the presumption of a company, association or legal person pointing to the head office of these entities, because those institutions in the employment relationship may occur only as an employer. The employer, on the other hand, in accordance with the concept of Article 4, paragraph 2 of the Convention of fulfilling the characteristic performance of any obligation, which could be recognised as meeting the performance, does not fulfil it. Individual labour law provisions require the employer to pay wages to the employee for work done. Other obligations imposed on employers by the national legislature, in principle, cannot be regarded as a tangible benefit of having the nature of donations to the value defined benefit assets. I write "in principle," because the employer may be required by the national legislature to satisfy the social needs of employees. Such an obligation is often held by employers, subject to their assets for social purposes.[123] There is no duty on the employer to facilitate staff in raising their professional skills. In the latter case, the legal basis for the employer's obligations and an obligation corresponding to the employee's entitlements to certain monetary benefits and in kind constitutes the agreement to supplement the general education or vocational training, the improvement of professional qualifications. In exchange for relieving the employee by the employer from performing certain duties can be the application of a set working time, providing relief and training leave or unpaid leave, or to pay the costs of training and reimbursement of expenses related to participation in training sessions. This is an agreement which is separate from the contract of employment. In addition, the employer is governed by the Agreement and shall pay an employee or compensate in the form of payment. For this reason, they do not meet the requirements to be considered to provide specific provision within the meaning of Article 4, paragraph 2 of the Rome Convention.

Another presumption set out in Article 4, paragraph 2 of this Convention does not apply to employment contracts. It refers to an agreement concluded in the framework of a professional or business party. Such an agreement may not include an employee, but only the person providing services in the ordinary course of business or employer. Thus, the indication on the basis of the presumption of law appropriate to the location of main undertaking or another undertaking in which the above agreement is concluded may not within a labour relation. According to the authors of the report – commentary to the Convention, Article 4, paragraph 2 contains a provision allowing the directive specified, the general and vague concept of "characteristic performance." According to the cited authors, the application

[123] These obligations are, however, recognised by Article 94, point 8 of the Polish Labour Code.

of legal presumption in Article 4, paragraph 2 of the Convention considerably simplifies the techniques used by the rules of private international law to resolve a conflict of obligations. The above simplification – according to M. Giuliano and P. Lagarde – is not to use as a determinant the place the agreement was entered into, as a deciding factor in establishing the relevant relevant national substantive law system. The place of performance is also no longer a reference point for the rules of private international law to solve the conflict of law issues.[124] In light of Article 4 of the Convention on selecting the appropriate determinant, the deciding factor is the performance carried out for the particular obligation within the contract. Specific obligations in different ways define these obligations involving the fulfilment of the characteristic performance. Determining on which of the parties the above obligation rests allows to identify one of the three determinants listed in Article 4, paragraph 2 of this Convention as a decisive indication of the relevant national law. However, in labour relations presented above, the usefulness of the method of the emergence of the national system applicable substantive law is minimal. In the case of an employment contract is not necessary to take steps to establish the party, which has to meet the characteristic performance. Due to the widespread remuneration agreements the employer will never be the obligatory party as the employer is only responsible to pay the worker salaries to reflect the nature and quantity and quality of work done. This specificity of the distribution of responsibilities between the parties to contracts of employment that makes the three presumptions listed in Article 4, paragraph 2 of the Rome Convention, only one may apply to work relations with a foreign element. Another argument against the use of methods of solving conflicts of the substantive rules laid down in the provision of Article 4, paragraph 2 of this Convention is the lack of certainty whether using the first presumption mentioned in this provision shall indicate the substantive law applicable in the place where the employee lives or their place of work. Therefore, the drafters of the Rome Convention decided on a separate regulatory framework for conflicts of substantive labour law in Article 6.

§ 3. Determinants in matters regulated by individual employment law

Article 6 of the Rome Convention governs conflicts of norms of substantive labour law. A separate conflict of law regulation relating to labour relations is the justification of needing to ensure special protection of the worker as the "weaker party" in the relationship law. The Commission preparing the draft of the Rome Convention perceived a need for a separate regulation of the conflict rules used in international private law work to resolve conflicts in a contract of employment

[124] M. Giuliano, P. Lagarde, *Report of the Convention...*, p. 17.

with an international element. This necessity is caused by the different interests of the parties in employment relationships. The Commission sought to retain in employment relations the fundamental principle of freedom of parties to choose the national system of substantive law. It perceived the need to regulate this principle in a way that ensures the protection of the workers' entitlements. The Commission strived to create a privileged category of contractors in contractual relations.[125] It was aware that in addition to the employee, the "weaker parties" in contractual relations are consumers, as contractors concluded trade agreements with businesses and entities conducting commercial activities. The distinct nature of labour relations and trade relations hindered the uniform regulations on how to resolve a conflict of national systems of substantive law used to shape individual employment contracts and consumer contracts. The Commission had the task of adapting a separate regulation of a conflict of substantive labour law to the general principle of freedom of choice of law and a separate regulation adopted with a view to resolving a conflict of commercial law in contracts entered into for the purpose of receiving goods or services by individuals for payments rendered, i.e. consumers who cannot be considered to be related to professional activity or to businesses receiving such goods and services and contracts entered into for financing such activities. These agreements have been named in Article 5, paragraph 1 of the Rome Convention as consumer contracts.[126] These requirements led to changes in the editorial and structural conflict of law rules used to resolve conflicts between contracts of employment with an international element. In the first version of the draft law rules of the Rome Convention in the field of international labour law are contained in Article 5. In another, the final version of the draft law rules relating to labour relations are exclusive and regulated by a separate provision. This is currently Article 6 of the Rome Convention. Lawyers involved in private international law work are not unanimous in the interpretation of Article 6, paragraph 1 of this Convention. Some believe that Article 3, paragraph 1 of the Convention limits the principle of freedom of parties to individual contracts of employment with an international element to choose the applicable national substantive law system.[127] Others are of the opinion that this freedom has been preserved and, in the case of not choosing an appropriate system of substantive law Article 6, paragraph 2, which reproduces the structure used in Article 4, paragraph 2 of this Convention and introduces a presumption of law that allows switching point determining the appropriate national system of substantive labour law in case of failure to be chosen

[125] Ibid., p. 22.

[126] On conflict of laws regulating the trading of these contracts written by, among others: D. Lasok, P.A. Stone, *Conflicts of Laws in the European Community*, Abingdon 1987, pp. 380 et seq.; A. Kassis, *Le nouveau droit...*, p. 334 et seq.; R. Plender, M. Wilderspin, *The European Contracts Convention...*, p. 137 et seq.; S. Klauer, *Das europäische Kollisionrecht zwischen der Römer Verbraucherverträge EVU und EG-Richtlinien*, Tübingen 2002.

[127] M. Giuliano, P. Lagarde, *Report of the Convention...*, p. 22.

by the individual employment contract.[128] In this dispute it is difficult to favour one party's position over the other because none of them invoke the arguments to support their own stance. According to the report prepared by M. Giuliano and P. Lagarde, Article 6, paragraph 1 of the Convention was introduced in order to limit the freedom of parties to individual contracts of employment with an international element to choose the applicable substantive national labour law system that could be applied to regulate the content of this contract and would be applied by courts recognising the contested case of claims arising from such a contract of employment.[129] Detailed analysis of the content provision, Article 6, paragraph 1 of this Convention does not provide any arguments to establish the relevance of the hypothesis presented above. In my opinion, Article 6, paragraph 1 affirms the principle of freedom of choice of law. It does establish however that the choice may not lead to depriving the employee of protection afforded by the mandatory provisions of labour law that would apply to individual employment contract with a foreign element on the basis of Article 6, paragraph 2 of the Rome Convention, where the parties to that agreement would not benefit from the right choice of a national system of substantive labour law. Article 6, paragraphs 1 and 2 of the Rome Convention is a conflict rule, which satisfies the functions in labour relations carried out by the provisions of Article 3, paragraph 1 and Article 7, paragraph 1 of the Convention, the provisions applicable to other contractual relations arising from contracts involving an international element. Provisions of a national system of substantive labour law that would apply to individual employment contract with an international element, to ensure stronger legal protection from the standards chosen by the parties shall have precedence over the laws freely chosen. Similarity of the conflict rules of substantive labour law used in Article 6, paragraph 1 to the legal mechanism formulated in Article 7, paragraph 1 of the Convention is expressed in the automatic replacement of the appropriate laws with necessary laws – rules evoking their own application. In the case of regulations formulated in Article 6, paragraph 1 of the Convention, laws selected by the parties to the individual employment contract, remain at the will of the international legislature, and therefore *ex lege* are replaced by the mandatory rules of the national system of labour law that applies in the country where the employee usually carries out work or in the country of the workplace employing the worker. According to the legal concept expressed in Article 7, paragraph 1 of this Convention, the standards deemed mandatory by the country's authorities, whose rules would be applied as appropriate to regulate the contractual relationship with an international element because of the close relationship with the facts of the case law of that country, may replace both the rules chosen by the parties and the provisions set out using a determinant listed in the private international law. By contrast, Article 6, para-

[128] M. Bogdan, *Concise Introduction to EU Private...*, pp. 132–133.
[129] M. Giuliano, P. Lagarde, *Report of the Convention...*, p. 22.

graph 1 of the Convention permits only the substitution of some of the mandatory laws, which would be indicated by one of the two determinants mentioned in Article 6, paragraph 2 of the Convention. This difference, as well as the use of the different basis for the comparison of the two provisions (Article 6, paragraph 2 indicated by the determinant, Article 7, paragraph 1, given the close connection with the case law of a specific country) mean that despite a similar function, Article 7 of the Convention shall also apply to labour relations with a foreign element. This is developed in the next section of this chapter.

Partially those lawyers claiming that to some extent the principle of freedom of choice of the proper national system of substantive law has been maintained are right. In the event of absence of choice in accordance with Article 3, paragraph 1 of the Rome Convention for the individual contracts of employment with an international element, the parties may apply the provisions of labour law of the country in which the employee usually carries out his work even when he has been posted to work in another country (Article 6, paragraph 2, point "a"), or the labour laws in force in the country where the workplace is employing the worker (Article 6, paragraph 2, point "b"). The last case applies in a situation where the employee does not work in the one and the same country. I write about "partially right" because unlike Article 4, paragraph 2 in Article 6, paragraph 2 of the Rome Convention does not draw any legal presumptions. There was no such need, for in Article 6, paragraph 1 of the Convention no general clauses were introduced or non-definable phrases, which would have to be supplemented by defining laws. An additional argument pointing to a lack of legal presumptions that prevent the establishment of treatment directives in Article 6, paragraph 2 of the Convention in a similar manner in which they were treated as presumption laid down in Article 4, paragraph 2 of this Convention is the wording contained in Article 6, paragraph 2, whereby the determinants established to indicate the relevant national regime of substantive labour law applies to individual contracts of employment with an international element "notwithstanding Article 4, in the absence of choice in accordance with Article 3." The Directives listed in Article 6, paragraph 2 of this Convention shall have the status of legal presumptions, because they can effectively be revoked on the basis of Article 6, paragraph 3 of the Convention. From all the circumstances of the case it is possible to conclude that the individual contract of employment with an international element is more closely connected with the labour law of another country than the one in which the employee usually carries out his work or the laws of the country in which the company is located employing that worker. I share the sentiment expressed by the authors of the report – commentary on the Rome Convention, the legal arrangements used in Article 6, paragraphs 1 and 2 are significantly different to the legal presumptions referred to in Article 4, paragraph 2 of this Convention.[130] In addition to the previously submitted comments it

[130] Ibid., p. 23.

should be noted that Article 6, paragraph 2 of the Rome Convention is applicable only in those cases where there is a need to resolve a conflict of substantive labour law in individual employment relations with an international element, which form the basis of employment of an employee in any country. These provisions do not apply to employment in areas, which are not regulated by labour law of any country, including, for example, drilling platforms located outside the continental shelf.

Article 6 of the Rome Convention applies only to individual employment contracts. Because the Rome Convention governs conflicts of the substantive rules that are applicable to the obligations arising from contractual relations, the question arises whether the scope of this provision, Article 6 of the Convention, differs from the scope of its other provisions that are used to resolve conflicts arising from contractual relations on the basis of other agreements than a contract. Unusual and different from the standards adopted by other provisions of the Rome Convention a solution applicable to individual contracts of employment creates certain difficulties for lawyers involved in the conflict rules laid down in the rules of private international labour law to resolve conflicts between individual provisions of labour law, used to indicate the relevant provisions of national substantive law governing individual employment relationships, not only for collisions of individual employment contracts. In the literature on private international labour law these differences are either ignored or overlooked. The report-commentary to the Rome Convention mentions this problem when applying the provision of Article 6, paragraph 2. M. Giuliano and P. Lagarde consider that the mandatory provisions, which would be appropriate if the individual work contracts involving an international element would not benefit from the rights guaranteed in Article 6, paragraph 1 of this Convention, are applicable not only to the matters covered by the contract of employment, but also issues of health and safety regulations governed by the national individual labour law of the Member States. It is clear that the doctrine of labour law does not allow you to place an equal sign between the terms "contract of employment" and "individual employment relationship." An employment relationship is a legal bond, which arises under the contract of employment. So they are not identical concepts. Therefore, M. Giuliano and P. Lagarde's arguments should be treated as erroneous, relating to provisions on collective bargaining agreements involving the social partners who have entered into such agreements above normatively.[131] With the exception of the United Kingdom, where collective agreements are not binding on employers in other EU Member States collective bargaining agreements are classified as sources of employment law. The above authors are of the opinion that certain provisions of collective bargaining agreements take on the form of mandatory laws, which means workers who are beneficiaries of these provisions cannot be denied legal protection afforded by theses provisions in the event the parties to the individual

[131] Ibid., p. 22.

contract of employment select the substantive labour law of other country than the one in which the employee usually carries out his work or the country of the employing company. Arguments presented are based on a misunderstanding of the views of proving specific mandatory provisions of labour law. These are usually the laws laid down by labour law set by national authorities, rather than the standards negotiated by the social partners. *Juris cogentis* characteristic feature is the inevitability of sanctions established by the state legislature. The provisions of collective bargaining agreements and other agreements negotiated by the social partners are not protected by such sanctions. They cannot therefore be regarded as mandatory standards. As a rule, the laws established by the country and standards negotiated by the social partners are dependent on the basis of employee benefits such as those protected by labour laws. The provisions of collective bargaining agreements and other collective agreements cannot be less favourable to employees than universally applicable labour laws established by the state (labour codes). This rule means that the social partners have the right to regulate in collective agreements and other normative powers regulated by the laws established by the state, provided that they deviate from generally applicable rules of employment law exclusively for the benefit of the employees. Any changes to the legal status of workers in minus shall be considered void, and do not have the desired legal consequences. The intention of the legislature is to generally replace the existing labour law. The principle of favouring the employee and the automatic application of rules of positive law of the state in place of the less favourable provisions for workers negotiated by the social partners, which are entered into collective bargaining agreements, shall be considered by Member States of the European Union, with few exceptions, as the basic canon of labour law. The exception to this rule, which I take as evidence of its functioning in the national systems of substantive labour law of the Member States of the European Union is found in Finland. Labour laws in this country are based on the standards established by the state and negotiated by the social partners. State labour law standards set high standards, which are not mandatory in nature. Labour laws issued by the state allow social partners to derogate from the standards established by competent authorities and to negotiate provisions less favourable to employees. A precondition for making use of this power is involved in the negotiations carried out by an entity representing the interests of employers of the nationwide employers' organisations. These two are thus assurances to maintain the current standards established under the provisions of generally binding state labour law. The first one refers only to the party of industrial relations, namely the employer. Finnish labour law deems valid and effective only those collective agreements and normative agreements replacing universally applicable standards established by the state, which are detrimental to the worker, only if a signatory to the collective agree-

ment or the normative agreement is a legislative organization of employers.[132] The second assurance stems from the very process of representing the interests of workers by trade unions, negotiating collective bargaining agreements or other normative agreements. The specificity of the Finnish labour law involves establishing the social partners as guarantors of the state labour standards. As long as the "state" labour law has been superseded by the provisions of collective agreements or regulatory agreements, employers are obliged to observe them. In this obligation there is a duty to proceed in accordance with the generally applicable rules of labour law, even though such laws are not formally mandatory in nature.

Returning to the main discussion on the legal consequences of Article 6 of the Convention one must look to the opinion expressed in the report by M. Giulano and P. Lagarde, in which the authors write that the change in legal terminology, using the wording "individual employment contracts" instead of the term "employment relationship," which appeared in the original version of this draft Convention does not matter, because the conflict rules of substantive law applies to all employment relationships regardless of whether the source of these relations are individual employment contracts.[133] I do not fully agree with this viewpoint.[134] The Rome Convention applies only to obligations based on agreements. In my opinion, you can accept the report's opinion, provided that it relates to contractual obligations which the parties have made whilst breaching the formal legal requirements prescribed by national labour law in matters relating to confirmation of an employment contract. As I mentioned before, an agreement in principle shall be deemed valid and effective despite the failure to meet the formal requirements. Therefore, the allegation contained in the report should be understood as referring to the validity and effectiveness of obligations in labour relations, which can arise only from individual job agreements. These objections to the application of conflict rules governed by the Convention to individual employment relationships, which should be established on the basis of a contract of employment, although part of the legal relations of such an agreement is not concluded. Writing about the usefulness of Article 6 of the Convention, despite the fact that the above provision clearly shows that it applies to individual contracts of employment, the report's authors had in mind primarily the so-called "real" relationships (*de facto* employment relationships).[135] The above definition is only a historical connotation. It was used for the determination of labour relations under which the legal relationship was entered into by allowing the employee to perform work.

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[132] Cf A.J. Suviranta, *Labour Law and Industrial Relations in Finland*, Helsinki, Deventer, Antwerp, London, Frankfurt, Boston, New York 1987, p. 52.

[133] M. Giuliano, P. Lagarde, *Report of the Convention...*, p. 22.

[134] But I do not agree with the position of A. Kozakiewicz, *Industrial Relations...*, p. 1032, who writes that the report of M. Giuliano and P. Lagarde "is not very helpful" in determining whether the analysed agreement may be treated as a contract of employment.

[135] M. Giuliano, P. Lagarde, *Report of the Convention...*, p. 22.

Allowing employers to involve workers in a particular part of the work team is today regarded as an implied act establishing a labour relationship agreement. Article 6 of the Rome Convention is thus applicable to solve the conflict of the substantive labour law relations in the case of obligatory work relationships for which its legal basis is the established individual contract of employment, regardless in what form this arrangement has been concluded.[136]

The authors of the report-commentary on the Rome Convention, express that Article 6 does not apply to collective bargaining agreements. They also consider that the submission of the individual employment contract with an international element to the provisions of labour law of another state may not exert influence on the powers of trade union organization representing the interests of workers employed under these contracts.[137] I share some of the views expressed. I agree with the authors of the report that the subject of legal regulation as defined in the Convention are only individual employment contracts involving a foreign element. These agreements may only be structured by the provisions of one of the two or more national labour law systems. Subjecting a contract to the chosen system of labour law of a specific country will automatically block the application of labour laws of another country to individual contracts of employment, subject to the regulations selected or identified whilst using the conflict rules of substantive labour law. Article 6 governs conflict laws between the national systems of substantive labour laws. Collective bargaining agreements are part of that selected or specified legal system when it comes to conflict of law issues. Thus, Article 6 of the Convention is applicable to collective bargaining agreements, because they are part of an appropriate system of substantive law, which since the time of selection or designation by the parties under one of the determinants mentioned in the private international labour law provisions, which apply to the whole system of

[136] See: B. Dutoit, *The Rome Convention on the Choice of Law for Contracts* [in:] B. Van Hoffman (ed.), *European Private International Law*, Nijmegen 1998, p. 55 et seq.; P. Nygh, *Autonomy in International Contracts*, Oxford, 1999, p. 150; A. Kozakiewicz, *Industrial Relations...*, p. 1032 et seq. There is no legal basis for the creation within private international labour law a separate, "autonomous" definition of an employment contract, because the conflict rules are applicable to labour relations. Although in the national labour law systems of Member States there are some, but not "huge" differences on matters relating to the definition of the employment contract, there is – in my opinion – no reason to take action in developing such a definition. The problem of determining the contract of employment can be solved in the same way in which the European employment law resolved the problem of defining the concept of a "worker." European labour law sees a worker as a person who is considered by the national labour laws of the Member States of the European Union as an employee. Considerations presented on contracts in the literature of private international law lead to the conclusion that an employment contract is a contract of commitment to be considered a contract of employment by the rules *lex fori, lex loci laboris* or *lex cause.* In this way, national systems of employment law are enforced in countries that are parties to the Rome Convention. Therefore, similarly as in the case of European labour law, for the purposes of solving conflict of law issues, national regulations should be used.

[137] M. Giuliano, P. Lagarde, *Report of the Convention...*, p. 22.

labour law, and therefore also to the collective bargaining agreements. The authors' theory in the report should be modified so that the provision of Article 6 of the Rome Convention applies to collective bargaining agreements, which are part of the national sources of substantive labour law at the time of the selection or designation of the legal system as appropriate to regulate the employment relationship with a foreign element. I strongly oppose the position of the authors of the report relating to collective agreements that are subject to regulatory labour laws in force in another country in terms of the competence of trade unions representing the interests of workers employed under individual contracts of employment with an international element to the employer that employs them, the other side of the contract. With laconic assertion it is stated in the report that "the circumstances of having an individual employment contract come under the provisions of foreign law has no impact on the competence of the trade union powers in collective agreements." I do not deny the employee entitlements, subjected to the provisions of labour law enforced in country A, to benefit from the protection and representation of trade union organisation regulated by the provisions of country B. However, such a trade union is required to represent and protect the employees' work and social rights, within the scope of labour law, which is applicable to the said employment contract involving a foreign element. This situation presents the provisions in force in country A. As I have already written, the above rule may have exceptions in situations referred to in the provisions of Article 6, paragraph 2 and Article 7, paragraph 1 of the Rome Convention. However, in matters governed by the provisions of collective labour law provisions of the Rome Convention ("Rome I") do not apply. From the date of January 11, 2009, the collision of these standards is regulated by the Regulation of the European Parliament and Council Regulation EC No. 864/2007 dated July 11, 2007, which were formulated in the conflict, *inter alia*, on matters relating to liability for unlawful industrial action effects. I write about this in Part IV of this volume. In other matters regulated by collective labour laws, conflicts of the substantive labour laws are governed by the internal rules of private international law of individual countries. In Poland it is the Law of Febryary 4th, 2011 – Private International Law.

The seperate regulation of conflicts of substantive labour law by the provisions of the Convention has been caused by the desire to protect the rights of workers employed under individual contracts of employment, in which there are foreign elements. The concept of protection of the "weaker" party in the legal relationship (workers – Article 6, and consumers – Article 5)[138] followed by an international legislature based on the assumption that in each case, that is, if you choose a specific national system of substantive labour law or any indication of an appropriate system of law by using the determinants specified in the rules of the Rome

[138] C.G.J. Morse, *Consumer Contracts, Employment Contracts and the Rome Convention*, "International and Comparative Law Quarterly" 1992, Vol. 41, p. 13.

Convention, the worker is protected by more favourable provisions of the country where the work is usually carried out or the country in which there is a place of business in which the employee was hired. The application of such methods to protect the interests of employees (workers' rights are protected by laws regulated by the provisions of the relevant national legal system), encourages lawyers dealing with private international labour law to bring about the hypothetical question whether the rules of private international labour law allows employees to choose the most advantageous system out of the three national labour law systems set out in Article 6, paragraph 2 of the Rome Convention. Granting consent to select the most advantageous labour law system for the workers from the several national labour laws in private international law literature, is coined as "pick[ing] cherries out of the cake."[139] The quoted expression is used to describe the practice of selecting the most favourable legislation for one ("weaker") party to the individual employment contract – the employee. This method is characterised by the accumulation of the most beneficial provisions to employees governed by labour laws in the national systems of substantive labour law, which may be applied under the conflict rules governed by the provisions of the Rome Convention. This method does not cause practical complications. Mandatory rules chosen by the parties of the national system of labour law as appropriate, less favourable than the mandatory provisions of the national system of employment law in force in the country in which the employee usually carries out his work or the country where the company employs the employee or the country where the labour contract law has a closer connection, will remain in the collision. Article 6 of the Rome Convention does not contain specific rules governing conflicts of mandatory rules. For this reason, mandatory standards will be subject to the same rules on conflict of laws, which apply to other provisions. There are no arguments supporting the hypothesis expressed in the literature on private international labour law that the overlapping of mandatory rules by two or more competing national substantive labour law systems will lead to the accumulation of these laws.[140] It is therefore an irrelevant hypothesis presented by M. Bogdan the accumulation of mandatory rules will lead to excessive legal protection, in excess of the standards of protection guaranteed by the rules of any national system of substantive labour law. In the opinion of Bogdan the cumulation of protection is a threat to the conflict rules, because it can be used as an argument for exclusion of individual employment contracts from the rules of private international labour law. The arguments presented above are entirely academic. International conflict laws, which include the analysed provisions of the Rome Convention are primarily based on the law of the parties to make a free choice of a national system of labour law. In legal terms, none of the parties to individual employment relationship benefit from greater

[139] M. Bogdan, *Concise Introduction to EU Private...*, p. 133.
[140] Ibid.

powers than those which the other party may have. It is therefore difficult to accept the reasoning based on the assumption that the worker, as a weaker party to the contract of employment with an international element, would be able to exert greater influence than the employer on the choice of a national system of labour law. It is a false idea to regard the possibility of accumulation, which forms the legal rights guaranteed by the multiplication of mandatory provisions. Fallacy of this argument illustrates an example relating to the minimum length of mandatory notice periods of the employment contract. If, according to a national system of employment law in the country A these periods are three months, and in country B they are one month, we cannot agree with the view according to which the aggregate of mandatory provisions of the labour force in both countries will lead to an extension to a four months minimum notice period. Writing about the accumulation of mandatory rules, which is a result of the coincidence of the most favourable provisions chosen out of the two national substantive law systems by the worker, a situation should be considered whereby the provisions considered as mandatory in country A do not have such a nature in country B and, in turn, rules mandatory in country B are not considered mandatory in country A. Thus, the aggregate of the mandatory provisions described in the literature on private international law coined as an accumulation is a term used to define the phenomenon of expanding catalogue of mandatory standards. Enrichment of this catalogue is not threatening and can endanger the existence of conflict laws. For these reasons, the critique of the legal solutions of Article 6 of the Rome Convention, I consider as baseless. I am critical, however, as to the determinant formulated in Article 6, paragraph 2 *in fine*. In light of this provision, as it appears from the circumstances as a whole, it may be decided that the individual contract of employment indicates a stronger relationship with another country than the one in which the employee usually carries out his work or, where the company employing the worker is located.[141] The introduction of the third determinant is not defined precisely, which can be used by the authorities applying the labour law for the replacement of one of two specific fittings mentioned in Article 6, paragraph 2 of the Convention and is not conducive to the legal certainty in international labour relations. The provision under consideration does not specify the type of relationship that should exist between the individual employment contract and the other country, than those mentioned in Article 6, paragraph 2, point "a" or point "b" of the Rome Convention. The opposition to an indefinite general clause, which should apply before specifically defined determinants requires the bodies applying the substantive conflict labour laws to consider the purpose of the use of

[141] An example is given in the literature which illustrates that the thesis is closely connected with the determinant of residence with the individual employment relationship with an international element when the parties to the contract reside in one country, and the employee daily commutes to the workplace located in another Member State. P. Kaye, *The New Private International Law of Contract of the European Community*, Aldershot 1993, p. 237.

several different, often conflicting national systems of substantive labour laws. The logical design of Article 6, paragraph 2 of this Convention obliges courts to apply in the absence of choice of national labour laws Article 6, paragraph 2, point "a" or "b." The court is exempt from this requirement, if according to its assessment of the circumstances as a whole that the contract is more closely connected with another country. In such a case, in the last sentence of this provision, the legislature requires the court to apply the international law of that other country. One can only speculate which relationship might be closer, the contract of employment relationship or the place of work or place of business location, where the worker is employed. Depending on the discretion of the court the national labour law systems of countries in which the work is carried out may prove to have stronger determinants between the laws of the home country of one of the parties to the individual employment contract, the place of residence of parties under the contract or the place of the employer headquarters, the place of carrying out legal actions or the place the employment contract was entered into. The above circumstances I mention by way of examples. I am aware that in Article 6, paragraph 2 of this Convention is used as an indicator in determining a replacement determinant listed under the letters "a" and "b" of the provision in no particular circumstances, but in its entirety. In Polish, the word "entirety" means "considered in the whole system" or "organized in a certain way as a whole." Thus, not individual components, but the group may show a closer connection with another country and thereby eliminate the determinants listed in Article 6, paragraph 2, point "a" and point "b" of this Convention. It should be noted that the above, not defined by the international legislature, considerations should apply only to contracts of employment. *A contrario*, the circumstances of the parties to the contract of employment should not be at all taken into account by the court assessing the nature and intensity of the dependency between the contract and other country than those mentioned in Article 6, paragraph 2, point "a" or point "b" of the Rome Convention. Amongst the factors mentioned, which are used by the rules of private international law to indicate the status of the employment contract, although it is not considered a component of the employment contract, may be taken into account in assessing the degree of the intensity of the decisive element in indicating the laws of another country other than those listed in Article 6, paragraph 2, point "a" or "b" of this Convention. The place the contract was entered into cannot be treated as a set of circumstances. It must be treated as one circumstance, which is not of the most importance. Furthermore, the place for an employment contract cannot be considered as part of the content of the employment relationship, but a place to work is generally classified by the national systems of substantive law necessary and essential (*essentialia negotii*) components of the employment contract. Arguments outlined above lead to the conclusion that the insufficiently clear regulation of the general clause, which applies in the event of a conflicts occurring between specific determinants mentioned in Article 6, paragraph 2, points

"a" and "b" and "the entirety of the circumstances" relating to individual employment contract, in which there are foreign elements. There are reasons to express doubts about the usefulness of this "super" determinant for the resolution of a conflict of substantive labour law.

§ 4. Mandatory rules

Article 7 of the Rome Convention defines two types of necessary standards – overriding mandatory rules. In Article 7, paragraph 1 of the Convention it is stated that national legislation can be granted the status of mandatory rules, when the authorities of a particular country with which the facts of the case governed by the individual contract, including the employment contract, have a close relationship. These are provisions by which the authorities of that country give mandatory rules the necessary character, making them effective in respect of all or specified contracts, which show a close relationship with the country concerned. Applying national mandatory provisions shall be at the level of decisions taken by the authorities of a particular Member State, which has close ties with the contract, in which there are foreign elements. Article 7, paragraph 1 of the Rome Convention is the conflict norm, which grants full rights associated with substantive decision-making to the transmission status to the mandatory provisions of applicable substantive law in force in the country. Depending on the decision of the authorities, this status may be granted to some or even all the rules governing the relationship of obligations involving a foreign element. At the international level there are no restrictions on the granting of such status. However, granting the mandatory standards a legal character, applying this to all the mandatory rules or a large part of them, has a significant impact on reducing opportunities for specific national systems of substantive law governing the relationship of obligations involving an international element, as part of those relationships will be less interested in locating the place of work under a contractual employment relationship subjected to national regulations of state labour laws in country B, which the authorities considered all the national labour law standards as necessary. The basic principle of mandatory rules is to apply these rules to the contractual relations subject to foreign law when in fact the contract is closely connected with the proper law of contract of another country.[142] For clarity, the matter should be stressed that this is not the Rome Convention, Article 7, paragraph 1 that states the national laws of the national system of substantive law issued by the country to regulate certain contractual relations are the mandatory provisions. Article 7, paragraph 1 of the Convention confers a carte blanche to the authorities of indi-

[142] D. Lasok, P.A. Stone, *Conflict of Laws…*, p. 372 et seq.; A. Kassis, *Le nouveau droit…*, p. 443 et seq.; R. Plender, M. Wilderspin, *The European Contract Convention…*, p. 183 et seq.

vidual states that have ratified the rules governing conflict of laws rules of substantive law applicable to obligatory relations to determine the extent of binding rules that are deemed mandatory provisions. In this provision were formulated in a general way the criteria for making that decision. Authorities of individual countries in deciding to grant the necessary nature of mandatory provisions apply to take into account the nature and purpose of those provisions and legal consequences of their use. The criteria set out in Article 7, paragraph 1 of the Rome Convention are not clear. However, they allow the possibility of becoming acquainted with the basic principles of national standards to give the legal nature of the standards required. Firstly, the directives formulated in this provision can conclude that there should be appropriate provisions, which were not considered mandatory standards by the national substantive law. Secondly, the authorities of a specific country may not give the status of necessary standards in the country recognised as mandatory, if universally applicable international standards do not consider the rules governing certain institutions of labour law or workers' fundamental rights protection as the mandatory standard. The rules of public international law operate according to the concept of workers' rights. These are the basic workers' rights and social rights protected by international labour and social security, which, because of protected rights (the right to work, the right to strike, the right to social security) are included within the category of fundamental human rights. They enjoy the same legal protection afforded by rules of public international law work. Thirdly, the category of necessary standards could be included in the national labour laws that protect the good of the highest order, such as for example: freedom of work and the associated protection of the life of the employment relationship, equal treatment in labour relations, dignity and fair wages, freedom of association of workers and their right to participate in collective actions, the right to social security benefits. The last factor that should be taken into account by the authorities of a Member State before taking a decision on the status of the selected standards considered as necessary, the most important national labour laws should consider the consequences of taking or not taking a decision on the identifying national mandatory rules as necessary and therefore being placed in the category of mandatory provisions. The decision to apply the mandatory provisions should be taken wisely. The specific nature of the necessary standards not only eliminates the relatively current provisions of the relevant national substantive law system, but also all chosen or identified as relevant mandatory provisions. Necessary standards must be assimilated to the rules "of another country with which the situation has a close relationship." Included in this category they may be classified as either national rules, which were in conflict with the rules chosen by the parties to contractual relationship, as well as those of a third country not listed in the standards of conflict of laws as rules of substantive law that the will of the international legislator should apply in the relations with contracts involving an international element. The only determinant to the decisive use

of mandatory provisions under the provisions of a third country, which take precedence over standards selected or identified by using determinants as defined in the Rome Convention is the close relationship of the case with the third country. It should be noted that Article 7, paragraph 1 of the Convention does not oblige the courts to evaluate according to the facts of the law of a third country. A relationship with the laws of other country than the one chosen by the parties or designated by the conflict rules does not have to be stronger than that which exists between the standards recognised by the parties or the provisions of the Rome Convention as appropriate for the regulation of a particular contractual relationship. Mandatory provisions must take precedence over other rules recognised by the competent national system of substantive law, even if their relationship with the facts is just as intense or less intense depending on the obligations determinanting the said contract. Article 7, paragraph 1 of the Rome Convention does not require judicial authorities to make comparisons between the facts and the rules of the selected national system of substantive law. It is a conflict rule of substantive law, granting the authorities a lot of flexibility in decision-making in matters relating to the findings and determining the relationship between the contract and the national substantive law system of any country. The use of standards required is dependent on the free decision of the court to settle a contested case against the contractual relationship with a foreign element. Although the application of those standards by the court, after their qualification for the category of necessary standards does not undergo any control, in Article 7, paragraph 2 of the Convention the special position given to the provisions of the *lex fori*, which, in relation to the specific facts at issue by a court adjudicating necessitate their use. In the report-commentary to the Rome Convention, Article 7, paragraph 2 is not given much attention to. It was noted only that some members of the Committee were interested in granting the law of the country whose courts have jurisdiction to hear contested cases occurring in the contracts involving a foreign element with the legal status of necessary standards. Comparing the disposition of Article 7, paragraph 1 and Article 7, paragraph 2 of the Rome Convention attention should be paid to the important differences that exist between them. The requirements set out in Article 7, paragraph 2 of the Convention are positioned below those set out in Article 7, paragraph 1. In the latter provision, the authorities of a Member State may confer the status of the necessary standards only to the mandatory requirements, while under Article 7, paragraph 2 of the Convention courts *fori* may be taken as necessary standards and regulations relative to the nature of the standards in force in the country where the dispute is recognised. According to the authors of the report-commentary to the Rome Convention, the difference between the compared provisions is qualitative. Provision of Article 7, paragraph 1 applies to matters relating to the creation of the necessary standards, and Article 7, paragraph 2 regulates the rules for applying

the *lex fori* are treated by law enforcement as the *loi d'application immediate*.[143] I believe that there are fundamental differences between the compared provisions of Article 7 of the Rome Convention on the sole ground that the necessary standards set out in paragraph 1 of that provision are mandatory and the standards set out in paragraph 2 are any standards, both as *jus cogens* and *jus dispositivi*. The difference between these two categories of legal norms stem from the sources which determine how they are to be used, either universally applicable rules of positive law by the state or a social partners' agreement or consent of the parties to individual contractual relations. Moreover, from the perspective of the courts of both types of legal norms, the courts did not indicate major differences between them. Any legal norms enforced in a Member State must be applied by judicial authorities. Article 7, paragraph 2 of the Rome Convention is thus the norm that specifically protects the interests of the State whose courts rule on disputed matters arising from contractual relations with a foreign element.

The particular nature of the legal regulations formulated by both of the provisions of Article 7 of the Convention, which is evident in the uncontrolled freedom granted to the national authorities by international legislators, to apply national substantive laws that are more important than that which follows the will of the parties in contractual relations or with the application of certain determinants described in the Rome Convention that makes the authorities of certain European Union member states (Ireland, Luxembourg, Germany, Portugal, UK benefit from the rights guaranteed in Article 22, paragraph 1 of the Rome Convention and reserved the right not to apply Article 7, paragraph 1 of this Convention.

§ 5. Scope of applicable law for employment contracts

Article 10 of the Rome Convention defines the limits of the substantive law governing the contract of obligations chosen by the parties to contractual relations with a foreign element or on the basis of designated determinants set out in the substantive law of conflict of laws laid down in the rules of private international law. The authors of the report-commentary to the Rome Convention write that the first draft version of the Convention does not contain provisions defining the scope of an appropriate system of substantive law. The indication of the limits of the applicable substantive law was limited to a brief statement that the national law chosen or identified as appropriate to regulate the contractual relationship with a foreign element is competent to regulate conditions of use and legal consequences of non-compliance or misuse. Since the first version of the draft rules govern conflicts of law in the legal relations arising from contractual

[143] F. Vischer, *The Antagonism between Legal Security and Search of Justice in the Field of Contract*, "Recueil de l'Académie de La Haye" 1974, Vol. 142, 974, p. 21 et seq.

and non-contractual obligations, and set out in this version of the draft provision of Article 11 of the Convention defined the scope of the law applicable to contractual obligations, and therefore the Committee also decided to define the scope of law applicable to contractual obligations.[144] The final draft of the Rome Convention governs only the conflicts of law standards resulting from the agreements. Removal of Article 11 from the final version of the draft in the early stage of legislative work did not cause marked changes in the content of Article 10, governing the scope of the law applicable to contractual obligations.

Article 10 of the Rome Convention consists of two regulatory bodies. Paragraph 1 of this provision, for example, lists the categories of cases which determine the extent of use by the parties and the authorities applying the law of the national substantive system of law in obligatory relations involving an international element. Paragraph 2 of Article 10 of the Convention formulates directives on how to carry out obligations specified in the agreements and the remedies that may be available to the creditor making claims of breach of contract against the debtor (obligated to carry out the performance). The catalogue of issues relating to indicate the scope of the applicable law is not closed off. It is demonstrated by the wording of the first sentence of Article 10, paragraph 1 of the Convention, in which the calculation of the five categories of cases to which the applicable law chosen or identified using the conflict of law rules governed by this Convention, uses the phrase "in particular." It means that the law applicable to contracts affected by the provisions of Article 3 – Article 6 and Article 12 of the Rome Convention applies to all issues concerning such an agreement. Above all, however, it applies to categories of cases for example listed in the directory set out in Article 10, paragraph 1, points "a" to "e." At the top of the list are the relevant provisions of national systems of substantive law, which are applied to regulate the contractual relations with a foreign element (point "a"). According to this provision, the law applicable to contracts involving a foreign element is relevant for the interpretation of this agreement. Various national systems of substantive law in many different ways set the priorities to use various techniques to the interpretation of contracts. In the case of differences of opinion of the contracting parties on matters relating to specific provisions of this agreement, the national system of substantive law designated as the authority to regulate the obligations set out in this contract and the handling of litigation, which occur against the background of the provisions of this contract, may be granted by the will of this crucial part of the the provision in question is set out in the contract by the initiative of the parties. In continental European countries the importance attached to the process of interpretation of the agreements is not only assigned to the interpretation of the rules of grammar (language) content of the contract, but also (and perhaps even primarily) to the intention of the contracting parties, the purpose

[144] M. Giuliano, P. Lagarde, *Report of the Convention...*, p. 39.

for which the contract was concluded, and – what is most important – functions that were contracted to carry out. In the UK and Ireland, more attention is paid to the interpretation of the wording of the contract.[145] These differences in attitudes of lawyers, encouraged by state and administrative authorities to supervise the compliance of contracting parties and the judiciary determining disputes arising between the parties as to the methods of interpretation of contracts, is important because of the widespread use of English in international trade. Parties to a contract involving a foreign element often use British, Irish or American legal terms, which makes it necessary to clarify the understanding between the parties and the importance of these terms and to determine the context in which they were used in the interpreted contract. Therefore, in the case of contracts involving a foreign element, it is first and foremost to determine what both parties seek to achieve in the agreement, written down in a foreign language to both or one of the parties. Therefore it is not only important to establish the meaning of the terms of the contract in the country where the contract was entered into in the official language of that country, but also a teleological interpretation should be taken into account by the judicial authorities in claims arising from the contract. Legal terms occurring in the official English language may not correspond with the findings made by the parties to the contractual relationship with a foreign element, nor do they correspond to the intentions and the arrangements the parties entered into. Parties to the contractual relationship, however, should be aware of the legal consequences of submitting the contract to the national substantive conflict laws. With the power of Article 10, paragraph 1, point "a" of the Convention on the consequences of the choice of an appropriate system of substantive law apply equally to the interpretation of the rules in force in that country, the provisions of which were identified as appropriate.

Applicable law chosen by the parties or referred to using the determinants provided in the standards of conflict of laws is applicable in cases involving performance of the obligations under the contract, in which there are foreign elements. Article 10, paragraph 2, point "b" of the Rome Convention has been given a reference to the benchmarks laid down in national legislation applicable substantive law. In no way should the rules contained in this provision be equated with that Article 10, paragraph 2 of the Convention on the implementation of obligations by parties to a contract involving a foreign element. National substantive laws indicated as appropriate, govern the diligence with which the parties should carry out their obligations. They govern the conditions relating to the place and time of implementation of obligations as part of the subject of that agreement. They require the parties to personally fulfil their obligations under the contract or determine the conditions under which both parties or one of the parties has the right to substitute a third person or other entity to carry out the obligation.

[145] See: M. Bogdan, *Concise Introduction to EU Private...*, p. 136.

Further they establish the rules for the payment of monetary benefits by the party liable to pay salaries and make other similar remuneration benefits in return for fulfilling the obligations specified in the concluded contract. In cases relating to individual labour law these requirements are established either in the standards of a national system of substantive labour or civil laws that apply as appropriate to work relationships. National rules may be general, in that the employee is obliged to faithfully and diligently perform work. In this case, national standards for the completion of this obligation are shaped by the judiciary. They may also establish positive patterns and negative patterns of employee behaviour in the process of fulfilling obligations under a contract of employment and individual labour law provisions that govern the employee's attitudes to their duties regulated by individual employment law as is desired by the legislator. In matters relating to the place and time of performance by the employee and their obligations under the contract of employment, national rules of substantive law of the Member States of the European Union authorise the parties to the employment relationship to determine in the contract of employment the time and place of work being carried out. Time and place of work are considered by the national laws of individual labour law as essential elements of a contract. The most characteristic feature of the employment relationship, used by lawyers dealing with employment law to distinguish between the work provided in the employment relationship from the work done within other legal relations, is manifested in the law of the employer to identify the employee, within the limits specified in the contract of employment, and the time and place of work. Another defining feature of the work performed under the contract prevents the use of employee benefits in the process of working with the assistance of other persons not employed by an employer with whom the employee has established an employment contract. I am introducing the above claim, since in the case of contracts concluded with a temporary employment agency a worker who remains employed with the agency is required to perform work for a third party to set out the employment relationship – the employer. During the performance of work, the employee is generally required to comply with the limits set by the nature of the work specified in the contract of employment entered into with the employer, according to the employer's instructions, on whose behalf the work is provided. The latter has the right to require the employee to benefit from the assistance of other persons not employed by a temporary employment agency. The terms and conditions of the contract, followed by an employee at work employed by the user employer, yet remaining in an employment relationship with a temporary employment agency, shall be governed by private economic laws, entered into by employers, with whom the employee has a relationship: the employer, a party to the contract of employment and the employee on whose behalf the work is done – the user employer.

The national laws govern individual employment law bases for determining the remuneration and the rules, procedures and the method of payment of

employees' salaries for work carried out, paid by their employers. Cases subjected to individual labour law, in the majority fall into the category of issues addressed in Article 10, paragraph 2 of the Rome Convention. However, the conditions for entitlement to receive remuneration for work are among the issues not directly related to the carrying out of the obligations by the employer, but rather on the obligations of employers placed by the legislature of the national obligation principle of equivalence in the process of determining remuneration for work. The amount of remuneration for work should be in direct relation to the type of work specified in the contract of employment, its quantity and quality and other objective indicators, such as, for example, responsibility for the employee by the employer to achieve the desired objective. It might seem that labour relations based on the employment contract, which the national laws of individual labour law is regarded not as a result of the agreement, but the welfare of the requirement outlined above, it remains in conflict with the basic principles of labour law. Modern employers require employees in managerial positions to accomplish their tasks and achieve the expected results. These attitudes of employers do not change the nature of the employment contract, which remains a contract of diligent actions. The duty of the worker hired for a managerial position is to undertake reasonable efforts to more or less fulfil the intentions of the employer.

National labour laws are applicable to the effects of total or partial non-performance of obligations under the contract of employment and the law of individual employment law, in which diligence was specified by the legislature of the national standards of workers in the labour relations. According to the authors of the report-commentary on the Rome Convention, some Committee members felt that the impact assessment of damage caused by the contractual relations does not fall within the scope of regulation of the conflict rules of substantive law, because it cannot be regarded as a legal issue, but is the real problem, which affects economic and social situation of individual states. Other members of the Committee were of the opinion that the methods of regulating the ways of assessing the consequences of improper performance or defaults, in particular, determining the amount of damage are regulated by national legislation. For this reason, there are grounds to enable this matter to be governed by the conflict rules of substantive law.[146] Article 10, paragraph 1, point "c" of the Rome Convention was formulated as a compromise between the standard positions of supporters and critics of regulation through choice of law rules of the legal consequences of failure or improper performance of obligations and determining compensation for injured persons and entities following the failure or improper fulfilment of the obligations to comply with contractual obligations in accordance with the standards laid down in national law. According to Article 10, paragraph 1 of this provision, point "c" the above effects, including the determination of damage shall be governed by the

[146] M. Giuliano, P. Lagarde, *Report of the Convention...*, p. 30.

provisions of the relevant national substantive law, or be left to the assessment of courts operating within the limits of the procedural rules. This provision governs only the substantive conflict rules used by the judicial authorities to assess the consequences of failure to comply with the obligations contained in agreements involving an international element. The basic formulation contained in this provision is not precise. Article 10, paragraph 1, point "c" applies to "the effects of total or partial default, including the assessment of damages." Since the quoted provision is a conflict standard, and therefore it contains no indication relating to damage assessment. This matter was left to the powers of the national legislature. The discourse on the conflict of law standards analysed in the book devoted to problems of private international labour law notes that the term "consequences of default" refers only to those consequences which have been identified in the national substantive laws. In these regulations there may be a set up of a flat-rate or a maximum rate of compensation for damage caused to the employee as a result of failure by the employer of the basic duty of care to protect the health or life of the employee (*lump sum*) or in the absence of due diligence of the worker in the employer's interests (the maximum compensation). Reservation made at the end of Article 10, paragraph 1, point "c" of the Convention concerning the role of the court hearing the cases of compensation for failure in whole or in part of the default specified in the contract, in which there are foreign elements is a twofold role. On the one hand it allows the courts in adjudicating such matters in the legal systems not regulated by state authorities to set rules and limits of liability for damages, on the other it authorises the courts closely related to the directives set out in regulations by the state to guard over compensation levels according to the provisions of the relevant national system of substantive law applied by the court in another state, where applicable procedural rules do not authorise the court to rule on the basis of the *lex fori* in favour of damages within the limits set in the appropriate law.

The controversy resulted in the idea of solving conflicts between national legislation in matters relating to the regulation of termination of obligations, limitations, loss of rights resulting from the passage of time (Article 10, paragraph 1, point "d") and the consequences of nullity of the contract (Article 10, paragraph 1, point "e"). Due to the differences between the national laws on matters relating to the jurisdiction of the substantive or procedural issues related to the aftermath of the passage of time on the existence or termination of the obligations established under the contract, national courts are not obliged to apply the rules chosen by the parties or by the designated determinants controlled by the conflict rules laid down by the Rome Convention. By contrast, substantial differences between the effects of nullity of the contract, cause according to some national legislation to reactivate the contractual relationship erroneously considered resolved and payment of compensation or to introduce only the obligation of compensation for breaches of causing negative consequences for the contract, meant that Article 22

of the Rome Convention had a right reserved for the national authorities, who had decided to ratify the Convention, not to use the determinants deciding on the proper indication of the national system of law in matters regulated in Article 10, paragraph 1, points "d" to "e."

The determinants introduced by Article 10, paragraph 2 of the Convention indicate the relevant provisions of the national system of substantive law applicable in matters relating to the way the implementation of obligations and resources enjoyed by the creditor, which may be taken in cases of non performance by the debtor. As the applicable law, the provision states the country in which there is a fulfilment of the obligation. In the social relations regulated by individual labour laws carrying out obligations are clearly defined in the rules defining the obligations of each party to a contract. An employee has a duty to faithfully and accurately perform the work, observe work discipline and observe the order established in the plant, and must look after the interests of the employer. The employer shall within the time limits laid down in the provisions of the applicable law pay an employee remuneration payable for the work carried out. Punctuality and attention to detail on both sides of the employment relationship in fulfilling the obligations imposed on it give some indication that apply to determine how to carry out obligations. Because of the far-reaching differences in national laws regulating individual labour law of employees on how to carry out worker obligations, Article 10, paragraph 2 of the Rome Convention requires the application in cases of conflict of laws rules of substantive law in force at the place of performance of the obligation. In labour relations these are the provisions in the place of work. *Lex loci laboris* determines the legal remedies that may be applicable to the parties inadequately carrying out obligations, as expressed in the provisions of substantive law. In matters of employment law the above conflict rule is crucial because of the different nature of sanctioning, secured only by sanctions of civil, administrative or criminal penalties. A situation in which the legal good is treated by the legislature as a national priority is also possible, as the legal good is doubly secured by the sanctions, civil and administrative law, and even criminal. These differences justify the indication of a proper system of substantive law of the country in which these sanctions are applied. Article 10, paragraph 2 of the Rome Convention makes directives addressed to the judiciary applying the law of the country in which there is the performance of obligations under a contract with a foreign element. Relatively mild words in the provision contained in Article 10, paragraph 2 of the Convention, is taken under consideration by the court, which may be treated as an indication of the nature of the presented regulation expired. This is how the provision was understood by the authors of the report-commentary to the Rome Convention.[147] In my opinion, the obligation could not be worded in any other way to make the obligation applicable in the country in

[147] Ibid., p. 31.

which obligations are governed by the substantive law. The use of legal sanctions is governed by procedural law. Thus, the Rome Convention, an international treaty on the standards governing conflicts of substantive law may not require the forum courts on the basis of the relevant, yet as a rule foreign provisions to apply sanctions imposed by the country in which the obligations are implemented. Therefore in the directive "the court shall take into account" is understood as an obligation to take into account the law of the country in which there is a commitment in the implementation of such limits in which it is consistent with the procedural law of the country where the court is applying foreign law. The above restriction does not apply to the forum court, handing down judgements according to the laws in force in the country in which the misfeasance of an obligation was carried out. This court must apply its own law. There is no need to apply the directive as laid down in Article 10, paragraph 2 of the Rome Convention.

Chapter 3

Converting the Rome Convention into Regulation No. 593/2008 ("Rome I")

Conventions are included within the category of sources of international law whose validity is clear from the authorities of Member States' obligations to comply with its provisions. The Rome Convention also has such character. Despite the fact that the European Union Member States are obligated to ratify and comply with the standards set out in the conflict of law Convention, neither the authorities of the Member States nor EU institutions have a legal obligation to apply the Convention. For this reason, the European Commission has taken action to transform the Rome Convention into the Regulation of the European Parliament and the Council of the European Communities. Passed on June 17, 2008 Regulation No. 593/2008 on the law applicable to contractual obligations ("Rome I") was preceded by consultations in the communities concerned to protect the interests of individuals, primarily consumers and issues of private international law – lawyers with university backgrounds and judges. The consultation was a report prepared by the Commission of the European Union on the conversion of the Rome Convention into a legal instrument of the European Communities.[148] Over the next eight months all stakeholders – individuals and institutions – had the opportunity to make observations on the changes necessary to transform the occasion of the Rome Convention for the Regulation of the European Parliament and the Council of the EC should be made in the process of preparing a primary source of private international law of the European Union. The Commission's intention was not only to give the rules of private international law character of universally binding norms in the European Union, but also to modernise the existing conflict of law rules applicable in contractual relations involving an international element. In preparing the report, called "Green Paper" the European Commission had not been determined whether to make changes to the legal nature of the rules governing conflicts of norms of substantive law. It was also not convinced of the need to modify the conflict rules contained in the Rome Convention. In fact, the EU

[148] Called "Green Paper," it was published on January 16, 2003. See: *Green Paper on the conversion of the Rome Convention of 1980 on the law applicable to contractual obligations into a Community instrument and its modernisation*, COM (2002), 654. See also: U. Magnus, P. Makowski, *The Green Paper on the Future Rome I Regulation – On The Road to Renewed European Private International Law of Contracts*, "Zeitschrift für vergleichende Rechtswissenschaft" 2004, Vol. 103, No. 2, p. 131 et seq.; A. Kozakiewicz, *Industrial Relations...*, p. 1043 et seq.

Commission in launching the publication of the report did not carry out general consultation, but a *sui generis* referendum, whose aim was to gather information and views on these two issues. The so-called Green Paper clearly stated that legal issues relating to the transformation of the Rome Convention into the Regulation and the modernisation of the conflict rules are not inevitable.[149] Positive opinion on the revision of the legal nature of the Rome Convention, to transform it into a regulation and to make its modernisation presented during the plenary session of the 405 days on January 28–29, 2004 The European Economic and Social Committee.[150] The Committee believes that the proposed amendment of the legal nature of private international law will contribute significantly to both the construction of a common market and building on the European continent a civil society and expanding and consolidating freedom, security and justice for the citizens and legally residing persons in EU Member States. The Committee appealed to a number of its earlier opinions, which drew attention to the difficulties associated with the use of conflict rules governed by the Rome Convention.[151] The Committee stressed the need for programs made during the session of the EC Council in Vienna in 1998 and in Tampere in 1999. It pointed out the advantages of the transformation of the Convention into a regulation presented in the opinions on the conversion of other conventions.[152] Changing the legal nature of the

[149] The EU Commission's intention was to "launch a wide-ranging consultation of interested parties of a number of legal questions concerning conversion and modernisation, formally declaring that it has neither taken a decision in respect of the necessary to modernise the Rome Convention nor in respect of this conversion into a Community instrument." In the prescribed period, until September 15, 2004, the European Commission received about 80 views on the transformation and modernisation of the Rome Convention. Employees of the Chair of Civil Law and Private International Law at the University of Silesia presented "Notes on the European Commission's Green Paper on the conversion of the Rome Convention." See: A. Kozakiewicz, *Industrial Relations...*, p. 1045.

[150] Opinion of the European Economic and Social Committee on the "Green Paper on the conversion of the Rome Convention of 1980 on the law applicable to contractual obligations into a Community instrument and its modernization," OJ of the EU, C 108/1 April 30, 2004.

[151] These were the opinions on the reform of the procedural rules and principles of judicial cooperation of EU Member States in civil matters: Proposal for a Council Directive on the service in the Member States of judicial and extrajudicial documents in civil and commercial matters, OJ C 368, December 20, 1999; Proposal for a Regulation on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ C 117, April 26, 2000, on the Report from the Commission on the implementation of Council Directive 93/13/EEC of April 05, 1993 on unfair terms in consumer contracts OJ C 116, April 20, 2001, Council Regulation on cooperation between the courts of the Member States in the taking of evidence in civil and commercial matters, OJ C 139, May 11, 2001; Proposal for Council Decision Establishing a European Judicial Network in civil and commercial matters, OJ C 139, May 11, 2001, Proposal for a Council Regulation creating a European Enforcement Order, OJ C 85, April 08, 2003; on the Green Paper on a European order for payment procedure and on measures to simplify and speed up small claims litigation, COM 2000 746 final, OJ C 220/2, September 16, 2003.

[152] OJ C 117, April 26, 2000, OJ C 241, October 07, 2000.

secondary Community laws, giving the characteristics of the Convention with its directly applicable standards should be considered a "significant progress" in the process of seeking to ensure the safe conduct of legal transactions within the European Union. Achieving this state of certainty is possible due to the powers of the Court of Justice, a body set up to ensure uniform application of European law by Member States authorities. In the legal opinion submitted to the European Commission, the European Economic and Social Committee drew attention to the arguments put forward in the evolution of the Brussels Convention in the EC Council Regulation No. 44/2001 of December 22, 2000 on jurisdiction and enforcement of judgements in civil and commercial matters ("Brussels I").[153]

The European Economic and Social Committee expressed the conviction that the conversion of the Rome Convention into the Regulation EC will contribute to the consolidation of the common market and will have a positive impact on economic and social relations, especially in matters regulated by labour law and commercial law, in the European Union. This will increase the security of legal relations and lead to the equal treatment of all participants in legal relationships involving foreign element, irrespective of their nationality, residence, office or place of conclusion or performance of a contract of commitment. Unification of the conflict rules in a single, common system of private international law of the European Union will increase legal certainty for parties involved in international trade agreements. It will also result that the parties to these relationships will be able to select in the event of a conflict of substantive law, national rules which are most associated with the legal relationship in which there are foreign elements. They will not be guided only by the benefits when choosing the law most suitable for them. Forum shopping will be limited.

The unification of private international law will contribute greatly to increasing the predictability of how a national system of substantive law is competent to regulate contracts involving a foreign element. According to the European Economic and Social Committee, the Rome Convention is based on several fundamental principles that should be preserved in a Regulation.

These are: free choice of the contractual relations with a foreign element of the national substantive law system, the right to use the authorities of the Member States with the necessary standards – the application of mandatory laws for the protection of public order; stabilisation of international trade law, unification of legal rules that address the conflicts occurring between national legislation (which may be applicable to contracts involving a foreign element), the protection of expectations and acquired rights, special protection of the interests of the "weaker" party to the contractual relations: consumers, policyholders and employees. In matters relating to regulating the conflict rules applicable to individual

[153] OJ L 12, January 16, 2001. Regulation was amended by Regulation EC No. 1791/2006, OJ L 363, December 20, 2006, p. 1.

labour relations, the Committee responded to questions raised in point 4.8.1 of the questionnaire developed by the European Commission and served by those participating in the referendum on the transformation and modernisation of the Rome Convention. The Commission's questionnaire on the modernisation of Article 6 of the Rome Convention has included questions relating to the settlement of a conflict of national substantive labour law in the case of posting workers by the employer established in another Member State and, therefore, sending personnel to work in another country. The place of employment located abroad is an element that in such cases makes all work contracts, entered into by the parties who are nationals of the one country, living permanently in that country, and employers from workplaces located in the same country in which the employees permanently reside employed, assume an international character.

The European Commission needs to reconcile the conflict rules of international standards of European labour law laid down in Directive 96/71/EC of December 16, 1996 on the posting of workers to work abroad in the provision of services.[154] In particular, the Commission was drawn to the respondents to answer the question whether the conclusion of the individual employment relationship, under which an employer posts a worker to work in another Member State, the new contract results in termination of the delegation and therefore requires the replacement of the conflict rules laid down by the provisions of Directive 96/71/EC of the Rome Convention, and actually prepared a regulation on the law applicable to contractual obligations, replacing the Convention.

The Commission was also interested in the issue of implementation by Member States of the provisions governing the employment relationships of workers posted by employers carrying out activity in the territory of another Member State. It was also interested in the matter of regulating the conflicts of national substantive labour law in labour relations in which workers were employed in international transport and were subject to compulsory registration in the transport records or located on platforms at sea.

The last question posed by the Committee put to the respondents concerned the role of collective work agreements in international labour relations and the relationship between national and international collective labour relations. The European Economic and Social Committee called for restricting the freedom of the individual parties to employment relationships involving an international element to the choice of a national system of substantive law. It emphasised that the rule adopted in Article 6, paragraph 1 of the Rome Convention, the principle according to which in the event of absence of choice by the parties to the proper employment of contract labour law system is the determinant used to allow the contract of employment with an international element be governed by the labour law of the country in which the employee usually carries out the work and should

[154] OJ L 018, January 21, 1997.

be part of a Regulation. This has been supplemented by the proposition that the regulation governing conflicts of norms of substantive labour law makes it clear that the *lex loci laboris* should also apply to individual employment relationships in which employees perform work temporarily abroad as part of the posting.

The Committee spoke against the definition in the regulation of temporary work. It suggested that the regulation be adapted to the provisions of Directive 96/71/EC. This means that in the adopted Directive and in the judicial term of temporary employment of an employee posting by an employer in another EU Member State should apply in cases of choice being made or when indicating the relevant national rules of substantive law in the event of a conflict of labour law. The Committee did not comment in a decisive fashion in favour of terms used in European social security law, according to which the posting of workers takes place in the event of a referral worker employed by an employer established in the country X to country Y in the work of up to 12 months, with the possibility of extension for a further 12 months. The provisions of Regulation 1408/71/EC of June 14, 1971 on the application of social security schemes to employed persons, earning an independent living for themselves and their families, changing residence within the Community, specify the period of the posting,[155] whose time has not been restricted in Directive 96/71/EC.

In the opinion of the European Economic and Social Committee presented to the European Committee, it listed the arguments against the use of this definition, a posted worker, and the introduction of the Regulation on the law applicable to contractual obligations. The EESC pointed to the many possibilities of resolving the posting of workers in terms of organisation of such postings, including the possibility of carrying out temporary work in a place other than indicated by the work agreement. The EESC came to the conclusion that accepting such a definition within the Regulation governing the substantive conflict of labour laws re-

[155] The provisions of Article 14, paragraph 1, points "a" and "b" exclude the application of the principles mentioned in Article 13, paragraph 2, point "a" that the Regulation, according to which "the person performing an economic activity in the territory of a Member State is governed by the legislation of that State, even if he resides in the territory of another Member State or if a company or an employer who employs him has its registered office or place of residence in the territory of another Member State," provided that the anticipated duration of work of that person does not exceed 12 months and that the person was not posted in the place of another person, whose posting time had elapsed. If the work is extended due to unforeseeable circumstances beyond the originally anticipated 12-month period, the provisions of the national system of social security law in force in the usual place of employment shall be used until the completion of the posting work, subject to the approval of the continuation of these provisions expressed by the competent authorities of the Member State in whose territory the insured worker is posted. The authorisation must be requested before the expiry of the initial period of 12 months. Consent cannot be granted for a period exceeding 12 consecutive months. A similar regulation is included in Article 12, paragraph 1 of Regulation No. 883/2004 of April 29, 2004 on the coordination of social security systems, Official Journal of the EU, L 166/1, April 30, 2004. Regulation No. 883/2004 extended the initial period of the posting to 24 months.

quire a clear and decisive definition of whether cases of posting of workers are *ex-ante* or *ex post*. Not wanting to resolve this dilemma, the Committee suggested that this problem be left to the courts to settle on whether individual employment relationships involving a foreign element of workers working in another country should be governed by the *lex loci* or the *lex loci laboris delegationis*. It asked only that the legal concept of delegation of the worker to work in another EU Member State does not oppose the employment of posted workers under a contract of employment by another employer, provided that the employer is a member of the group, consisting of the employer posting the employee. European labour laws do not contain a legal definition of posting an employee to work abroad to a particular Member State of the European Union. So far, the term "posting" was used in the European labour law to denote a situation in which an employer engaged in a trade or service in country X benefited from the freedom to provide services undertaking business activity in country Y. In order to provide services abroad the employer had the right to employ, according to the the time specified by the provisions of the European labour law in country Y, workers, who were previously employed by the said employer in country X. Directive 96/71/EC laid down the conditions of employment, which should comply with the minimum standards laid down by the authorities of country Y.[156] In the opinion of the European Economic and Social Committee the concept of delegation was expanded. This included cases in which an employer operating in country X enters into an agreement governed by private commercial law with a temporary referral to work for employer B, operating in country Y with workers previously employed in country X. Taking into account the relations governed by labour law the employer operating in country X may act as a temporary employment agency, which means that the employer B, operating in country Y will be performing for workers supplied by employer A as the user employer. In light of this concept, between employer B and the employees who perform work on the employer's behalf, there will be no legal relationship regulated according to the legal provisions of labour law. This situation is similar to the traditional notion of delegation in which the employer's workers, who perform a job *ad hoc* on their own benefit the employer or other entities designated by him.

The concept of an expanded posting is evident when employer A, carrying out business activity in country X provides an employee unpaid leave to take up

[156] Article 3, paragraph 1 of Directive 96/71, which defines the conditions of employment, obliges Member States' authorities to ensure that regardless of which national rules of substantive law applicable to the employment relationship, posted workers will have guaranteed conditions of work and employment no worse than those in the European Union Member State where the work is carried out, relating to: maximum work periods, minimum paid annual holiday leave, minimum wages, together with the rates of pay for overtime work, the conditions of hiring workers, the protection of health, safety and hygiene at work, protective measures concerning the employment of women during pregnancy or immediately after childbirth, children and young workers, equal treatment for men and women, and protection against discrimination in employment.

employment with employer B who operates in country Y. Depending on who took the initiative to take up temporary work for another employer (employer A, employer B or the employee), we have to deal with the case of direct or indirect posting of an employee to work abroad. The direct posting you can be written about directly if the decision to refer the employee to work for another employer, doing business or service in another country will be decided by the employer responsible for the posting. It does not matter whether this referral will be taken independently by the employer, or whether in the economic agreement entered into with another employer, for whom the posted worker is obliged to carry out the work. The case of indirect posting occurs when a "posting" employer agrees to offer the staff member concerned to take temporary employment with another employer, established abroad. The "posting" employer approves the employee's initiative, and gives the worker a period of unpaid leave for employment in another establishment. From the perspective of employment law, the question arises whether the case of "indirect" posting is also there when an employee terminates the contract with the employer and establishes a working relationship with employer B who is abroad. In light of the opinions presented by the European Economic and Social Committee, of crucial importance for the qualifying of a posting are the employer organisations posting or accepting a posted worker. These determinants should be governed by private commercial law.

The Committee seems to believe that regardless of whether the employee has maintained legal ties with the previous employer during the period of temporary employment abroad by another employer, you can write about a work posting, if the organizational relationships governed by commercial law between entrepreneurs acting as employers employing the same worker, permit them to be treated in the same organisational structure regulated by commercial legislation. I have major objections as to the use of, for the purpose of regulating the conflict rules of international labour law, legal concepts and structures used in private commercial law.

If the proposal of the European Economic and Social Committee has been accepted, any changes in employment in the workplace owned by various employers who are members of structures regulated by the commercial laws and classified by these rules to the "same group" plants, which consists of an employer with whom the employee terminated an employment contract, could be considered as cases of "delegation" within the meaning of the proposal mentioned in points 4.8.2.1–4.8.2.3 of the opinion of the European Economic and Social Committee. It should be noted that the Committee's suggestion was not accepted by the European Commission. The Commission endorsed the views expressed by the representatives of the lawyers engaged in private commercial law, which deemed it unnecessary to introduce the idea of a definition of temporary employment in the posting of workers to work in another Member State.[157]

[157] A. Kozakiewicz, *Industrial Relations...*, pp. 1044–1045.

In matters concerning the designation of the applicable law for labour relations in which workers are employed by international carriers (air and sea), and mining platforms located in international waters, the European Economic and Social Committee commented on the subject-term contracts involving a foreign element to be governed by the labour laws in force in the country of the company location through which the employment relationship has been established.

In the case of "permanent" employment on the basis of contracts of indefinite duration, in the opinion of the Commission on the conflict of labour laws, they should be resolved by using the determinant specified in Article 6, paragraph 2 of the Rome Convention. This proposal has a *raison d'être* only in cases where mining platforms are located in territorial waters. Then the relationship governed by the labour law of the Member State in which the platform is located, can be considered by a judicial authority to be stronger than the relationship which is chosen by the parties to a contract of employment with an international element. Conflict of labour standards for employment of workers on offshore platforms and ships and aircraft moving in the area of controlled public international law would be subject to national labour regulations of the country with which the contract is more closely connected. This proposal could not be accepted by the Commission. The general clause in too large a fashion replaced the objective determinants laid down in Article 6, paragraph 1 of the Convention allowing judicial bodies to determine whether these determinants mentioned in Article 6, paragraph 1 are less closely determinanted to the analysed contract, rather than the labour laws of another country. However, in matters relating to collective bargaining agreements the European Economic and Social Committee expressed the sentiment that they are mandatory rules only when the nature of the provisions of the national system of labour law chosen by the parties to a contract of employment with a foreign element or indicated as appropriate by one of the determinants listed in Article 6 or 7 of the Rome Convention. From the statements contained in point 4.8.2.6 of the Committee, it may be concluded that the identification by the provisions of the international system of collective national legislation as appropriate to regulate labour relations with a foreign element is endorsed under the condition that, in light of the provisions of positive law in a particular country, collective labour provisions are mandatory in nature. At the same time, however, in the opinion of the European Economic and Social Committee it notes that the mandatory provisions of international collective bargaining agreements should be considered only in so far as they appear in conflict when it is possible to determine the most appropriate system of substantive national labour law.

The discussion on the conversion of the Rome Convention into the Regulation was held on January 27, 2004. Participants in the debate spoke of the Rome Convention for the replacement of the Regulation on the law applicable to contractual obligations ("Rome I"). In the section on conflicts of labour standards the discussions expressed no strong perceptions. For this reason, the provision of

Article 8 of Regulation on June 17, 2008 reproduces the wording of the provision Article 6 of the Rome Convention.

Nearly an identical structure is evident in both provisions: Article 6 of the Rome Convention and Article 8 of Regulation No. 593/2008 ("Rome I"). Although Article 6 of the Convention set up consists of two normative units, and Article 8 of the Regulation of four, the difference is apparent, because in Article 6, paragraph 2 of the Convention there are three separate provisions. Article 6, paragraph 2 point "a" and "b", and one in the final paragraph of Article 6 is not marked with a paragraph. An editorial change introduced into Article 8 of the Regulation, the provision that is divided into four separate sections clearly labelled, paragraphs 1, 2, 3 and 4, increases the transparency of the regulation. Article 6, paragraph 1 of the Rome Convention corresponds to Article 8, paragraph 1 of the Regulation No. 593/2008. Article 6, paragraph 2, point "a" of the Convention is equivalent to Article 8, paragraph 2 of Regulation. Article 6, paragraph 2, point "b" corresponds to Article 8, paragraph 3 of the Regulation. Previously indeterminate, and placed in a separate paragraph, Article 6, paragraph 2 of the Convention provision was labelled as Article 8, paragraph 4 of the Regulation. In the compared provisions of both instruments of private international law there are differences of a substantive law. The first one is editorial in nature. It was formulated in the first sentence of Article 8, paragraph 1 of the Regulation. In the cited law, in contrast to the regulation used in Article 6, paragraph 1 of the Convention, it explicitly stressed that the parties to an individual employment relationships involving an international element can exercise their right to choose the applicable national substantive labour law. In the provision under consideration, it stated bluntly, "the individual employment contract shall be governed by the law chosen by the parties in accordance with Article 3." Article 6, paragraph 1 of the Convention applying the principle of freedom of choice of law by parties to contracts of employment with an international element was a result of the interpretation of this provision. It was not clear from its clear wording. The term: "Notwithstanding Article 3, in a contract of employment a choice of law made by the parties (...)" should be construed as a statement indicating that, irrespective of legal regulations as formulated in Article 3 of the Convention, the worker shall not be deprived of legal protection the worker is entitled to on the basis of *juris cogentis* not chosen by the parties. Article 6, paragraph 1, the first sentence of the Rome Convention focused on protecting the rights of workers in the event the parties choose in a contract of employment with an international element the appropriate law. It did not repeat the wording contained in the first sentence of Article 3, paragraph 1, that "the contract shall be governed by the law chosen by the parties." Lawyers involved in private international law, interpreted these words as a directive to grant the parties to any contract involving an international element to the provisions of freely elected national system of substantive law. Persons who are not lawyers may have had doubts whether the principle

of selecting an appropriate national system of substantive labour law also applies to employment contracts involving a foreign element. In title II "Uniform provisions" of the Rome Convention rules have been been included that are applicable to all types of contracts and provisions concerning certain types of these contracts. Employment contracts and consumer contracts are classified by the Convention in the latter category. Article 8, paragraph 1 of Regulation leaves no doubt that the basic principle of freedom of the contracting parties also applies to individual employment contracts. On the margins of considerations relating to the comparisons between the legal regulations contained in the provisions of Article 6, paragraph 1 of the Convention and Article 8, paragraph 1 of the Regulation, should be given to the specific terminology used by the European legislator in the first sentence of Article 8, paragraph 1 of the analysed Regulation. Parties to the "individual contracts of employment" have the right to choose the applicable national substantive labour law system. Assuming that every legislator operates rationally, we should consider whether the parties to contracts of employment other than "individual contracts" shall enjoy the right to submit those contracts selected to their national system of substantive labour law. Argument *a contrario* deprives the parties of the above-mentioned powers in such agreements. For this reason, we should consider what entities to the individual working relations with a foreign element do not enjoy the right to exercise a choice of applicable law. The answer to that question is simple: they are not contracts considered by the rules of private international law as "individual employment contracts." Since neither national nor European labour law regulates other than individual contracts of employment, it is difficult to know which entities the Community legislator had in mind, when it included them to the categories of entities related to other contracts than the "individual employment contracts." By contrast to this conceptual category entities should be included that are related to "collective employment contracts." In the provisions of the individual labour law there is no concept of "collective employment contract." In my opinion, the only reasonable explanation for this phenomenon of language used by the European legislator in the provision of Article 8, paragraph 1 of the Regulation No. 593/2008 is a reference to the grammatical interpretation of the English text of the regulation. In the English legal terminology, the term "contract" is used to indicate agreement or contract between two or more persons, giving a commitment to do or refrain from doing certain activities.[158] In Anglo-Saxon literature, the labour law term "contract" is also used to denote the collective bargaining agreements, also known in the legal literature as "collective agreements." In the former Polish labour law literature, collective agreements are sometimes referred to as "collective employment contracts." No one ever used the term "collective labour contracts," or alternately, did not employ the concepts of

[158] H. Campbell Black, *Black's Law Dictionary*, St. Paul, Minn. 1983, p. 170.

"individual employment contracts" and "collective labour agreements" to determine the sources or the legal basis of employment in an individual employment relationship. Explanation of the use of the term "contract of employment" Article 8, paragraph 1 of Regulation is therefore possible by indicating that in that provision, the focus in English has been to seek to distinguish contracts from collective bargaining agreements. Regulation No. 593/2008 does not regulate the conflict of labour law, which exists between the provisions of collective bargaining agreements. Given the impossibility of recognition of employment contracts with collective labour relations by almost all the national systems of labour law, either collective or individual, Member States regards the term "individual employment contracts" as used in Article 8, paragraph 1 of Regulation as inappropriate. The most substantive difference between the compared legal provisions of Article 6, paragraph 2 of the Convention and Article 8, paragraphs 2 and 3 of the Regulation is the lack in the Regulation of the possibility to take advantage of one of the two alternatives formulated in Article 6, paragraph 2 of the Convention. In this rule, parties to the individual employment contract with a foreign element which did not choose the applicable substantive labour law are required to use one of the two determinants mentioned in Article 2, paragraph 2, point "a" (a place of work) or point "b" (the location of the workplace). The alternative construction used in this provision indicates that the parties to an employment contract involving a foreign element could freely decide on the selection of one of the two determinants, if the directive in the provision did not decide on the order of selecting the said determinants. In cases where the employee usually carries out his work in the country, even if temporarily posted to work in the territory of another State, the national labour laws in force in the first of these countries apply to contracts of employment with an international element. Employment law in the country where the company headquarters are located is applied to contracts involving a foreign element in those cases where an employee does not carry out work in one and the same country. In Article 8, paragraphs 2 and 3 of the above Regulation, the sequence of determining the appropriate national system of substantive labour law has been preserved. Determinants listed in Article 8, paragraphs 2 and 3 of the Regulation can be replaced by a determinant specified in Article 8, paragraph 3 of that Regulation, if from the circumstances that the employment contract with a foreign element is more closely connected with another country than that indicated by the provisions of Article 8, paragraph 2 or 3. The only difference between the formulations set out in Article 8, paragraph 3 of Regulation No. 593/2008 and the wording used in the final paragraph of Article 6, paragraph 2 of the Convention, is that the Regulation uses more precise terms. The said provision of the analysed Convention used the term "the circumstances in their entirety." Based on all the circumstances the entities applying the provisions to a contract are required to apply the national substantive labour laws, instead of those indicated in the determinants

specified in Article 6, paragraph 2, point "a" or point "b." The term "entirety" is synonymous with the accepted definition of "organised whole." The court, ruling in a case concerning the conflict of laws between national substantive labour law based on two of the three determinants listed in Article 6, paragraph 2 of the Rome Convention on the basis of consideration of all of the foreign elements present in the particular contract of employment, is required to give priority to the national labour law of the other country than is indicated on the basis of one of the two determinants mentioned in Article 6 paragraph 2, point "a" or point "b." The term "entirety" requires the court to make an overall assessment of the components of the employment contract, with particular emphasis on the foreign elements. In Article 8, paragraph 4 of the Regulation, the concept of "all circumstances" was used. On the basis of this provision the court ruling in conflict of law disputes is required to take into account not only the general ("entire") factors, but also the various separate elements of the contract containing foreign components. In my opinion, the term "all the circumstances" encompasses a whole set of conceptual, rather than – as is the case with the term "entirety of circumstances" – the overall effect of certain system components. I believe that the new concept introduced to the Regulation No. 593/2008 of Article 8, paragraph 4 in a greater degree than the terms used in the last paragraph of Article 6, paragraph 2 of the Rome Convention, restricts the freedom of decision-making by entities applying the provisions of contracts involving an international element to replace one of the two determinants mentioned in Article 8, paragraph 2 or 3 of the Regulation determinant mentioned in Article 8, paragraph 4 of the Regulation.

Part III

Conflict of law issues in individual labour law in light of the Regulation (EC) No. 864/2007 of the European Parliament and the Council of the EU (July 11, 2007), concerning law applicable to Non-Contractual Obligations (“Rome II”)

Introduction

The draft Regulation No. 864/2007 of the European Parliament and Council Regulation on the law applicable to non-contractual obligations ("Rome II") was presented by the European Commission on July 22, 2003.[159] It was supplemented on February 21, 2006.[160] Adopted on July 11, 2007 the Regulation supplemented the Rome Convention, which governs the conflicts of the law applicable to contractual obligations. Regulation No. 864/2004 is used to resolve a conflict of law applicable to non-contractual obligations. The preamble to the Regulation states that the law of the Member States defines the concept of different non--contractual obligations. For this reason, in the preamble to the Regulation it was stated that non-contractual obligation should be understood as an autonomous concept. In Article 2, paragraph 1 of the Regulation it is evident that the concept of non-contractual obligations concerns any legal consequences arising from tort, unjust enrichment, *conduct gestio* or *culpa in contrahendo*. The Regulation applies not only to damages resulting from the events referred to in Article 2, paragraph 1, but also to non-contractual obligations, which are likely to result in damages (Article 2, paragraph 2). paragraph 1 states that the Regulation be applicable to non-contractual obligations in civil and commercial matters related to the law of different countries. It does not apply it to taxes, customs or administrative matters or state liability for acts and omissions in the exercise of public authority (*acta jure imperii*). Article 1, paragraph 2 of the Regulation lists seven categories of non--contractual obligations, which are excluded from the scope of this Regulation. Among these obligations there are no issues regulated by labour law. However, in Chapter II of the Regulation dealing with determinants used to regulate conflicts of substantive law relating to torts in matters regulated by collective labour law are listed acts of unfair competition and collective disputes. This does not mean that the examined Regulation does not lay down general rules to regulate national substantive laws relating to obligations not arising from contracts.

[159] COM 2003 427 final.
[160] COM 2006 83 final.

Chapter 1

Lex loci damni

The preamble to the Regulation states that the applicable law must be determined on the basis of where the damage occurs, irrespective of the country or countries in which indirect consequences could occur (point 15). The general rule adopted in Article 4, paragraph 1 of the Regulation is regarded as the proper rule for the contractual obligation arising from the tort law of the country where the damage occurred. *Lex loci delicti commissi* is the basic solution for the obligations in all Member States of the European Union. In the preamble to Regulation No. 864/2007 (point 15) it was found that application of this principle in practice, where the elements of the case are determinanted to various countries, is different. Such a situation leads to uncertainty in the determination of the competent national system of substantive law. Therefore, point 17 of the preamble to the Regulation adopted by the applicable law should be determined on the basis of where the damage occurs, irrespective of the country or countries in which indirect consequences could occur. In the event of injury to persons or damage to property, the country in which the damage occurs should be the country where the damage was caused to person or property. Article 4, paragraph 1 of the Regulation develops these rules and provides that the law is the law of the country in which the damage occurs irrespective of the country in which the event occasioning the injury, and regardless of what country or countries there are indirect consequences of that event. This regulation does not mean, however, that a determinant of where the damage has occurred was adopted in the standards of conflict of laws concerning the law applicable to contractual obligations as exclusive. Provision of Article 4, paragraph 1 of this Regulation has been formulated conditionally. "If this regulation provides otherwise, the law applicable to non-contractual obligation arising from a tortious act is the law of the country, in which the damage occurs (...)." So whether a critical determinant to identify the substantive law of the country in which the damage occurs is determined by the EU's legislature, who has the power to specify another determinant. The specificity of regulation of the conflict rules of substantive law is to permit the EU legislature to two kinds of exceptions to the general principle laid down in Article 4, paragraph 1 of the Regulation. Two of them were laid down in Article 4, paragraphs 2 and 3 of the Regulation. They apply to all non-contractual obligations, with the exception of those which are dealt with separately in Chapter II of "Torts/Delicts" (Article 5–Article 9) and Chapter III, "Unjust enrichment, *negotorium gestio* and *culpa in contrahendo*" (Article 10–Article 13). In cases of individual labour law partial provisions apply of Article 6 "Unfair competition and acts re-

stricting free competition" and Article 10 "Unjust enrichment." By contrast, collective labour law issues are regulated by Article 9 "Industrial action." The subsequent chapters of this volume deal with the differences governed by these provisions in matters relating to the identification of the relevant determinants. In the chapter devoted to the analysis of the general principles adopted in Article 4 of the Regulation, to indicate the proper national system of substantive law relating to non-contractual obligations, I present exceptions, which have a general use. The first exception to the rule *lex loci damni* is formulated in Article 4, paragraph 2 of the Regulation. It applies to cases where the parties to non-contractual obligations, the person claimed to be liable for damage caused and the victim, have, at the time of injury, their place of residence in the same country. In such a situation, the determinant of the common residence on the territory of one country, completed by the temporal sub-definition (the moment of injury), referred to in Article 4, paragraph 2 of Regulation takes precedence over the determinant mentioned in Article 4, paragraph 1. The designation of the order of the use of determinants listed in the provisions of Article, 4 paragraphs 1 and 2 of the Regulation may be affected, in the event of the entities applying conflict rules of substantive law that "out of all the circumstances of the case, it is clear that the tort is manifestly more closely connected with country other than that indicated in paragraph 1 or 2 (...)." Article 4, paragraph 3 of the Regulation listed by way of example the situation in which – due to a much closer relationship of the tort with a country other than that indicated in Article 4, paragraph 1 or 2 – the determinant is applied as indicated in Article 4, paragraph 3, i.e. law of the state, which remains closely connected with the tort. The directive deciding on the exclusion of the determinant having priority is "in existence of a prior relationship between the parties, such as a contract, closely determinanted to the tort." The basis for the exclusion of indicating the order of the use of determinants deciding on the appropriate law, is the existence prior to the tort of legal relations between the parties to non-contractual obligations. This earlier relationship can be resolved before the incident which caused injury to person or property of one party to the legal relationship. The phrase "the existence of prior relationship" as used in Article 4, paragraph 3 of the Regulation is a term which applies to existing and dissolved legal relationship between the parties to non-contractual obligations. The legal basis for the "prior relationship" may constitute a contract. However, not only the contract may give rise to non-contractual relationship, which Article 4, paragraph 3 of the Regulation concerns. The provision of the Regulation under consideration, does not identify the legal relationship with the contract, although the wording "much more closely connected with another country, may include, in particular, the pre-existing relationship between the parties, such as a contract (...)" puts forth such a hypothesis. It would be not true for two reasons. First, the impossibility of putting an equal sign between the terms "legal relationship" and "contract," and secondly to be listed in Article 4, paragraph 3 of the Regulation listing the agreement by way of exam-

ple, as one source of a legal relationship. The most important condition that determines how to replace one of the two determinants mentioned in Article 4, paragraphs 1 and 2, the determinant specified in Article 4, paragraph 3 of the Regulation, is the presence of a close relationship between the legal relationship or the contract under which the obligatory relationship was entered into and a non-contractual arising from a tort. The lack of such a determinant is opposed to replacing the national system of substantive law indicated in applying determinants specified in Article 4, paragraph 1 or 2 of the Regulation provisions of the national legal system of another country. In point 18 of the preamble to Regulation No. 864/2007, Article 4, paragraph 3 was presented as an "escape clause" with respect to Article 4, paragraphs 1 and 2. This conflict rule is applicable in cases where all the circumstances of the case, from which it is clear that the tort is manifestly more closely connected with another country. It does not appear that the term "escape clause" was appropriate. It is associated with defects resulting from correction of errors committed by the legislature in the process of regulating conflict of law rules in Article 4 provisions of paragraphs 1 and 2 of the Regulation. In my opinion, in Article 4 of the Regulation, the rule was established (paragraph 1) as well as two exceptions (paragraphs 2 and 3). The EU legislator decided that the general principle of non-contractual relations involving an international element, resulting from the tort should apply to the provisions in force in the country where the damage was caused (*lex loci delicti commissi*). It introduced two exceptions from the above rule. It ordered to assess these legal relationships according to a common domicile of the parties (*lex domicili*) or to all the circumstances. Not all of the determinants listed in Article 4 of the Regulation have the same legal value and are suitable for use in individual employment relationships. In the event of an incident qualified as an occupational accident or an illness that is part of the category of occupational illnesses eventuating in the framework of the employment relationship in which there were foreign elements, to regulate the law applicable to non--contractual obligations arising from these events is the labour law of that country in which the damage occurred. In the case of an accident at work it will usually be *lex loci laboris*. An accident at work is in fact defined as a sudden event, caused by external circumstances. Its effect, being the damage to health or life of the employee are disclosed immediately. In the event of an occupational illness, the appropriate law applicable is the law of the country where the said illness was discovered. When indicating a proper national system of substantive labour law for the damage resulting from an accident at work or occupational illness, the determinant will apply that was specified in Article 4, paragraph 1 of the Regulation. It may happen that the above mentioned events will take place in the event of temporary workers staying on the territory of another State by virtue of performing work within the service order issued to the employee by the employer that employs them (posting). The relationship between the damage and the place where it occurred, is random. For this reason, in Article 4, paragraph 2 of Regulation another determi-

nant was formulated, allowing the evaluation of non-contractual obligation arising from a tort according to the rules of the common domicile of the parties, i.e., the injured employee and the employer responsible for damage suffered. In Article 4, paragraph 2 of Regulation no use was made of the term "common residence." The wording was also not used to indicate that in the case of individuals the determinant is the common residence, and in the case of relationships between individuals and other entities, it is residency and the location of the business headquarters. The neutral term that was used was "stay." It it used to mean "located in." Normal residence is the place where the persons or entities – subjects to legal relations are usually located. The rules of private international law applied to resolve a conflict of substantive labour law, the term "usual residence in the same country" of the parties to the relationship involving a foreign element is an indication of a determinant of labour laws of the country in which the employee and the employer resides or has the workplace in which the employee is employed. Due to the constant exercise of working abroad the parties to the employment relationship are entitled to come under the law of their choice, binding the two sides, even if their "usual residence" is located in the same country. Between of the contract to an employment relationship entered into, in which the foreign element is the place of work, there is a correlation, which can be defined as being a closer relationship, than the other determinants established in Article 4, paragraph 1 (place of the event – injury) or paragraph 2 (place of "usual residence" of the parties). In a hearing of a claim for benefits for an accident occurring at work, an employee accident or occupational illnesses, the court will be required to consider all the circumstances of the case and to assess which of the national substantive labour laws will be applied to assessing the claims made by an employee injured in an accident at work within a non-contractual relationship arising from tort. If a work relationship in which the employee resides permanently in country A, which houses the seat of the employer or the company is located, with which the worker has concluded a contract of employment with, identifying the agreement above, that the work will be performed at the workplace of country B, and the work relationship comes under the labour laws of country C (as selected by the worker), the conflict laws under Article 4 of the Regulation No. 864/2007 will be required to identify an appropriate system of substantive labour law, regulating worker claims who has been injured at the workplace. In cases where an event considered an occupational accident will take place on the territory of another country than country A, B, C, while the worker posted to this country (country D), the conflict will remain in the systems of three countries: country D, in which the damage occurred, country A, the country where the parties have their habitual residence, and country C, whose labour laws were chosen by the parties to regulate the legal relationship based on the contract of employment with an international element, with which the non-contractual obligation arose out of tort (accident at work or employee accident) and has a close relationship. From the above description of the substantive national labour laws,

which remain in conflict, because under Article 4, paragraph 1, 2 and 3 of the Regulation apply to work accidents or employee accidents, stating that the only system of substantive labour law, which cannot be taken into account by the conflict rules laid down in Article 4 of the Regulation in resolving the conflict of three national systems of substantive labour law, the national system of employment law in force in country B, *legis loci laboris*. As a result of this legal analysis, there are two observations. The first refers to the relationship between the conflict rules, formulated in two separate systems of private international law: the Rome Convention and the Regulation No. 593/2008 on the law applicable to contractual obligations ("Rome I") and Regulation No. 864/2007 on the law applicable to non-contractual obligations ("Rome II"). *Lex loci laboris* as a standard indicated as appropriate on the basis of the conflict rules governed by an international legal instrument designated as "Rome I" have not been included in the sister act of international law – "Rome II." One might think that it was not necessary, because work-related accidents or occupational accidents usually occur at work, i.e. in a place where the damage occurred. This determinant is referred to in Article 4, paragraph 1 of Regulation No. 864/2007. The above example shows that the determinants of the places of work and tort (a harmful event, qualified as an accident at work) do not overlap. Occupational accidents and occupational illnesses, which are events part of the category of non-contractual obligations arising from a tort do not qualify as one of the specific categories of non-contractual obligations arising from torts governed by specific determinants mentioned in Article 6, or Article 10 of the Regulation No. 864/2007, which apply in individual employment relationships. Accidents at work or occupational accidents and occupational illnesses, considered as damages regulated by the law applicable to non-contractual obligations arising from tort, only apply the general principles set out in Article 4 of Regulation No. 864/2007.

Another observation concerns the lack of choice of law rules of the second degree, which can be used in cases of conflict resolution of the conflict rules. Article 4 of Regulation No. 864/2007 is a classic example of the above shortcomings of the EU legislature. Included in this provision the conflict rules have been established in a particular chronological order. This order was determined by applying three distinct conflict rules to one of the three normative units of Article 4 of the Regulation. All standards covered in Article 4 have been included by the legislature of the EU as "general principles." Only thanks to the order of determinant regulation one can attempt to express an opinion that they were arranged by the legislature in a particular hierarchical order. The grammatical interpretation of Article 4, paragraphs 1, 2 and 3 of the Regulation does not provide strong arguments supporting the above hypothesis. Each normative unit included in paragraph 1, 2 or 3 of Article 4 of the Regulation was drawn up in a similar manner. It begins with the conjunction used to determine the condition: "if" (paragraphs 1, 3) or the word accompanying the sentence (or part thereof) used to differentiate the

approach, "however" (paragraph 2). Relying solely on the grammatical rules of interpretation of this provision, it can be concluded that the principle was formulated in Article 4, paragraph 1. From the above principle an exception to Article 4, paragraph 2 has been allowed. From this and, in the situation described in Article 4, paragraph 3, a further exception was introduced, but that does not lead to a re-application of the principle formulated in Article 4, paragraph 1, but requires the use of the determinant specified in the provision of Article 4, paragraph 3. From the above argument it is evident that Article 4 of Regulation establishes two general principles. The first in Article 4, paragraph 1, and the second in Article 4, paragraph 3 was determined. The relationship between Article 4, paragraph 1 and Article 4, paragraph 2 and Article 4, paragraph 2 and Article 4, paragraph 3 was determined. The relationship between the provisions of Article 4, paragraph 1 and Article 4, paragraph 3 was not regulated. It seems that the EU legislator assumed that the conflicts between the standards of the general principles of conflict of law rules will be resolved by the parties to non-contractual obligations arising from tort by choice of law.

Chapter 2

The freedom to elect an appropriate law for non-contractual obligations

Regulation No. 864/2007 on the law applicable to non-contractual obligations ("Rome II") allows parties, a person or entity who is liable in tort and the victim, to conclude an agreement to submit the non-contractual obligation to the chosen national system of substantive law (Article 14, paragraph 1). Because the agreement can be concluded by the parties to a non-contractual obligation arising out of tort, therefore it should be obvious that before the creation of such a relationship there is no basis to conclude an agreement on the selection of applicable law. However, in Article 14, paragraph 1, point "a" of the Regulation, the right of the parties to submit the non-contractual obligations to the law chosen by the parties after the event causing the damage has occurred, has been limited. For the reasons given above, this claim would not be necessary if, in Article 14, paragraph 1, point "b" of the Regulation it was not decided that in the event of a non-contractual obligation between the parties engaged in economic activities it is permissible to conclude such an agreement and prior to the event causing the damage. Article 14, paragraph 1, point "b" does not apply to individual labour relations, because the employee acting as a party to a non-contractual obligation is not engaged in economic activity. Despite the inadequacy of this provision, it should undergo legal analysis, as the formulations contained within it may give rise to the claim that this provision introduces a separate mechanism for agreements for non-contractual obligations to be submitted under the law chosen by the parties. In Article 14, paragraph 1, point "a" it is decided that an "agreement" constitutes the legal basis for choice of law for non-contractual obligations. However, in Article 14, paragraph 1, point "b," it was found that the self-employed are entitled to make a choice of law "by an agreement freely negotiated." Because the relations between the parties have no real equality, as the worker is always treated as a "weaker" party to the contract, the question arises whether the omission by the legislator in Article 14, paragraph 1, point "a" of defining the term "the Agreement" with complementary terms, as are applied in Article 14, paragraph 1, point "b," indicating to the parties that in the process of negotiation, such an agreement should be negotiated in good faith, respecting each other's interests and should not exert pressure on each other, particularly compelling to conclude an agreement. It does not appear that the different ways to regulate the provisions of Article 14, paragraph 1 of the Regulation of alternative methods of

entering into agreements on the subject chosen by the law of contractual obligations could justify the acceptance of radically different assessments of the proceedings prior to an agreement on the choice of applicable law. The interpretation *a contrario* wording set out in Article 14, paragraph 1, point "b" by "an agreement freely negotiated" in conjunction with Article 14, paragraph 1, point "a," which refers only to "the agreement" would lead to conclusions inconsistent with the core values of any system of law, under which the agreement shall be deemed valid only when it is voluntarily entered into. So an alternative provision introduced to Article 14, paragraph 1 of the Regulation applies only to entities carrying out economic activities. The analysed rules grant them permission to enter into agreements subjecting contractual obligations before or after the event causing the damage. A different interpretation of those provisions, based on the technique of interpretation *a contrario* would lead to absurd conclusions, according to which the entities conducting economic activity could cause damage before the occurrence of events, by entering into agreements without the basic requirements of freedom of negotiation.

A necessary condition for the validity of the agreement to submit the non-contractual obligation to the chosen law, is to make a clear act of selection of a national system of substantive law. Failure to comply with that requirement does not invalidate the carried out act, provided that the choice is made due to sufficiently reliable circumstances of the case. The last paragraph of Article 14, paragraph 1 of Regulation No. 864/2007 limits, compared with the regulation used in Article 3, paragraph 2 of Regulation No. 593/2008, the number of determinants used to one, to assess the validity of the choice of a national system of substantive law. Comparing the legal regulations of the freedom of choice in cases of conflict of substantive law applicable to contractual and non-contractual obligations involving a foreign element, it should be noted that Article 14, paragraph 1 of Regulation No. 864/2007 does not regulate the rights of the parties to "pull apart into bits" non-contractual obligations and does not grant them permission to undergo to the different national systems of substantive law. In cases relating to work accidents, occupational diseases or work-related illnesses, the conditions of work performance, processes and factors at work and the work environment, one can imagine an agreement entered into by the parties to an individual employment relationship or by the injured worker's successors, after the injury has been caused (to health or life), to submit questions concerning the legal classification of the event by the labour law of country X, while issues related to employee benefits actually granted to the victim or his family members under the labour laws of country Y. The wording of Article 14, paragraph 1 of Regulation No. 864/2007 "Parties may agree to submit non-contractual liability law of their choice" should be construed as an authorisation to make the contractual obligation in its entirety to one, chosen by the parties to the national system of substantive law. In contrast to the rules adopted in Article 3, paragraph 2 of Regulation No. 593/2008,

which grants the parties to contractual relations based on agreements, the right to change the choice of law, Article 14, paragraph 1 of Regulation No. 864/2007 allows the parties to contractual obligations to make a single act of choice. In other respects, in matters concerning the application *juris cogentis*, which cannot be derogated from the contract, the application of EU law and to protect the rights of third parties, the provisions of Article 14, paragraphs 2 *in fine*, 3 and 4 of Regulation No. 864/2007 in line with the provisions of Article 3, paragraphs 2 *in fine*, 2 and 4 of Regulation No. 593/2008.

Regulation No. 864/2007 applies a different conception of the relationship between connections which determine the proper indication of the national system of substantive law from that adopted by Regulation No. 593/2008. In contrast to the conflict rules of substantive law governing conflicts of contractual standards based on agreements ("Rome I"), which hold the freedom to choose a law as a basic principle conflict of law rules applied in international private law concerning non-contractual obligations arising from torts ("Rome II") as a general principle adopt the use of determinants specified by the legislature of the EU, while allowing the parties to non-contractual contractual relations to waive this rule and to choose the applicable law within the limits specified in Article 4 of Regulation No. 864/2007. This change of priorities has been introduced in the subsequent stages of construction of the conflict rules of law applicable to contractual obligations. The first version of the draft Regulation No. 864/2007 adopted by the order of the Rome Convention, was later used in the Regulation No. 593/2008.[161] Using the data included in the preamble to Regulation No. 864/2007 one can only assume that the use of different techniques to indicate determinants used in Regulation "Rome II" resulted from the need to ensure legal certainty and the need to ensure justice in individual cases (point 14). The cited item of Regulation No. 864/2007 states that it provides for determinants which are most suitable to achieve these objectives. Therefore, whereas this Regulation sets out the general rule *lex loci damni,* as well as the detailed rules and an "escape clause" allowing the parties and the courts to waive these rules in cases where all the circumstances of the case clearly show that the illicit act is manifestly more closely connected with another country. Introduced to Regulation No. 864/2007 and a set of rules to regulate the relationship between the principle of general and specific rules creates a flexible framework of conflict rules. According to the view expressed in point 14 of the preamble of the regulation, it "also enables the competent court to consider individual cases in an appropriate manner."

The principle of freedom of choice of law under Article 14 of Regulation No. 864/2007 has a particular legal position. It was not included in the category as a "general rule" within the meaning of Article 4 of the Regulation. It does not belong to the category of "special rules," which includes some principles that apply

[161] See: M. Bogdan, *Concise Introduction to EU Private...*, pp. 149–150.

in individual employment relationships, Article 6 (unfair competition) and 10 (unjust enrichment). The category of special rules also includes Article 9 (industrial disputes), which I cover in Part IV of this volume, devoted to the analysis of the conflict rules of collective labour law. The principle of the parties' freedom of choice has not been recognised by the legislature as a general principle. It also cannot be qualified as part of the special rules which govern the methods of identifying determinants in the case of conflict of laws governing the various types of contractual obligations. The principle of freedom of choice of the parties to contractual relations arising out of tort is applied generally. Using this principle, the parties may indicate a system of substantive law of any country, which will be applied to regulate contractual relations by *legis loci damni*, where the conflict rules contained in Regulation No. 864/2007 are treated as special, treating the principle *lex loci damni* as a general principle of the Regulation, "Rome II."

Chapter 3

Conflict rules of substantive labour law relating to specific non-contractual obligations arising from tort

§ 1. Unfair competition

Acts of unfair competition are governed by national legislation. Subjects capable of committing such acts are generally individuals or entities engaged in economic activity, service or business. In matters regulated by individual labour law employees, acting on their own behalf may behave in such a way that their action or inaction may be regarded as an act of unfair competition.[162] According to Polish legislation, the Act of April 16, 1993 on Unfair Competition,[163] states that an employee may commit acts of unfair competition, passing, disclosing or using someone else's trade secrets (Article 11 of the Unfair Competition Act), urging other workers to non-performance or improper performance of work duties (Article 12 of the Act) or disseminating false or misleading information about their employer (Article 14 of the Act). Assessing whether the acts committed by an employee may be treated as acts of unfair competition and assessing the legal consequences of acts committed in individual employment relationships involving an international element, are dealt with in Article 6 of Regulation No. 864/2007, which lists the determinants indicating the relevant national substantive labour law system of the country in which the unfair competition occurred, or there is likelihood the breach will occur. In matters relating to the regulation of the conflict rules of substantive laws, applicable to cases of unfair competition, the general principle expressed in Article 4, paragraph 1 of Regulation No. 864/2007 applies, reproduced in Article 6, paragraph 1 of the said Regulation. This principle is, however, used only in situations where illegal acts of unfair competition committed by employees are prejudicial to the interests of two or more unidentified competitors. In a situation where an act of unfair competition affects exclusively the interests of a competitor the general principle formulated in Article 4, paragraph 1 of the Regulation is applied. In

[162] J. Czerniak-Swędzioł, *Pracowniczy obowiązek ochrony interesów gospodarczych pracodawcy*, Warszawa (See closer: J. Czerniak-Swędzioł, *Employee's Duty to Protect the Economic Interests of the Employer*, Warsaw 2007, p. 285 et seq.).

[163] Unified text: Official Journal of Laws 2003, No. 153, item. 1503.

labour relations involving a foreign element, the employee, due to their knowledge of the employer, may primarily act in a way which leads to unfair competition against their own employer. In special situations, a worker employed by employer X may be able to carry out acts of unfair competition also against other entrepreneurs. For this reason, a book dedicated to resolving conflicts of substantive labour law should provide legal solutions used in the provisions on the law applicable to contractual obligations, which may be used in individual employment relationships. The main problem arising from the conflict rules in Article 6, paragraph 3, point "a" of the Regulation No. 864/2007, is the inability to solve the conflict dispute between the second-degree determinants indicating the national substantive law in force in the country on whose market the conduct (practice) had the effect of unfair competition and regulations in force in the country whose market is likely to produce such an effect. The organisation established in Article 6, paragraph 3, point "a" of the conflict rules determines the order in the selection of the competing national substantive law systems. In those cases where the act or acts of unfair competition have caused the legally prohibited effects, the law of the particular country, applicable to the disadvantaged entrepreneurs, applies as the appropriate law. Only then, when an act of unfair competition has not caused adverse effects on a business, the conflict rules are subject to the national substantive law of that country, in which likely such an effect took place. The general principle mentioned in Article 4, paragraph 1 of the Regulation is subject to Article 6, paragraph 3, point "a" and is interpreted broadly, since it covers situations in which the damage subsequent to an act of unfair competition has not eventuated, but whether there is probability of the damage occurring. If the result of an act of unfair competition is damage brought about on the market of one country or is likely to result in the damage of a market for more than one country, the injured person, who initiates litigation proceedings in an appropriate jurisdiction based on the domicile of the defendant who has committed an act of unfair competition may, on the basis of a filed claim, cite the provisions in force in the country in which the person has requested the settlement of the dispute (Article 6, paragraph 3, point "b"). A necessary condition for filing a claim is that the market of a Member State chosen by the injured person or entity (the plaintiff) belonged to one of the markets directly and was significantly affected by the restriction of the competition, from which the non-contractual obligation formed the basis for the filed claim. The injured party by an act of unfair competition has the option of selecting a national system of substantive law, provided the claim has been filed in court and considered by the plaintiff as an appropriate law (*lex cause*). The analysed regulation explicitly prohibits the parties to non-contractual obligations to enter into agreements, which exclude the applicable law as a consequence (Article 6, paragraph 4).

§ 2. Unjust enrichment

A non-contractual obligation arising out of unjust enrichment, concerns a relationship existing between the parties, such as one arising out of a contract or a tort, that is closely connected with that unjust enrichment, it shall be governed by the appropriate law that governs that relationship, as is provided in Article 10, paragraph 1 of the Regulation No. 864/2007. A necessary condition for the application of the status of a contractual relationship resulting from a contract or contractual obligation with the unjust enrichment element, are the closely determinanted events underlying the non-contractual obligations in the obligation relations entered into earlier. For non-contractual obligation of unjust enrichment, in which there are foreign elements could be treated by the law applicable to a legal relationship, to which it is is closely related, and the two legal relationships (the contractual relationship based on an agreement of obligations for non-contractual unjust enrichment, or the provision of non-contractual relationship with another non-contractual obligation, such as as unjust enrichment), should occur concurrently. In Article 10, paragraph 1 of the Regulation there is a collision between one of the two non-contractual obligations (undue or unjust enrichment provision) and the previously entered into agreements by the same parties, in contractual or non-contractual relationships. The provision does not govern only the relationship between other non-contractual obligations and the undue or unjust enrichment provision. Legal relationships between these types of obligations can be well illustrated with examples from the areas of individual employment law. Individual, statutory work relationship, based on an employment contract, in which there are foreign elements, governed by the provisions of labour law chosen by the parties or designated by using a determinant as is defined in Article 8–4, paragraph 2 of Regulation No. 593/2008 provides the basis for the application of the contract of employment to an unjustly enriched employee who improperly received pay for work, as well as an employee who negligently carried out their employee's duties becoming the source of the augmentation without a legal basis. Depending on whether the same or any other national measures of substantive labour law apply to the regulation of contractual relationships in which they remain with one employer, a worker unjustly enriched, and a worker who has decided to distribute the excess sums of wealth, two related non-contractual obligations under the unjust enrichment and misappropriation benefits will be subject to national regulation of the same or two different systems of substantive labour law. In the latter case because of the relationship between the rules governing regulation of the employment contract and one of the two mentioned in Article 10, paragraph 1 of Regulation No. 864/2007 contractual obligations, relevant national rules of substantive labour law applies to the case of unjust or undue enrichment. The same legal mechanism is used in the case of the relationship between a non-contractual obligations and the undue or unjust enrichment

provision. The injured party, who did not acquire the rights for work accident or occupational illness cover due to lack of legal conditions to qualify for these events into the category of work accidents or occupational illness, yet received by mistake from the pension granting institution undue benefits, therefore becoming unduly enriched, the injured party is required to repay the benefits within the limits prescribed by the regulations that were applicable to non-contractual obligation arising out of tort (*lex loci damnum*). However, an employee from the pension granting institution, who breached the obligations set out in the contract of employment or in the provisions of relevant labour law, having caused or contributed to payout of the amount wrongly received will be liable to the employer for the contractual obligation in respect of undue benefits under the provisions of which the employee is subject to the individual employment relationship. The above examples concerning the relationship between non-contractual obligation (accident at work or occupational illness) and unjust enrichment and the obligations arising from contracts of employment and not due provision shall apply only in cases in which both coincide there aspects of legal relations abroad.

In case the use of determinants listed in Article 10, paragraph 1 of Regulation No. 864/2007 is not possible to determine the law applicable to regulate the legal relations arising from the contractual obligations specified in that provision, Article 10, paragraph 1 of the regulation requires the use of a determinant of common habitual residence of the parties in the same country at the time of the event, which is the source of unjust enrichment. The legislation is in force in the country in which both of the parties to the non-contractual obligation have a permanent residence and it is this law that is applicable to regulate legal relations set out in Article 10 of the Regulation. One event is usually the source of two different non-contractual obligations, one of unjust enrichment, the second is for undue benefits. Due to the use of the following term in Article 10, paragraph 2 of the Regulation, the time of the event giving rise to unjust enrichment, there may be doubts as to whether the change of habitual residence by a natural person – an employee who determines on behalf of the employer or another entity (the pension fund) about the payment for an unauthorised person who wrongly receives, in the period occurring between the decision and the date of unjust enrichment of a person not entitled to benefits, does not permit the use of the residency in the same country determinant. It would be possible if a person who makes the decision directly about the distribution of payment changed the place of residence. In cases regulated by individual employment law, such a situation may arise when transferring residence to another country by a natural person who acted as an employer to an employee unjustly enriched. Also moving the headquarters or enterprises in the period between the decision made by the employee acting on behalf of the employer to make undue payments and the date, in connection with a procurement of property, which is seen as unjust enrichment may not apply Article 10, paragraph 2 of the Regulation. The legislature had foreseen

complications that can occur when indicating national systems of substantive law in the process of applying Article 10, paragraph 2 of the Regulation. Therefore, in Article 10, paragraph 3 the legislature decided that if the appropriate law cannot be determined according to the provisions of Article 10, paragraph 1 or 2 of the Regulation, the appropriate law deemed will be the law of the country in which the unjust enrichment occurred.

Just like in the case of a conflict of substantive law applicable to contractual obligations, Article 10, paragraph 4 of Regulation has included an escape clause that allows the courts to identify the applicable law to non-contractual agreements from the rules mentioned in Article 10, paragraphs 1–3 of the Regulation when all the circumstances of the case clearly show that non-contractual obligations of unjust enrichment are manifestly more closely connected with a country other than that indicated in Article 10, paragraphs 1–3. In such a situation, the law applicable is the law of that country with which these obligations are closely connected to. With the exception of Article 10, paragraph 1 of the Regulation, none of the provisions of Article 10, paragraphs 2–4 include a contractual obligation of undue benefits to which the same determinants are applied as are applied to the conflict rules stipulated in Article 10, paragraphs 2–4. This was not necessary, since the same event is both a source of unjust enrichment and undue benefits. The order of the two non-contractual obligations remain as they were presented in Article 10, paragraph 1 of the Regulation. Presenting the chronological relationship between these two non-contractual obligations undue benefit should be mentioned first, because in most cases, unjust enrichment is a consequence of it. Article 10, paragraph 1 of the Regulation serves as a general principle in the case of non-contractual obligation of unjust enrichment. This article addresses the substantive scope of a conflict of substantive law and therefore also applies to undue benefits in all other cases provided for in Article 10, paragraphs 2–4.

Part IV

Conflicts of law in collective labour law

Introduction

Conflicts of law for collective rights have not been developed in the literature of private international labour law. In the Polish literature, the authors of private international law dealing with the conflict rules of labour law focused exclusively on individual labour law provisions. They did not take up the problems of collective labour law. The same applied in the literature abroad. The International Encyclopedia of Private International Law devotes to the conflict area of collective labour law no more than a dozen lines of text. Gamillscheg, in his literature in the field of the internal system of private international labour law work, 36 years ago came to the conclusion that it is premature to address the issues of collective rights in the context of a conflict of collective labour law governed by national rules of private international law.[164] He separated three levels where conflict rules can apply to substantive labour law relating to industrial relations. These include, collective bargaining agreements, employee representation and collective disputes. These categories are considered by the author as appropriate for use in collective labour relations with a foreign element in collective labour during the time and place of certain undertakings regulated by such law. According to Gamillscheg's views, collective agreements, regardless of their use, are subjected to regulatory provisions in force in the country in which these agreements were negotiated and concluded. Similar rules apply to the activities of workers' representatives, although in this particular case Gamillscheg cites prevailing views in private international law doctrine, under which only the establishments within the territory of Germany are subjected to German labour law, governing the operation and powers of workers' representatives.[165] The author did not personally share this view.[166] From the above, lapidary formulation, one can draw conclusions that the German labour law concerning worker representation does not apply to German workplaces operating abroad. They do however, apply to the foreign employers employing foreign workers, if they are established on the territory of Germany. It seems that, according to contemporary views about the conflicts of norms of collective labour law used in collective labour relations with a foreign element, Gamillscheg speaking out in favour of the rules laid down in the national (internal) private international law, expresses progressive views of the times, which are

[164] F. Gamillscheg, *Labour Contracts* [in:] K. Lipstein, J.C.B. Mohr (Paul Siebeck) (ed.), *International Encyclopedia of Comparative Law, Private International Law*, Tübingen, Mouton, The Hague, Paris 1973, p. 19.

[165] Ibid., p. 20.

[166] F. Gamillscheg, *Internationales Arbeitsrecht (Arbeitsverweltungsrecht)*, Tübingen 1959, p. 370.

not accepted by the vast majority of representatives of the doctrine of German private international law. Regarding the issues relating to the resolution of conflicts of collective labour law in the part relating to collective bargaining disputes, Gamillscheg was an advocate of collective action to be undertaken by the parties into industrial disputes (strikes, lockouts) *lex loci laboris*.[167]

[167] Ibid., p. 365 et seq.

Chapter 1

Conflicts of law in collective labour law in the Council Directive No. 38 of May 6, 2009 on the establishment of a European Works Council or a procedure in Community-scale undertakings and Community-scale groups of undertakings for the purposes of informing and consulting employees (2009/38/EC)

Directive 2009/38/EC of the European Parliament and of the Council on the establishment of a European Works Council or a procedure in Community-scale undertakings and Community-scale groups of undertakings for the purposes of informing and consulting employees (Recast)[168] entered into force 20 days following its publication in the Official Journal of the EU of May 16, 2009 (Article 18). It is to be implemented in the internal order of labour law of the EU Member States no later than June 5, 2011. Article 16 of the Directive in question obliges the authorities of EU Member States to implement the Directive by way of bringing into force laws, regulations and administrative provisions necessary to comply with its provisions. The authorities of the EU Member States may entrust the obligation to bring the Directive into force to the social partners. Nevertheless, they must ensure that no later than on June 5, 2011 the social partners negotiate and sign collective bargaining agreements which are generally applicable in a given Member State and whose provisions would implement the provisions of Directive 2009/38/EC in the national system of labour law.

Directive 2009/38/EC introduces a number of changes in the European standards laid down in Directive 94/45/EC.[169] Its purpose is to raise the level of the rights to information and consultation of employees employed in European work establishments. Directive 2009/38/EC is without prejudice to the basic rights of employees of the European Union. It was issued to guarantee employees or their representatives the right to guarantee at appropriate levels the rights to obtain information and to present opinions in cases specified in the provisions of European labor law. The aim of the Directive in question is to improve the employees' rights

[168] OJ L 122/28, May 16, 2009.

[169] OJ L 254, September 30, 1994, p. 64.

to information in Community-scale undertakings or Community-scale groups of undertakings. Directive 2009/38/EC modernizes Community legislation, in particular Directive 94/45/EC, within the scope of transnational employees' information and consultation for the purpose of ensuring effectiveness of the right to information and consultation at a transnational level, within the area of the European Union, increasing the proportion of European Works Councils, resolving problems encountered in the practical application of Directive 94/45/EC. Directive 2009/38/EC does not deny the achievements of social partners under the previous Directive 94/45/EC. The agreements on appointing European Works Councils or establishing alternative means for informing and consulting employees employed in Community-scale undertakings concluded under Directive 94/45/EC remain unaffected. Except for the cases specified in Article 13 of Directive 2009/38/EC, i.e. a) where the structure of the Community-scale undertakings or Community-scale group of undertakings change significantly, b) in the absence of provisions established by the agreements entered into by the social partners regulating the procedure for information and consultation in the undertakings in question, c) in the event of conflicts between the relevant provisions of applicable agreements on information and consultation of employees concluded in the merged Community-scale undertaking, the social agreements concluded under Directive 94/45/EC remain unaffected. The provision of Article 14, paragraph 1 of Directive 2009/38/EC exempts the social partners from the obligation to conclude new agreements on information and consultation of employees after the new Directive enters into force. The condition necessary for taking advantage of this exemption is that the social partners, under Article 13 of Directive 94/45/EC or Article 3, paragraph 1 of Directive 97/74/EC of December 15, 1997 extending to the United Kingdom of Great Britain and Northern Ireland, Directive 94/45/EC on the establishment of a European Works Council or a procedure in Community-scale undertakings and Community-scale groups of undertakings for the purposes of informing and consulting employees,[170] have to conclude an agreement or agreements covering all the workforce. The referred agreements should establish a transnational procedure for informing and consulting employees on the matters specified in the Directives in question. The agreements concluded under Directive 94/95/EC or 97/74/EC, which were previously in force, are to be adjusted to the currently valid, transnational organizational structure of a Community-scale undertaking or Community-scale group of undertakings (Article 14, paragraph 1a of Directive 2009/38/EC). No additional conditions are laid down in Article 14, paragraph 1b of Directive 2009/38/EC in respect of agreements concluded or changed by the social partners pursuant to Article 6 of Directive 94/45/EC between June 5, 2009 to 5 June 2011. From the point of view of the conflict of laws rules governed by the provisions of the private interna-

[170] OJ L 10, January 16, 1998, p. 22.

tional labour law, the most important is the last subparagraph of Article 14, paragraph 1 of Directive 2009/38/EC, pursuant to which when such agreements on information and consultation are signed or revised the national law applicable continues to apply to Community-scale undertakings or Community-scale groups of undertakings. The basic principles of employees' participation via their representatives in employers' decisions concerning European establishments were provided for in the extensive preamble to Directive 2009/38/EC, consisting of 49 points. The modernized procedure for informing and consulting employees in Community-scale undertakings or Community-scale groups of undertakings are to be adjusted to the transnational structure of employing entities – multinational employers making decisions concerning employees – EU Member States citizens. An absence of necessary adjustments may result in unequal treatment of employees affected by the decisions made in one Community-scale undertakings or Community-scale groups of undertakings. From the perspective of the EU private international law what is particularly important is that employers running Community-scale undertakings or Community-scale groups of undertakings inform employees that are employed in another EU Member State rather than employees employed in a state where the decision-making body is located. From the perspective of the EU private international law it is important that employees employed in establishments located in the territory of EU Member States be also informed and consulted on the decisions made by employers located in the third countries, which are not EU Member States. For the purpose of ensuring proper information and consultation of employees employed in Community-scale undertakings or Community-scale groups of undertakings operating in at least two EU Member States, it is necessary to appoint European Works Councils or to establish another transnational procedure to inform and consult employees. The transnational procedure for informing and consulting employees regulated by the provisions of Directive 2009/38/EC must be effective; therefore, it must guarantee that employers forward the information to employees' representatives and their opinions to the employees in a timely fashion. Informing and consulting employees and their representatives in Community-scale undertakings or Community-scale groups of undertakings should be guaranteed at the relevant, transnational level of management of the multinational enterprise and of the bodies representing the interests of employees employed in EU Member States. In order that the proper level of information and consultation is achieved, Directive 2009/38/EC requires that the competences and areas of action of European Works Councils be regulated separately from the competences and areas of action of the national bodies representing the interests of employees in EU Member States. The competences and areas of action of European Works Councils should cover exclusively transnational matters. Issues concerning the whole Community-scale undertakings or Community-scale groups of undertakings operating in at least two different EU Member States are of such a transnational nature.

The transnational nature can be also ascribed to the matters significant to employees employed in Europe on account of the possible effects these matters may have on them irrespective of the number of the EU Member States engaged because of the Community-scale undertakings or Community-scale groups of undertakings located in their territories. Finally, the transnational nature is characteristic of the matters concerning any issues connected with entrepreneurs' transferring of their business within EU Member States. The mechanisms for informing and consulting employees employed in Community-scale undertakings or Community-scale groups of undertakings regulated in Directive 2009/38/EC must encompass all of the establishments or the group's undertakings located within the EU Member States, regardless of whether the undertaking or the group's controlling undertaking has its central management inside the territory of a Member State or outside the boundaries of the European Union.

Directive 2009/38/EC draws attention to the principle of autonomy of social partners. According to this principle, determining by a normative agreement, being the result of the social dialogue between the social partners, the nature, composition, function, mode of operation, procedures and financial resources of European Works Councils or other information and consultation procedures, adjusted to the situation of the Community-scale undertaking or the Community-scale group of undertakings falls under the exclusive competence of the employees' representatives and the management of the undertaking or the group's controlling undertaking. According to the principle of subsidiarity it is for the Member States to specify employees' representatives entitled to conclude agreements on the establishment of European Works Councils or a different, alternative procedure for informing and consulting employees in the Community scale undertakings or Community-scale groups of undertakings. The legal grounds for determining the relative representation of employees are the provisions of labour law in force in these Member States. Directive 2009/38/EC introduces one condition: the authorities of the EU Member States must provide, if they consider appropriate, for a balanced representation of different categories of employees in the European Works Councils.

Directive 2009/38/EC clarifies the concepts of "information" and "consultation" of employees. It takes into account the necessity to provide employees with the information at appropriate time and fashion. Furthermore, the information provided to employees should have appropriate content. Nevertheless, the procedure for informing employees must not slow down the decision-making process in a Community-scale undertaking or Community-scale group of undertakings. The procedure for consulting employees should take into account the goal of allowing employees or their representatives to express an opinion which is to be useful to the employer in the decision-making process. The consultation considered by the Directive as an opinion-giving process should take place at an appropriate time and in appropriate fashion, and it should have appropriate content. In the case where the central management of a Community-scale under-

taking or a Community-scale group's controlling undertaking is located outside the territory of the Member States, the provisions of Directive 2009/38/EC must be implemented by the representative agent of the Community-scale undertaking or Community-scale group of undertakings in one of the Member States. In case where the central management of a Community-scale undertaking or Community-scale group of undertakings has not appointed such an agent, the information and consultation of employees must be carried out by the establishment or controlled undertaking employing the greatest number of employees in the Member States.

All definitions are autonomous legal concepts contained in the Directive 2009/38/EC, such as: "Community-scale undertaking," "Community-scale group of undertakings," "controlling undertaking," "employees' representatives," "central management," "information," "consultation," "European Works Council," "special negotiating body" (Article 2, Article 3). Compared to Directive 94/45/EC, which analogously defines the basic legal concepts, Directive 2009/38/EC extends the scope of the information and consultation. Pursuant to Article 2, point "f" of the Directive, "information" encompasses transmission of data by the employer to the employees' representatives in order to enable them to acquaint themselves with a given subject matter and to examine it. The Directive requires that the information be given at an appropriate time, in an appropriate fashion and that it have appropriate content. These requirement were laid down in the Directive to enable employees and their representatives to undertake an in-depth assessment of the possible impact of the employer's intentions on the undertaking and the employees employed in this undertaking. The information must be detailed. Where appropriate, the employer must enable the employees and their representatives to prepare for consultations with the competent organ of the Community-scale undertaking or Community scale group of undertakings. According to Article 2, paragraph 1, point "g" of the Directive, "consultation" means the establishment of dialogue and exchange of views between employees' representatives and central management or any level of management of a Community-scale undertaking of Community-scale group of undertakings which is more appropriate on account of its transnational character. The social dialogue and exchange of opinions must be initiated at an appropriate time and conducted in an appropriate fashion. They must enable employees' representatives to express their opinion on the basis of the information provided by employers about the proposed measures to which the consultation is related. The procedures for providing the information and expressing an opinion by the employees' representatives must be without prejudice to the responsibilities of the management of undertakings. Opinions must be given by the employers within a reasonable time so that they may be taken into account by a Community-scale undertaking of Community-scale group of undertakings. The procedures laid down in the Directive 2009/38/EC are autonomous in order to identify the special negotiating body and to make joint decisions

to conclude an agreement on setting up a European Works Council or a special procedure to establish information and consultation. In Article 4, paragraph 1 of the Directive it was agreed that the central management of the Community-scale is responsible for ensuring the conditions and measures necessary to establish a European Works Council or to arrange information and consulting for employees about matters concerning European companies on the terms set out in Directive 2009/38/EC. The cited provision does not state national system of collective labour law, as to which rules should be used to bring into being one of the two alternative forms of participation of employees or their representatives on matters concerning the management of the European company workplaces. The wording of Article 4, paragraph 1 of the Directive shows that central management is responsible for the conditions and the means for the establishment of either a European Works Council or information-consultation procedures. It can be concluded that these legal forms of employee participation in European workplaces should be organised in accordance with the rules of the European Union member state, in which the seat of the Community-scale undertaking or group of companies is located. In these cases where the Community-scale undertaking form organizational structures regulated by private business law, under the control of the central management group of companies, the State of the central management group of the Community-scale undertaking identifies the proper national system of substantive labour law. If the central management is located outside the European Union, the responsibilities related to ensuring the conditions and measures necessary to establish a European Works Council or an alternative procedure for informing and consulting employees are imposed on the representatives of the central management of the establishment or group (Article 4, paragraph 2). This provision has a conflict of law character, which in the case of a conflict of rules of collective labour law with regard to employees' representation in European companies, stipulates that national labour law of the Member State in which the representative of the central management of Community-scale undertaking or group of companies is placed, is to apply. This restriction applies only to situations in which the central management has been located in a country outside the European Union. Article 4, paragraph 4 is a significant novum to Directive 2009/38/EC. It imposes obligations on the management of every undertaking belonging to the Community-scale group of undertakings and the central management or the deemed central management of the Community-scale undertaking or group of undertakings to obtain and transmit to the parties concerned by the application of this Directive (that is employees and their representatives, and the special negotiating body) the information required for commencing the negotiations. In particular, the employer or the management of the undertaking acting on behalf of the employer must inform its social partner representing the interests of employees on the structure of the undertaking or the group and its workforce and on the number of the employed employees.

In carrying out the recommendations set out in Directive 94/45/EC, the authorities of EU Member States should oblige the central management to negotiate on the election of one of the two mentioned in the Directive 2009/38/EC modes of consultation and informing employees or their representatives on issues of European workplaces. Negotiations are initiated either by the central management of the Community-scale groups of executives or Community-scale undertakings. A group of 100 workers employed in a Community-scale undertaking or their representatives acting on behalf of two employees in undertakings or establishments located in at least two different Member States, may also commence negotiations. The proposal of workers or their representatives should be reported in writing (Article 5, paragraph 1). The decision of the central management of a Community-scale enterprise or group of undertakings, and the request of employees or their representatives, initiate proceedings, in which the first stage is the creation of a special negotiating body representing the interests of employees within the workplace, in order to set up a European Works Council or procedure identifying information and consultation procedures. The special negotiating body is elected or appointed pursuant to the provisions of collective labour law applicable in the Member State in which the negotiations were initiated. This term is unclear, because the initiative to enter into negotiations as may be notified in a central management office (country A), the country where the workplace is located employing at least 100 employees, each of whom signed a motion to enter into negotiations (State B) or in two different countries, which are home to establishments included in the Community-scale undertaking (state C and D), in which representatives of employees reported such a request. Assuming that the central management of the Community-scale does not fit in the Member State in which the employer was located forming part of the organisational structure of such company, lawyers specialising in private international law must indicate the determinants that determine the proper indication of the national system of collective bargaining in the collision of two or three systems of collective labour laws enforced in the central management office (country A) and the country of the workplace employing at least 100 employees, who submitted the request to commence negotiations (State B). Another case, which requires the solution to a conflict concerns the conflict between the provisions of collective labour law in force in a central management office (country A) and collective labour law provisions in force in the two Member States, in which the application to negotiate was made by the representatives of employees (state C and D). The only case in which there is no conflict of norms of collective labour law concerns a situation in which the initiative of negotiations has been notified by the central management of the Community-scale group. In this case the mode of election or appointment of members to the special negotiating body representing the interests of workers in different workplaces within the organisational structure of the Community-scale undertakings and other matters referred to in

Article 5, paragraph 2 of Directive 2009/38/EC shall be governed by the provisions of collective labour law in force in the country where the central management is located. Because Article 5 of the Directive does not specify determinants that could be applicable in the event of a conflict of collective labour law, there are grounds to conclude that the only determinant which is applicable to solve the conflict of collective labour law is the central place of central management. Collective labour law provisions in force in the country in which the central management of the Community-scale undertaking is located, should apply in all matters relating to the mode of election or appointment (the first dilemma) of the special negotiating body, the size of this team (the second dilemma), within the limits laid down in Article 5, paragraph 2, point "b" of the Directive, to ensure that workers from different Member States, employed in workplaces included in the Community-scale undertaking have a minimum equal number of representatives in the special negotiating team while maintaining the principle of proportionality in the selection of the other members of the special negotiating body (the third dilemma). Appointment of additional members of the team while maintaining the principle of proportionality in relation to the number of employees in individual workplaces of the Community-scale undertaking is dependent on the number of vacancies in the special negotiating team. Assuming that the provisions of collective labour law in force in the country in which the Community-scale undertaking is based, requires that the special negotiating body is to be made up of 13 members, if the organisational structure of the Community-scale undertaking includes 13 different sized workplaces, the special negotiating body shall appoint 13 workers, each of which will be indicated by the employed in one of the 13 workplaces located in different Member States of the European Union. In such a case, the special negotiating body will include general members, to ensure participation of the team of employees of the workplace situated in the territory of each Member State. The choice or selection of the other "additional" members of the special negotiating body is dependent on the number of workers employed in workplaces located in different Member States. The rules for calculating the proportionality of the above shall be governed by the collective law of the Member State in whose territory the central management of Community-scale undertaking or group of companies (Article 5, paragraph 2, point "c") is located. In the Directive 2009/38/EC the conflict of collective labour laws is governed by using only the one determinant, which in each case indicates the *lex situs* as the relevant provision of the collective labour law. The matters relating to the selection of additional members to the special negotiating teams where there may be conflicts between national systems of substantive labour law is solved by the Polish Act on the European Works Councils of April 05, 2002.[171] Article 3, paragraph 1 and 2 of the Act establishes the method of

[171] Journal of Laws 2002, No. 62, item 556.

calculating the size of the employment in the workplace in order to determine whether individual workplaces located in Poland may be considered as organisational units of Community-scale enterprises, whereby the management has its seat on Polish territory. When specifying the techniques critical in establishing the number of employees, it was considered necessary to organize a special negotiating body. In light of the provisions of Article 3, paragraphs 1 and 2 of the Act on European Works Councils the number of employees in workplaces which are part of the Community-scale undertakings are determined from the average number of employees employed during the last two years prior to the initiation of proceedings which aim to select a specific negotiating team achieved by an application or withdrawal from the initiative of negotiations on the establishment of a European Works Council or the way information and consultation with the workers. In determining the average number of employees all the persons under any contract of employment converted into full-time work, are considered. In order to calculate the average number over the past two years the following average number of employees in the months and the average amount received is divided by 24. The technique in calculating the number of employees by the Polish legislature is just one of several possible methods used to determine the workplaces subject to the provisions of Directive 2009/38/EC. According to the rules of conflict used in this Directive, the deciding determinant indicating the appropriate national system of collective labour law is the law of the State in whose territory the central management of the Community-scale undertaking is located.

Negotiating one of the two alternative ways of participating employees and/or their representatives in managing the business partners of the Community-scale industrial relations: the central management and special negotiating body shall be required to negotiate in the "spirit of cooperation" in order to conclude an agreement on specific ways of informing and consulting employees (Article 6, paragraph 1). Committing the social partners to cooperate, Directive 2009/38/EC does not define the above concept. This means that the specific terms of the above are not defined and are left to the determination of the national rules of collective labour law. In the event of a conflict of national standards, the deciding provisions are those of the Member State in which the central management of the Community-scale undertaking is located. These provisions particularise the obligations imposed on the social partners negotiating their choice of one of the ways of participation and identifying the responsibilities of central management of Community-scale undertaking and the competence of European Works Council. The agreement concerning the detailed arrangements for informing and consulting employees in workplaces with a Community dimension is subject to Directive 2009/38/EC. Community scope of regulation of the contract is general and requires concrete national collective labour law provisions. Clarification of the Community legislation is necessary in matters relating to organisational determi-

nants with the Community-scale undertaking, composition and number of members of the European Works Council, division of seats in the Council between establishments in the various Member States, the term of the Council, the functions to be fulfilled by the Council and an agreed procedure for informing and consulting the board of the central management, location, frequency and duration of meetings of the Council on financial and material resources, which must be granted to the European Works Council by the central management of the Community-scale undertaking. National rules of collective labour law should also determine the duration of the agreement of selecting the method of employee participation, as regulated by Directive 2009/38/EC, and the mode of renegotiating the agreement. The above-mentioned categories of cases which should be specifically laid down in national regulations in collective labour law are set out in Article 6, paragraph 2 of Directive 2009/38/EC. Clarification of this regulation has been left to the collective labour law provisions in force in the country in which the central management of the Community-scale undertaking is situated. For such undertakings, or groups of undertakings whose central management was located in Poland, the Act of April 05, 2002 should stipulate the general wording as it appears in Directive 2009/38/EC. I am using the conditional, as Article 19, paragraph 1 of the Polish regulation reproduces the text of Article 6, paragraph 2 of Directive 94/45/EC (now Article 6, paragraph 2 of Directive 2009/38/EC), which makes Polish provisions of collective labour law have a general nature and leave the social partners the competence in all matters concerning the designation of the establishments falling within the scope of the European Works Council or an alternative method to the council informing and consulting employees by the employer, the composition and structure of the European Works Council, how its information is structured and its techniques of consultations, place, frequency and duration of meetings of the Council, financial means and material from which the Council can use, the duration of the agreement and the procedure for its renegotiation. Article 19, paragraph 1 of the Polish Law on European Works Councils Community-scale undertakings, which the central management is situated in Poland does not contain any specific regulation, specific to the Polish system of collective labour law. From the wording of this provision it is clear that the national legislature refrains from any interference into the common legal system of a Member State concerning the participation of employees and their representatives in the management of Community-scale undertakings. Lack of interference by the national legislature in matters related to the organisation, scope, performance and capabilities of the European Works Council means that in the case of Poland force collective labour law cannot be used in conflict of law issues. Indeed, they are not sufficiently specific. Act of April 05, 2002 leaves the social partners dealing with any issues connecting to the clarification of the six categories of matters mentioned in Article 6, paragraph 2 of Directive 2009/38/EC. References made to national collective labour law provisions in the Directive, which then refer to the standards

negotiated by the social partners, is not objectionable, provided that the regulatory agreement concluded by the social partners in collective labour relations are the sources of labour law. The provision of Article 19, paragraphs 1 and 2 of the Act on April 05, 2002 does not specify whether the agreements negotiated by the Central Board of Community-scale undertaking and the special negotiating body are sources of employment law. In the Polish labour law system, the necessary conditions for including into the categories of labour law the regulatory agreements are set out in Article 9, paragraph 1 of Labour Code. One of them is the legal basis of the agreement. It should be specified in the Act. The condition of an agreement between the central administration Community-scale undertaking located in Poland and the special negotiating body is fulfilled. The provisions of Chapter 3 of the Act of April 05, 2002 (Article 17–Article 19), govern the legal basis for the negotiation of such agreements and determine their content. However, another important condition for the inclusion is to regulate the rights and obligations of employers. According to the views presented in the Polish literature on collective labour law, "the agreement referred to in Article 19 of the Law of the EWC (European Works Councils – perm. A.M.S.) is a collective labour agreement. It is not a source of labour law (...) because it did not specify the rights and obligations of workers and employers. It is binding."[172] When considering the legal nature of an agreement regulated by Chapter 3 of the Act on April 05, 2002 one should consider the two categories of issues presented by the conflict rules laid down in Directive 2009/38/EC of the Polish law regulations of labour law because of the location of the headquarters of the central board of the Community-scale undertaking in Poland. Firstly, dealing both with conflict laws and the relevant collective labour law standards, the question is asked whether the social partners listed in Directive 2009/38/EC and in the Polish Act on April 05, 2002 are required to include one or more agreements or matters referred to in Article 6, paragraph 2 of Directive 2009/38/EC. The cited provisions of the Directive offer no reason for the social partners to negotiate two or more agreements (contracts). The European Community legislature consistently uses the singular term "agreement." Without fear of error it can be assumed that the provisions of Directive 2009/38/EC require the social partners in Community-scale undertakings to enter into a single agreement, which will be governed by the categories of matters mentioned in Article 6, paragraph 2 of the Directive. As discussed earlier, the Polish Act of April 05, 2002 regulates matters relating to the agreement regulated by Directive 2009/38/EC in three provisions of Chapter 3 of the Polish Act (Article 17–Article 19). In the commentary to the Polish Act on the European Works Councils referred to above, M. Zieleniecki seems to consider each of the three provisions of Chapter 3 as the legal basis for the conclusion of a separate agreement by the social partners. Com-

[172] M. Zieleniecki, *Ustawa o europejskich radach zakładowych z komentarzem* [in:] S. Pawłowski, J. Stelina, M. Zieleniecki, *The Act on European Works Councils with Commentary*, Gdańsk 2006, p. 117.

menting on Article 19 of the Act of April 05, 2002 he writes, "just as an agreement referred to in Article 18 of the Act of the EWC, it may (concerning the agreement referred to in Article 19 of the Act – perm. A.M.Ś.) form the basis of lower standards of interaction with the representatives of workers." I do not share this position. In the title of Chapter 3 of the Polish Act and in each of the three provisions of Chapter 3 only the singular "agreement" is used. The Act introduces into the Polish legal order the provisions of Directive 94/45/EC, which regulates the two alternative forms of worker participation in decision-making process with the management of a Community-scale undertaking located in Poland, one of which is the European Works Council, and the other as is agreed by the social partners the information and consultation procedure, Article 17 of the Act on April 05, 2002 formulates the legal basis of the negotiations undertaken to establish the European Works Council into existence,established in Article 18 of the Act, the legal basis for one or more ways to inform employees and conduct consultations with them in a case where the social partners cannot reach agreement on the establishment of a European Works Council. However, Article 19 of the Polish Act stipulates the terms for the agreement, under which the European-scale undertaking sets up the European Works Council.

After explaining the above concerns one should address the matter of the essential content for a single agreement, which may include the social partners of a European-scale undertaking. Depending on how the provisions of the EU Member States define the sources of labour law identical to the agreement on setting up a European Works Council and determine its composition, organisational structure, powers, procedures for communicating with the central management of the Community-scale undertakings, financial and property sources from which the European Works Council can make use in the conduct of activities and duration of the agreement and its re-negotiation procedure, may be considered or not as a source of collective labour law. The Polish Labour Code as one of the two selection criteria presented in the earlier normative agreements as a source of labour law, lists the content of the regulation. The normative agreement based on the Act is classified as a labour law source, as it "describes the rights and obligations of employees and employers" (Article 9, paragraph 1 of Labour Code). Any normative agreement governed by the provisions of Chapter 3 of the Act of April 05, 2002 meets the requirements of the above-cited provision of the Polish Labour Code for it to be assigned to the sources of employment law. Regulating the powers of the European Works Council, the agreement concluded by the normative social partners in the Community-scale undertaking defines the scope of workers' rights to participation in the management of these workplaces. Thus, this agreement governs the obligations of employers conducting business with a European dimension. It requires them to share with employees and their representatives knowledge about matters concerning the workplace and requires the employers before any decision is made, to allow workers' representatives to express their position. I try to avoid the

legal wording which may indicate the competence of workers' representation in the Community-scale undertakings. Neither Directives No. 2009/38/EC, No. 94/45/EC, nor the Polish Act of April 05, 2002 contain the wording that would determine whether European Works Councils have strong and consultative powers. The intensity of the powers of workers' representation in a Community-scale undertaking, is decided by the social partners' agreement of establishing a European Works Council. In the literature of European employment law, you may encounter the expression "balanced participation of representatives of workers in the management of undertakings by employers." This would mean that the share of the European Works Council in the management of the Community-scale undertakings cannot be limited to allow workers' representatives to express opinions, and then by the decision of the central management of the European workplace concerning that opinion. The regulatory agreement entered into by the central management of the Community-scale undertaking and the special negotiating body shall specify the powers of workers and their representatives on matters concerning the management of the European workplace. It also regulates the responsibilities of the central management of the undertaking. There is, in my opinion, a lack of the legal basis to believe that the provision of Article 9, paragraph 1 of the Labour Code lists as one of two basic conditions to qualify for the category of normative agreements sources of Polish law regulating the rights and obligations of individual employment relationships. The provision requires that the acts of labour law be treated as a source of law setting out the rights and obligations of workers and employers. In Article 9, paragraph 1 of the Labour Code there is no mention from which one could conclude that a necessary condition for regulatory agreements to be part of the categories of sources of employment law, is the regulation of the rights and obligations of individual employment relationships. The Labour Code defines the rights and obligations of employees and employers (Article 1 of the Labour Code). This makes the subject not only to regulate the provisions of the Labour Code, but also the social relations regulated by labour law (individual and collective). There are therefore reasons to consider binding agreements governed by the provisions of Chapter 3 of the Act of April 05, 2002 as a source of labour law within the meaning of Article 9, paragraph 1 of the Labour Code.

The principles of European Works Council or modes of cooperation of the central management of the Community-scale undertaking with workers' representatives in the framework of informing and consulting workers, are specified in Article 9 of the Directive 2009/38/EC. This provision states that the cooperation of workers' representative bodies with the employer should take place "in a spirit of cooperation and respect for mutual rights and obligations." The Polish Act of April 05, 2002 does not firmly stipulate the obligations under that provision.

The final matter regulated by the provisions of Directive 2009/38/EC is to ensure special protection and relative stability for the workers entering into the special negotiating body, for members of the European Works Council and rep-

resentatives of employees holding the functions under the information and consultation procedures set out in Article 6, paragraph 3 of the Directive. Article 10, paragraph 3 and 4 of the Directive provides that the said employees enjoy the performance of its functions to the same legal protection and guarantees that are provided for employees' representatives by the national legislation and/or practice in the country in which they are employed. *Lex loci laboris* decides on the protection of the sustainability of the employment relationship of workers' representatives. In Poland, the degree of legal protection guaranteed by the labour law is equal to that of the workers' representatives on the boards of company unions within workplaces, and in the councils of workers of state enterprises. Article 37, paragraph 1 of the Act of April 05, 2002 of the Polish law prohibits the termination of a work relationship with a notice period with workers entering into special negotiating bodies or into European Works Councils within the duration of the mandate and one year after its expiry, without the agreement of the worker's association representing the worker. If an employee is not covered by the special legal protection of a trade union organisation, there can be no termination without the consent of the relevant district inspector of the National Labour Inspectorate. Special protection of the life of the employment relationship is covered by the prohibition of making amendments of the existing conditions of the work agreement of a worker who is specially protected because of exercising their functions during the protection period in the special negotiating team or in the European Works Council (Article 37, paragraph 2). Guaranteed protection of workers' representatives in the European-scale undertaking also includes the entitlement to relief from the obligation to work with the right to pay in order to attend meetings of the special authority negotiating or European Works Council or any other meetings referred to in the agreement by the social partners. In Article 37, paragraph 2 of the Act of April 05, 2002 members of the negotiating teams or the European Works Council were granted the right to paid leave from work in connection with the participation within these bodies. This rule differs from the standard laid down in Article 10 of Directive 2009/38/EC. It is difficult to assess whether it may be more favourable or less favourable than the regulation guaranteed by Directive 2009/38/EC for workers covered by special legal protection. The conflict rules contained in Directive 2009/38/EC refer the matters of special protection of relative stability of work relations of workers who are members of special negotiating bodies or of European Works Councils to the relevant provisions of national labour law. The relevant provisions are those indicated with the help of the determinants of the place of employment of the representatives of workers employed in establishments which are part of Community-scale undertakings. The conflict rules contained in Directive 2009/38/EC take into account the special legal regulation of labour relations under special protection to sustainable employment by the national labour laws in force in the Member States of the European Union. In this case, Directive 2009/38/EC departs from the principle

according to which the determinant is the seat of the central management of the Community-scale undertaking required when properly indicating the appropriate national collective bargaining system. In the event of a conflict of national labour law in matters relating to the sustainability of specific protection against workers who exercise functions as special representatives in the negotiating team enjoy special legal protection provided for employees' representatives in the national labour laws applicable in the place of work and representative responsibilities.

Article 10, paragraphs 1 and 2 of Directive 20009/38/EC obliges the authorities of the EU Member States to ensure that the national provisions of labour law provide the European Works Councils and their members who represent the interests of employees with the means required to apply the rights arising from this Directive. Without prejudice to the principle of confidentiality set forth in Article 8 of the Directive in question, the members of the European Works Council are obliged to inform the representatives of employees of the establishments or of the undertakings of a Community-scale group of undertakings or, in the absence of representatives, the workforce as a whole, of the content and outcome of the information and consultation procedure carried out in accordance with Directive 2009/38/EU.

Chapter 2

Regulation (EC) No. 864/2007 of the European Parliament and the Council of July 11, 2007 concerning the law applicable to non--contractual obligations ("Rome II") resulting from collective actions

The conflict rule included in Article 9 of Regulation No. 864/2007 regulates the collisions of national collective labour laws only in matters relating to the liability of individuals (workers, employers) participating in collective actions, in connection with the initiated or planned industrial action. The provision contains a determinant to indicate the relevant provisions of the collective labour law, which govern the responsibility of the organisation representing the professional interests of the parties to the collective dispute for damage caused by a planned or carried out collective labour dispute. The law applicable to assess the legal implications of the effects of intentional and/or carried out collective action is the collective labour law of the Member State in which the industrial action was initiated or had been announced. It should be noted that Article 9 of this regulation has applied the formula used in Article 4, paragraph 2 of this Regulation, defining the relationship between the general principle of liability for the obligations arising out of non-contractual agreements and the exceptions to the rule under which the applicable law is *lex loci damni* (Article 4, paragraph 1). In the event of any liability of the participants of a collective dispute, Article 9 of the Regulation No. 864/2007 *in fine* states as an appropriate collective labour law of the Member State in which the action is to be or has been taken. From this formulation it follows that the general principle formulated in Article 4, paragraph 1 of the Regulation is not substantially modified in the case of liability of persons and entities in collective labour disputes. The cases of liability for damage caused by planned or carried out industrial action can take place only in the event of organising collective action by any party to a collective dispute and/or representatives. If natural persons or organizations representing the professional interests of the parties to a collective dispute have at the time the damage occurs habitual residence in the same country, the law applicable to the non-contractual obligation for damages caused by industrial action, is the collective labour law of that country. Industrial action and demonstrations and other actions organised by the participants of this dispute are usually provided in the workplace or in a place which houses the headquarters of

the employer. In the case of organisations representing the interests of the parties to collective disputes the "habitual residence" is understood as the place where the headquarters of the trade union are located or other workers' representatives, representing the collective interests of the workers' dispute and – in the event that the professional interests of employers in the collective dispute are represented by employers' organisations – the place which seats the employers' organisation. As a rule, employees in the collective dispute are represented by a single organization representing their professional interests. The employers' interests are represented by the employer or the employers' organisation, where employer who is engaged in industrial action is a member. It cannot be excluded that the interests of each party to the collective dispute may be represented by two or more organisations whose headquarters are situated in different Member States. On the side workers involved in industrial action multiplicity of trade union representation may result from the affiliation of workers to various trade unions. These organisations can undertake collective actions together. In the case of an organised illegal union strike, the responsibility for damage caused to the employer by the strike will be governed by the law of the country in which trade unions and employers have their seat (Article 9 in conjunction with Article 4, paragraph 2 Regulation No. 864/2007). If the strike is declared illegal by collective labour law in the country where the strike was organized by three trade unions (A, B and C), of which only one of them (A) is located in the same country as the employer, the law applicable to the assessment of responsibility for the strike as a tort is the law of the country in which both parties to the collective dispute have their seats. The remaining trade unions (B and C) will be held liable under the provisions in force in the country where the industrial action was taken. The same situation occurs in the event of workers participating in an illegal strike. Employees who are not habitually resident in the country where the seat of the employer is located, will respond to the national collective labour law as indicated using the determinant listed in Article 9 of Regulation No. 864/2007. However, other workers residing in that country, where the employer is located or in which the workplace employing workers is located, will be liable under the provisions identified by the determinant specified in Article 4, paragraph 2 of the Regulation.

The provision of Article 9 of the Regulation lists the determinant used to indicate the applicable law for damages caused by industrial action. EU legislature uses a cumulative term. It takes into consideration all the damages caused by those actions classified as the relevant provisions of the national collective labour law. The use of two different determinants to indicate the applicable law may lead to a different legal assessment of collective bargaining and collective action taken by the parties involved in disputes. A major fault of the EU legislator is the lack of adoption of uniform criteria for the assessment of collective bargaining and collective labour action undertaken in these disputes. Assuming that in Chapter II of Regulation No. 864/2007 the EU legislature sought to regulate in a uniform

manner the conflict rules applicable to resolving conflicts of national collective labour law provisions, under which the determinants point to the law applicable to non-contractual obligations arising from tort, could be adopted as a rule, whereby the evaluation of the dispute of the parties are made by the collective labour law provisions in force in the country where the dispute has been undertaken or will be undertaken. From a logical point of view it would be correct, but would create serious difficulties for the judiciary in other Member States indicated on the basis of a determinant as defined in Article 4, paragraph 2 of the Regulation in cases of liability for acts recognised by the law of the country where the action was taken, and not prohibited by the appropriate collective labour law as indicated by the State. The only possibility of solving the problems associated with the use of the provision to the same industrial action is the amendment of Article 9 of Regulation No. 864/2007, which would rely on the erasure of the concerns articulated at the outset of this provision: "Without prejudice to Article 4, paragraph 2." The amended Article 4, paragraph 2 of this Regulation should begin with the words *de lege lata,* which would be written after the comma: "the law applicable to non-contractual obligations (...)." In the case of liability for industrial action should not be binding on the parties to collective bargaining, where there are associations of workers, and there may be a variety of organisations representing the professional interests of employees for making use of the two different determinants in the one conflict of laws.

The use of a determinant indicating the appropriate system of national substantive law does not have to lead to liability under the provisions of collective labour law, in force in the Member State whose legal system was identified as having authority to regulate liability for tort damages. Polish Act of May 23, 1991 on the resolution of collective disputes,[173] states that "the damage caused by a strike or other protest action organised in breach of the law, the organiser is liable under the terms of the Civil Code" (Article 26, paragraph 3). Indicated by the conflict rule – Article 9 of Regulation No. 864/2007 of the Polish system of collective labour law as the law appropriate to the non-contractual obligations, an organiser or an organising entity of a strike, which is in breach of the Act of May 23, 1991 for damages caused by illegal collective action necessitates the application of the provisions of the Civil Code for the liability. Specific "reference" used in Article 26, paragraph 3 of the Polish Act on resolving collective disputes, which cannot be regarded as an accident *renvoi* is governed by the provisions of private international law. In Article 9 of Regulation No. 864/2007, "the appropriate law" is indicated by the determinant, stipulating the appropriate law to be that of the

[173] OJ No. 55, item. 236, as amended. See: A.M. Świątkowski, *The Act on the Resolution of Collective Disputes* [in:] J. Wratny, K. Walczak (eds.), *Collective Labour Law. Commentary*, Warsaw 2008, p. 245 et seq., p. 436 et seq.

country in which the industrial action was intended or carried out. In the above the example is the Polish law.

Another legal issue that should be resolved in connection with the regulation in Article 9 of Regulation No. 864/2007 of a conflict of collective labour law is the question of the legal basis of responsibility, applied by the determinants regulated by Article 9 and Article 4, paragraph 2 of the Regulation. Analysing the content of Article 9 it should be considered whether these determinants apply if the damage was caused by the planned or the carried out industrial action. In Article 9 the EU legislature consistently uses the term “collective dispute” as the basis for any damage that may be caused by one of the parties to the dispute. It is therefore necessary to consider whether the mere fact that a collective labour dispute, which is in breach of the relevant national collective labour law may give rise to legal action for damages that need to resolve a conflict of laws existing between the national collective labour law provisions. In Article 9 of Regulation No. 864/2007 there is no mention of a definition of an autonomous collective dispute. It is to be accepted that an industrial action is a collective dispute deemed by the provisions of the national labour law in force in the country in which this dispute has been initiated. The first problem concerns the legal definition of the dispute. The question arises whether a dispute regarded as an industrial action by national collective labour law enforced in a country in which it was initiated, concerning other interests than the professional interests of the engaged workers, can be regarded as an industrial action in accordance with the conflict of laws under the Directive No. 864/2007. This question is a result of the use of Article 9 of the Regulation, which applies only to organisations representing the professional interests of the workers that may be involved in the dispute. The cited provision was made to identify the scope of collective bargaining with the competence of organisations representing the interests of workers. In interpreting this provision it can be concluded that the conflict dealt with in Article 9 of Regulation No. 864/2007 governing conflicts of national collective employment law on these matters, which under the provisions of national labour law protect the professional interests of workers, may be initiated by organisations authorised by national legislature to represent the professional interests of workers. In light of the Polish Act of May 23, 1991 industrial disputes of workers with the employer may relate to working conditions, wages, social benefits and rights and freedom of association of workers or other groups of employees who have the right to associate in trade unions (Article 1). Article 1 of the Trade Unions Act of May 23, 1991[174] stipulates that the dispute is a collective labour dispute, which may be initiated by trade unions set up to represent and defend the rights and the professional and social interests

[174] G. Orłowski, *Ustawa o związkach zawodowych* [in:] *Zbiorowe prawo pracy* (Unified text: Journal of Laws 2001, No. 79, item. 854, as amended. See: G. Orłowski, The Trade Unions Act [in:] J. Wratny, K. Walczak (eds.) *Collective Labour Law...*, p. 3 et seq.).

of workers. The conflict law regulated by Article 9 of Regulation No. 864/2007 is used as an indicator of collective bargaining powers of workers' representative organisations representing the professional interests. The meaning of the provision of collective disputes are disputes in which workers' representative organisations in the Member States may apply on behalf of the workers they represent. In fact, collective disputes initiated to defend the professional interests of workers are any disputes that may be initiated in the light of collective labour law of the Member States to defend those interests which are defended by the representative organisations of employees authorised by the national legislature to represent the interests of workers. In Poland, as in most other European Union Member States the organisations authorised to initiate collective bargaining, are trade unions. The competence of organisations regulated by labour law in force in an EU Member State, is of crucial importance, as it is a question of whether planned or carried out collective disputes in a particular Member State may qualify for the category of collective disputes within the meaning of Article 9 of Regulation No. 864/2007. An example of Polish regulations imposed by the legislature in the law on trade unions and the settlement of collective disputes shows that disputes concerning the professional interests within the meaning of Article 9 of Regulation No. 864/2007 are disputes based on the rights and professional and social interests of workers (Article 1 of the Trade Unions Act), on working conditions, wages, social benefits, rights and freedom of association (Article 1 of the Act on settlement of collective disputes).

The normalisation of Article 9 of Regulation No. 864/207 shows that not only collective action planned or taken in the course of industrial action, but also to initiate industrial action may give rise to liability of persons and entities involved in the dispute for damages which has arisen following the initiation of a planned or carried out dispute. Point 27 in the preamble to Regulation No. 864/2007 posed an equal sign between the concept of industrial action and certain actions taken by the parties to collective industrial action, such as a strike action or lockout. It was found that "the exact understanding of an industrial action, such as a strike or lockout, (...)" is not consistent with the concept of legal industrial action, even if the differences of collective labour law in the various Member States of the European Union will be taken into account. The distinguishing feature of collective disputes from other disputes governed by labour law is the distinction of professional, economic and social interests as well as the exercise of freedom of association of workers and employers. The occurrence of an industrial action can be written about from the point at which the body representing the interests of the workers requests from the employer the formation or more favourable formation of issues that in the light of national collective employment law can be subject to a collective dispute. Unlike the dispute concerning rights, i.e. the compliance by the employer of employee rights under the provisions of labour law, the dispute is a dispute over collective interests. Actually, in the provisions of a collective labour

law of the Member States there is a failure to provide a legal definition of a collective dispute. Instead, issues are identified that may be the subject of industrial action. In Article 7, paragraph 1 of the Polish Act on resolving collective disputes, there is an indication of the point in time, in which it is considered by the legislature as the beginning of a collective dispute. In the meaning of this provision, "a collective dispute exists from the day an entity representing the interests of the employees makes demands to the employer, which are referred to in Article 1." The Article lists the types of issues which may relate to an industrial action of employees with an employer. They are, as mentioned earlier, working conditions, wages or social benefits and trade union rights and freedoms of workers and other professional groups to which the provisions of collective labour law grant the right of association in trade unions. The method and techniques used by national lawmakers to regulate collective bargaining are different in different Member States of the European Union. For this reason, Regulation No. 864/2007 does not contain an autonomous definition of industrial action. An industrial action dispute is treated as an industrial action by the internal rules of the collective labour law of each European Union Member State. In order to protect the collective rights of the parties to the dispute, workers and employers, Regulation No. 864/2007 was adopted as a general rule that the law applicable to determine whether the dispute can be treated as a collective dispute within the meaning of that regulation is the law of the country in which the dispute has taken place. Identifying collective disputes with protest actions undertaken by the bodies representing the interests of employees (strikes) and the collective actions organised by the employers (lockouts), Regulation No. 864/2007 leaves aside the legal problems concerning the application of the conflict rules codified in Article 9 of the Regulation to non-contractual obligations of persons and entities involved in resolving industrial disputes by peaceful means. Liability for breach of the provisions governing the procedures for solving collective disputes may establish the liability of interfering qualified entities in initiating or carrying out industrial action in accordance with the law. An example of such legislation is Article 26, paragraph 1 of the Polish Act on the resolution of collective disputes. Responsibility for breach of the Act bear persons who, because of their positions in the company or because of the functions they exercise outside the workplace, in which there is a conflict of interests between workers and employers, have the opportunity to influence the conduct of persons and entities authorised to initiate a collective dispute. If the outcome of the activities described in Article 26, paragraph 1 of the Act on settlement of collective disputes eventuates in damages, the conflict rules governed by Article 9 of Regulation No. 864/2007 will apply. Because this provision regulates the conflict of laws to identify the relevant national legal system applicable to the determination of liability for damage caused by an industrial action, depending on the definition of industrial action by the relevant provisions of labour law in force in the Member State where the industrial action has been taken or is to be taken,

one can write about the conflict rules of collective labour law for damages arising out of disputes, which, in light of the relevant provisions cannot be defined as an industrial dispute. However, Article 9 of the Regulation regulates conflict of laws of collective labour law not only in the event of organising the industrial dispute, but even if the action has been scheduled. During the planning phase of the industrial action one cannot write about the met requirements regulated by national collective labour law, which determine the dispute to the credit of the proposed category for the purposes of collective bargaining, collective labour law provisions in force in a particular Member State. The damage caused by the actions made by the person who in connection with the duties of their position or function held interferes with the conduct of a lawful industrial action, shall be assessed by the national collective labour law of that Member State in which the dispute is to be carried out.

Point 28 of the preamble to Regulation No. 864/2007 has clearly stated that the special rule for resolving a conflict of national collective labour law applicable to collective bargaining, as defined in Article 9 of the Regulation, is without prejudice to the terms and conditions of such disputes in accordance with the national labour law. Article 9 of the Regulation does not affect the legal status of trade unions or other representative organisations of workers, which may be present as representatives of the professional interests of the workers who are part of a collective dispute. Article 9 of the Regulation only sets out the determinant used to resolve conflicts between the national standards of collective labour law.

The basis for the application of the relevant national collective labour law as indicated by the conflict collective labour laws, as defined in Article 9 of Regulation, is a damage caused by industrial action, in which there are foreign elements. Damage "caused by" industrial action, carried out, conducted or planned should be in causal connection with the dispute and any efforts made by the collective actions of the dispute. The term used in the provision of the Regulation under consideration is a synonym for a legal term introduced to Article 26, paragraph 3 of the Polish Act on the resolution of collective bargaining: "the organiser is liable under the terms of Civil Code, for damage caused by a strike or other protest action organised in breach of the law (...)." The differences in the regulation of the legal framework of collective labour law of the Member States concerning collective disputes, legal procedures to resolve them, liability for damages arising from any actions or omissions of the parties to the collective dispute and their representatives, make it impossible to present the principles of liability for damage caused by planned or carried out collective disputes. One can make comparisons only and highlight differences in the regulation of individual Member States responsible for industrial action and deduct from these disputes the collective actions. The Polish Act on dispute resolution refers to the collective strikes and other protest actions organised in breach of the law as the legal basis for the liability on the principles of the Civil Code by the organiser or organisers

of such actions. Depending on the adopted concept of a workers' representative in the Member States, collective disputes, strikes and other protest actions may be legally organised by trade unions, representative trade unions, other representative organizations of workers, and set up *ad hoc* strike committees. International standards for collective labour law applied by the Council of Europe allow Member States to permit the introduction of a monopoly of trade unions to represent workers' interests during collective bargaining, provided that the provisions of collective labour law in force in the State whose authorities have established a monopoly do not establish undue disruption to employees in the establishment of trade unions authorised to initiate collective bargaining and collective action.[175] Article 9 of the Regulation does not apply to the right to organise collective action in Member States. EU legislature accepts the principle of liability for damage caused by industrial disputes or actions which may take the form of acts and omissions by the parties and/or their representatives.

The conflict rule formulated in Article 9 of Regulation No. 864/2007 is addressed to any collective action taken by the parties or their representatives, and are regulated by the relevant national collective labour law. Lack of legal regulation of liability for damage resulting from the non-contractual obligation under the liability for the activities listed in the Regulation and that are not covered by the relevant national collective labour law legislation require to consider the liability of individuals and entities taking such action. The most spectacular example of collective action listed in point 27 mentioned in the preamble to Regulation No. 864/2007 is the lockout, which is undoubtedly a means of pressuring the employees and their representatives involved in industrial action and may only be initiated and conducted by the employer. Some Member States of the European Union do not regulate the decision-making principles for announcing lockouts by employers. In some Member States the concept of a lockout does not exist. The Polish system of collective labour law provides a good illustration of this legal problem. There are no legal grounds to believe that the damage caused by a lockout is seen as an organised protest, despite the provisions of the Act on the settlement of collective disputes. In Chapter 5 of the Polish Act of May 23, 1991 there is a list of actions conducted by individuals and entities representing the interests of both parties to collective disputes, regarded by the Polish legislature as conflicting with the provisions of the Act on the settlement of collective disputes. They are:

– any action which disturbs the party concerned in the initiation and conduct of industrial action in accordance with the provisions of collective labour law (Article 26, paragraph 1, point 1);

[175] See: A.M. Świątkowski, *Charter of Social Rights of the Council of Europe*, AH Alphen aan den Rijn, The Netherlands 2007, p. 227 et seq.

- any failure to comply with the obligations prescribed in the settlement of collective disputes (Article 26, paragraph 1, point 2);
- action undertaken to run a strike or other protest actions, organised in breach of the law on resolving collective disputes (Article 26, paragraph 2);
- strikes and other collective action organised in breach of the law on settling collective disputes, during which or in connection with which damage was caused (Article 26, paragraph 3).

A lockout, which causes measurable damage to the property of the workers who are not taking part in a collective dispute, and to commercial contractors of the undertaking which temporarily closes its workplace suspending work and activities, is outside the scope of Article 26 of the Polish Act on the settlement of collective disputes. The rule concerning the industrial action referred to in Article 9 of Regulation No. 864/2007, which does not affect the terms of carrying out collective disputes and to take collective actions during these disputes, set in the national collective labour law provisions of the Member States, indicates, in the event of a conflict of collective labour law as an appropriate national system of collective labour law of a Member State, which defines the collective disputes, rules and procedures governing the conduct of such disputes and – most importantly in this case – non-compliance with the collective action provisions. Loopholes in the legal regulations in matters relating to collective labour disputes, in particular strikes and lockouts, in certain Member States mean that the regulations in Article 9 Regulation No. 864/2007 concerning conflict of laws in some cases will identify an appropriate partial collective labour law system of a Member State. This in turn undermines point 6 of the preamble to the Regulation No. 864/2007 of the principle of legal certainty in employment relations, and the predictability of the results in collective actions. Lack of harmonization of collective labour law standards within the European Union is a threat to freedom, security and justice in collective labour relations.

Part V

Conflicts of law in social security – the coordination of national social security systems of EU Member States according to the regulation of the European Parliament and Council Regulation (EC) No. 883/2004 of April 29, 2004 on the coordination of social security systems

Chapter 1

The function of European social security regulations

European legislation governing the social security rules and procedures for implementing national systems of social security laws for the insured persons (employees, the self-employed and their families), moving within the European Union. The EU legislature provides the rules of European social security law, which coordinate the different national social security schemes, in order not to deprive any person entitled to benefits of social security under the rule of any national legal system of social security entitlements to benefits, to protect the rights acquired and ensure that the insured persons applying for benefits from another Member State receive equal treatment with the nationals of that Member State and to prevent the accumulation of social security benefits because of this reason. European social security law governing therefore conflicts of law of national social security legislation, using the method of coordination as a technique which allows for the adaptation of separate legislation in social security relations, in which there are foreign elements. The legal standards used to coordinate the foreign social security systems of EU Member States do not differ from the standards used to regulate the substantive conflicts of labour enforced in various countries. In the case of coordination and conflict laws, the determinants used in the provisions of private international labour law suggest appropriate systems of substantive law that should be used by the parties in legal relationships involving a foreign element, and by bodies applying the law. The specificity of the coordinating standards used by the EU institutions is based on the selection of appropriate national legislation of social security law by the competent bodies administering social security benefits, operating in one Member State, authorised to determine the length of service inclusive to receive insurance, from which national social security provisions make the entitlement to social security benefits by virtue of social insurance in another Member State. Council Regulation (EEC) No. 1408/71 of June 14, 1971 on the application of social security schemes to employed persons and their families moving within the Community[176] will be replaced by European Parliament and Council Regulation (EC) No. 883/2004 of

[176] Official Journal of the European Union L 149, July 05, 1971, p. 2, as last amended by European Parliament and Council Regulation (EC) No. 1386/2001, Oficial Journal of the European Union L 187, July 10, 2001, p. 1.

April 29, 2004 on the coordination of social security systems[177] from the day of entry into force of the implementing regulation. In this part of the book I present the standards coordinating national social security systems regulated by Regulation No. 883/2004. I also make use of the sixteenth and the final version of the proposal of the European Parliament and the Council on the implementation of Regulation (EC) No. 883/2004 on the coordination of social security systems of January 31, 2006.[178] This project was approved on September 16, 2009 and the European Parliament and Council (EC) enacted Regulation No. 987/2009 on the implementation of Regulation (EC) No. 883/2004,[179] as amended by Regulation No. 988/2009 of September 16, 2009 on the coordination of social security systems and also determining the content of the annexes (the content is valid for the EEA and for Switzerland).[180]

Council Regulation (EEC) No. 1408/71 of June 14, 1971 has been amended and updated. The reason for these changes are both the European Court of Justice and the changes in national social security legislation of the Member States of the European Union. These factors contributed to the complexity and the excessive build up of EU rules on coordination of national social security legislation. In paragraph 3 of the preamble to Regulation No. 883/2004 of April 29, 2004 it was concluded that in order to guarantee the free movement of persons within the European Union it is necessary to change the rules on the coordination of national social security systems and at the same time modernise and simplify them. The general principle applied by the provisions of coordinating national social security systems is to submit the social security relationship with a foreign element: the national social security law of the Member State in which the person carries out the work in a work relationship or is self-employed, or conducts commercial activities or services.[181] The basic determinant identifying the relevant national social security legislation is indicated to all. *Lex loci laboris* solving conflicts of substantive labour law has been used as a determinant showing the relevant national legislation in social security. From the above rule there are exceptions, governed by the provisions of Title II of Regulation No. 883/2004. The guiding idea was expressed in paragraph 17 to the preamble of the Regulation, stating the insured who moves around within the EU should submit to the social security system, which applies in the country where the work is being carried out. The application of this principle results from the ideas formulated in the preamble to paragraph 15 of the Regulation, that an insured person, moving within the European Union, should be covered by the social security system of only one Member State. This principle

[177] OJ of the European Union L 166/1, April 30, 2004, p. 72.

[178] COM (2006).

[179] Entered into force on May 1, 2010 Official Journal of the European Union L 284/1, to October 30, 2009.

[180] Official Journal of the European Union L 284/43, October 30, 2009.

[181] In paragraph 17 of the preamble to Regulation No. 883/2004 the term "employee" is used.

was reaffirmed in Article 10 of Regulation No. 883/2004, a provision that does not confer or does not allow the insured to retain a number of social benefits of the same type and for the same period of compulsory insurance. As a consequence of the movement of workers, persons who are self-employed and are moving between Member States of are subjected to at least two national systems of social security, therefore the principle formulated in paragraph 15 in the preamble to Regulation No. 883/2004 must be interpreted in such a way that makes it impossible for the same social security relationship to be subjected to the social security laws in force in two or more Member States. This does not mean that the social security relationship in which there are foreign elements will not be subject to social security laws in force in many Member States. Theoretically speaking, the social security relationship of one insured person who, in the period their working life is covered, moves within all Member States of the European Union is regulated by the national social security legislation in force in each Member State of the Union. The principle formulated in paragraph 15 in the preamble to Regulation No. 883/2004 prevents the simultaneous use of social security legislation of two or more Member States in this period, in which the insured is professionally active in the territory of two or more Member States. In this case the provisions of Regulation No. 883/2004 coordinating the implementation of national social security systems takes the form of the conflict rules *sensu stricto*. An example of such a standard is the provision of Article 13 of the analysed Regulation, which includes the determinants indicating the appropriate national system of social security in the event of simultaneous performance of work by the insured person working in two or more Member States of the European Union. The peculiarity of social security laws is evident in the close liaison of a social security relationship with the individual labour relationship and other legal relations under which insured persons pursue professional activities. So in the case when one remains in the employ of one employer, and is covered by the national social security system of the country in which the workplace is located employing the worker, the only foreign element is the place of work. Changing the place of work by an employee in another EU Member State means the employee will be covered by the social security law of another Member State. For this reason, it can be mentioned that the principle laid down in paragraph 15 of the preamble to Regulation No. 883/2004 shall not preclude the application of one social security relationship to two or more national social security systems of different Member States of the Union. This rule prevents the simultaneous use of the same social security system, where there are foreign elements (to perform the work within the territory of two Member States), national social security legislation in force in those countries in which the insured worker carries out his work. Subjecting persons moving within the European Union to only one national system of social security has been introduced in the Regulation No. 883/2004 in order to avoid overlapping of national social security legislation in force between two or more Member States, which

would be applicable because of the simultaneous work in two or more Member States. Because the situation cannot be avoided whereby the employee performs the same work in two or more Member States it was necessary to identify in Article 13 of the Regulation No. 883/2004 the appropriate national system of social security legislation. The overall determinant *lex loci laboris* does not allow, in this particular case, the emergence of a national social security system.

The provisions coordinating the national social security systems require the equal treatment of insured persons, subject by virtue of employment under the employment or professional activities in a particular Member State. The general principle of equal treatment of policyholders is particularly applicable to employees who are not resident in the Member State in which they carry out work (preamble, paragraph 8). The national social security legislation make the granting of benefits dependent on the conditions of insurance, which is usually identified with the period of employment or professional activity. However, the above conditions may take the form of requirements relating to the period of residence in a Member State.[182] In this case, persons employed in that country, living in another country, whose social security laws entitle to social security benefits from the period of residence would not be subject to social security in any of such countries. The provisions coordinating national social security systems to employees and the professionally active, equal treatment with nationals who are subject to social security law in a Member State, even if they do not meet the requirements for the submission of social security relations in which there are elements of foreign social security laws in force in place of work or professional activities. Paragraph 16 of the preamble of the Regulation states that in principle there is no justification for the European Union to make entitlements to social benefits dependent on the residence of the persons concerned. However, in specific cases, in particular with regard to social benefits associated with economic and social situation of the person concerned, the place of residence of the social security benefits applicant may be taken into account when making decisions by the competent social security body.

Equal treatment of insured persons includes:

- equality in matters relating to benefits, income and circumstances of acquiring entitlements to the benefits (preamble, paragraph 9);
- the obligation of insurers to use the legal fiction that one's circumstances or events occurring in the territory of another Member State in which the insured has been employed, resided or met other conditions for this to be a social secu-

[182] For example, the full Danish pension benefits are paid after a ten-year period of residence in Denmark. For this reason, in the Annex X of the Regulation No. 883/2004 it has been decided that the rules prevent the same kind of benefits applying to the amount of which does not depend on the length of periods of insurance or residence, as defined in Article 54, paragraph 2, point "a" of the Regulation lists the old age benefits acquired after 10 years of residence in Denmark prior to January 01, 1989.

rity scheme in country A, from which the national provisions of social security legislation in force in country B, in which the employee is employed, making the acquisition, maintenance, or multiplying the entitlement to social security shall be considered fulfilled, as if they were in place on the territory of country A. In particular, equal treatment of the insured commits the appropriate social security bodies for the aggregation of insurance periods, employment in the employment relationship, or in professional self-employment, completed under the national social security legislation in one Member State to the same periods completed under the social security legislation in force in another Member State in which the insured has worked, lived or run a professional activity. In paragraph 10 of the preamble to Regulation No. 883/2004 it has been decided that "the periods completed under the legislation of another Member State should be taken into account only by applying the principle of aggregation;"
– conduct by persons moving within the European Union and the expectations of the acquired rights to social security benefits (preamble, paragraph 13).

A necessary condition for the implementation of the principle of equal treatment of the insured persons is the summation by the competent institutions administering social security benefits in the Member States of the European Union of all the periods taken into account by the various national social security systems, which during the professional activity or residence in different Member States the insured was subjected to during the decision making process in matters relating to the acquisition, retention and expectation of rights to benefits, as well as due to the calculation of social security benefits (preamble, paragraph 14).

Specific rules of conduct were set out in Regulation No. 883/2004 on matters relating to maternity benefits, family benefits, pensions and retirement benefits, health care, unemployment benefits, and alimony benefits. Regulation No. 883/2004 adopted a uniform rule and regulation of maternity benefits and their equivalents to be benefited by those who are entitled, namely parents or legal guardians in the first months of life of the infant (preamble, paragraph 19). It was considered that in terms of insurance benefits for illness, maternity and equivalent benefits for the father of the newborn, the insured persons, as well as members of their families, living or staying in another Member State should have the assured care (preamble, paragraph 20). For the differences between the various national social security schemes in the preamble of Regulation No. 883/2004, it recommended that the authorities of the Member States to require, wherever possible, members of the families of workers living by border will benefit from medical care in the Member State in which the employee carries out the work (paragraph 23). Giving the insured the social security system of one Member State, the regulation declares that it is necessary to lay down specific rules governing the accumulation of non-cash and in kind benefits granted in the case of illness covering the same risk (preamble, paragraph 24).

Regulation No. 883/2004, containing the coordinating rules of national social security systems, considers it necessary to develop a system of coordination of disability benefits, which are specific features of national legislation. In particular, the national social security systems in matters relating to the determination of the degree of bodily injury, the degree of the disability and its further development (preamble, paragraph 26). It is necessary to develop a system of granting social security benefits for old age as well as benefits for the survivors in cases where the persons concerned are subject to social security law of more than one Member State (preamble, paragraph 27). The subject of coordination at the European Union level should also include provisions specifying the amount of social security benefits, the rules for collecting such benefits in confluence with other pecuniary benefits (remuneration for work). In order to protect workers, especially migrant workers and their survivors against overly strict application of national social security legislation on matters concerning the reduction, suspension or withholding of payment of social security benefits, Regulation No. 883/2004 requires Member States' authorities to apply a uniform method for calculating retirement benefits and pensions by summing up insurance periods and calculating the proportionate amount of benefits depending on the length of periods of insurance regulated by the national social security legislation of the Member States in which the insured was actively working or living in (preamble, paragraph 28). One of the purposes of the coordination of national social security legislation is to protect the insured against overly strict application of national rules concerning reduction, suspension or interruption of benefits. In paragraph 29 of the preamble to the Regulation was considered necessary to introduce strict regulations governing the application of such rules. These rules may not be established at the EU level. The Council of the European Union is not empowered to set rules that impose a restriction on the accumulation of two or more retirement schemes or pensions acquired in different Member States. In particular, the European social security law, coordinating national social security systems cannot set the rules that cause a reduction in the amounts of pensions acquired solely on the basis of the national legislation of the Member States of the European Union (preamble, paragraph 30). Establishing such rules should be within the exclusive competence of the national legislature. However, the legislative authority of the European Union has made a gesture of setting the limits with which the national social security provisions concerning matters relating to the reduction, suspension, or withholding of payments of social security benefits should apply (preamble, paragraph 31).

More effective coordination is required for the cover of insurance schemes in the event of loss of employment. With a view of supporting workers' mobility, it is particularly important to help the unemployed to seek employment in the various Member States of the European Union. Therefore, it is necessary to ensure coordination between the systems of unemployment insurance and employment services of all Member States (preamble, paragraph 32).

The autonomy of certain matters relating to the regulation of particular social security benefits in the national social security schemes of the Member States means that the coordination of benefits such as pre-retirement and family benefits should be regulated in a separate manner. Regulation No. 883/2004 states that the principle of aggregation of insurance periods should not be applied in respect of employment, self-employment or residence in a particular Member State, the length of which is conditional to the entitlement of pre-retirement benefits. Statutory pre-retirement systems exist indeed, in a very limited number of Member States of the European Union. However, the subject of coordination provisions under Regulation No. 883/2004 should be issue of equal treatment of policyholders entitled to retirement benefits, the granting of family and health benefits and enabling them to export pre-retirement benefits (preamble, paragraph 33). In the case of family benefits, paragraph 35 of the preamble of the Regulation emphasises the need to define the rules of priority in cases of overlapping entitlements to these, which are granted under the provisions of the applicable legislation of the appropriate Member State and of the State in which the family members reside.

The coordination of social security benefits principles are not applicable to alimony benefits. Paragraph 36 of Regulation No. 883/2004 states that these benefits are repayable, which are designed to compensate for the failure of one of the parents of the child, to pay alimony as part of their legal obligation to provide financial support for the child according to family law. Therefore, these alimony payments should not be considered as direct benefits "under the joint support for families." For this reason, the coordination governed by the provisions of the Regulation should not apply to such benefits.

Rules for the coordination of social security benefits can neither prevent nor impede the export of social benefits. Therefore, the interpretation of the national social security provisions which derogate from that principle must be interpreted strictly. This means that the prohibitions or limitations on the export of social security benefits can be applied to certain social benefits. As it is clear from the provisions of Chapter 9 of Title III of the Regulation, prohibitions or limitations on the export of social security benefits may apply only to benefits that are "both specific and non-contributory" (preamble, paragraph 37). These benefits will be determined by Parliament and the Council before the entry into force of Regulation No. 883/2004.

In order to deal with administrative matters arising from application of the Regulation and making the interpretation of its provisions, paragraph 38 of the preamble announced the appointment of the Administrative Commission. The composition of this Commission includes representatives of the governments of the Member States of the European Union (preamble, paragraph 38). Development and use of services for data processing to exchange information on matters governed by the standards require the establishment of the coordination of the Technical Commission of the Administrative Commission (preamble, point 39).

A necessary condition for the effective functioning of this Commission is that Member State authorities ensure that the documents exchanged between the competent administrative institutions managing the social security benefits in particular Member States or electronically issued by the institutions be accepted as the equivalent of original, hard copy documents (preamble, paragraph 40). Issues related to the implementation of Regulation No. 883/2004 have been dealt with in the draft regulation drafted by the Commission and presented to the Council on January 31, 2006.

The European Commission's proposal to enact Regulation (EC) No. 883/2004 on the coordination of social security schemes and accept as a basic assumption that the Regulation No. 883/2004 modernises coordination of national social security systems of EU Member States, measures and simplifies procedures of the coordination of national social security systems. The task of the Regulation is to establish detailed and effective policy implementation measures and procedures laid down in Regulation No. 883/2004. Basic principles of the proposed implementing Regulation are set out in the preamble. Firstly the need for the use of electronic means was mentioned, to permit rapid and reliable exchange of data between the social security institutions in the Member States. It was also noted that in the process of electronic personal data exchange social security institutions should benefit from all of the guarantees laid down in EU regulations concerning the protection of individuals in matters relating to the processing of personal data and free movement of such data (paragraph 3). The Commission is of the opinion that the accessibility of contact data, including electronic data, of the particular institutions of the Member States of the European Union that are able to participate in the implementation of Regulation No. 883/2004 will facilitate the exchange between social security institutions of Member States (paragraph 4). Strengthening certain procedures will bring the users of the Regulation No. 883/2004 more advantages and assurances of a higher level of legal security. In particular, setting common deadlines for fulfilling certain obligations specified in the provisions of Regulation No. 883/2004 or completing certain administrative proceedings for social security benefits will help to clarify the legal situation of persons applying for social security benefits, and "give the appropriate structure of relations between insured persons and the institutions" (paragraph 5). The explanation of this general formulation was included in paragraph 6 of the preamble. It follows from this that the authorities of the Member States and competent authorities and social security institutions of those countries should be allowed to establish simplified procedures and administrative arrangements in matters relating to the exchange of information and decision-making on social security benefits issues. The implementing Regulation No. 987/2009 does not specify those procedures. Using the "open method of coordination" permits the authorities of the Member States and institutions administering social security benefits for the right to choose the simplified procedures, the most adapted to

national social security system of the Member States concerned. With a view to simplifying procedures and speeding up proceedings, implementation of Regulation No. 987/2009 for the Regulation No. 883/2004 requires Member States' authorities, in the event of a conflict of social security legislation and its resolution by the competent social security institutions concerned of Member States in which the insured person applying for social security benefits has been either employed, conducted business activity, trade or services, or lived and – with one of these reasons – was insured, to agree to temporarily assign the applying person for social security to one of two or more national social security systems of EU Member States, in which the insured seeking benefits from social security is or had social insurance and made use of it (paragraph 8).

The objective of the Implementing Regulation No. 987/2009 for the Regulation No. 883/2004 is to increase the transparency of the criteria which the social security institutions of Member States use in their decisions to grant a right to social security benefits in the legal relations governed by the national social security legislation of two or more countries. Detailing the criteria for making decisions on these matters is clear from the European Court of Justice decisions and of the Administrative Commission rulings and with over 35 years of experience in applying the standards of coordinating the national social security provisions (paragraph 9). Extending personal scope to all insured persons, including persons economically inactive, but involved in community service activities (care for children) requires the introduction and use of certain specific rules and procedures against them in order to identify the relevant national legislation according to which social security will be addressed periods devoted to bringing up children by persons who have never worked or are not in a self-employed business, or in trade and services in the Member States of the European Union in which they have lived (paragraph 10). Implementing Regulation No. 987/2009 for the Regulation No. 883/2004 lays down procedures which are designed to balance the weight of health care protection between the Member States. The established procedures should take into account the situation of Member States which bear the costs of adoption of insured persons as a result of giving them the benefit of the national health system, organised in the Member State in which these persons reside and settle the costs of benefits in kind received by persons insured with the social security system of another Member State (paragraphs 11–12). The institutions administering social security benefits in the Member States calculate the costs and expenses incurred in the social benefits of social security paid to insured persons, remaining in legal relations, in which there are foreign elements. In order to maintain confidence in matters relating to the exchange of data required for the above-mentioned calculations and to allow the competent national social security institutions the effective management of social services delivered, Decree No. 987/2009 introduces more restrictive calculations than those being used to calculate payments so far, between the relevant social security institutions of the

Member States of the European Union. In particular, the Implementing Regulation No. 987/2009 for the Regulation No. 883/2004 decided that the procedures for payment claims should be strengthened relating to benefits in respect of incapacity for work due to illness and loss of employment (paragraph 13). The legal mechanisms should be regulated for effective recovery of claims relating to undue benefits. Procedures for mutual assistance between the social security institutions should be regulated in accordance with the provisions of Council Directive 76/308/EEC of March 15, 1976 on mutual assistance for the recovery of claims relating to certain levies, duties, taxes and other charges (paragraph 14).[183]

[183] OJ L 73, March 19, 1976, p. 18. The Regulation was amended by Council Directive 2001/44/EC on June 15, 2001, OJ L 175, June 28, 2001, p. 7.

Chapter 2

The scope and method of application of Regulation No. 883/2004

§ 1. Persons covered

Regulation No. 883/2004 applies to nationals of Member States, stateless persons and refugees residing in the Member States who are or have been subject to social security laws of one or more Member States. It also applies to family members of such persons (Article 2, paragraph 1). In addition, the aforementioned Regulation applies to survivors of deceased to the persons who are subject to social security legislation of one, two or more EU Member States (citizens, stateless persons or refugees) (Article 2, paragraph 2). A necessary condition for the application of Regulation No. 883/2004 for these persons is to remain in their employment relationship in a Member State, in business activity, trade or service or reside in the territory of a Member State. The last requirement shall be deemed satisfied if the rules of the social security legislation of a Member State, where the insured person lived and whereby this period of residence is amalgamated by the state into the period of social security cover. Since the coordinating laws of national social security regulations make social security benefits dependent upon the condition of employment (or self-employment) or residence in a Member State, Title I of Regulation No. 883/2004, therefore contains the definitions of "paid work," "self-employment," "insured," "family member," "period of insurance," and "usual residence." Autonomous definitions of the Regulation in the analysis are not exhaustive. The meaning of Article 1, point "a" of the Regulation "paid employment" is any work or period of employment considered as periods of employment by the national social security legislation of the Member States. Working for an employer is considered as period of employment by the national social security legislation for period of work performed under an employment relationship. By the same method the provisions of Regulation No. 883/2004 define self-employment (Article 1, point "b"). The insured, within the meaning of the Regulation, is any person entitled to benefits from social insurance (Article 1, point "c"). The fact that a person can be considered as a member of the family of the insured is determined by the social security legislation of each Member State.

"Period of insurance" is a summary concept. First of all, it refers to the periods in which the insured person alone or any other entity acting on its behalf, pays any insurance premiums. Contribution periods beyond the period of insurance cover

periods of employment or self-employment to the extent and on such conditions as these periods are considered as periods of insurance by the national social security legislation (Article 1, point "t"). In terms of the autonomy of defining legal terms, the Regulation No. 883/2004 considers all periods of employment or periods of self-employment as periods so defined or recognised by the legislation under which they were completed, and all periods treated as such, where they are regarded by the said legislation as equivalent to periods of employment or to periods of self-employment (Article 1, point "u").

Regulation No. 883/2004 does not attempt to define periods of residence. It is assumed that such periods are "periods defined or recognised as such" by the national social security law under which they were completed or regarded as completed (Article 1, point "v").

§ 2. Scope

Regulation No. 883/2004 applies to all (public and private), national social security systems operating in EU Member States. Paragraph 6 of the preamble of the Regulation states that due to the need to provide the same legal protection to insured persons, subject laid down by the authorities of Member States' social security systems and contractual provisions, which supplement or replace the social legislation, standards coordinating national social security schemes are generally applied. Article 3, paragraph 1 of the Regulation states that it applies "to all the legislation relating to the following branches of social security." The article lists ten types of risks resulting in an inability or limitation of economic earning by people who are active within the workforce, covered by the national social security system. The inability to obtain remuneration for employment under an employment relationship or earnings from self-employment by a professionally active person, is the basis for granting the following social security benefits or the benefits of social security: sickness, maternity benefits and equivalent paternity benefits, invalidity benefits, old age benefits, survivor's benefits, benefts for work accidents and work-related diseases, death grants, unemployment benefits, pre-retirement benefits, family benefits (Article 3, paragraph 1, points "a"–"j"). Coordinating the provision of these standards are applicable to general and special social security schemes regardless of the financing techniques of social benefits. Annex 11 to the Regulation No. 883/2004, which should be issued no later than the date of entry into force of the Regulation, empowers the European Parliament and the Council to exclude certain benefits from the scope of coordinating laws. Paragraph 6 of the preamble of the Regulation includes the tip how EU institutions should be guided when regulating the scope of the coordination laws. Its provisions should be applied to all social security systems (public and private), which are the result of the legislative authorities in the Member States. In principle, it will rise to an

exclusion from the scope of the provisions of the coordination of these contractual social security legislations, which have been recognised by public authorities and private standards for mandatory social security provisions, which are rendered applicable by the competent public authorities of the Member States extended to other categories of insured persons. There are no reasons to believe that the scope of coordination laws of the Regulation No. 883/2004 will be limited to special non-contributory social security schemes. In article 3, paragraph 3 of the Regulation it is stated *expressis verbis* that this Regulation also applies to the special non-contributory monetary benefits referred to in Article 70. These are benefits paid under social security legislation established by the state authorities which are provided under legislation which, because of its personal scope, objectives and/or conditions for entitlement of benefits coordinated by the provisions of this Regulation, have the characteristics both of the social security legislation and of social assistance.

§ 3. Equal treatment

Regulation No. 883/2004 establishes the principle of equal treatment of insured persons (Article 4). It also commands to treat in the same way the benefits, income, facts or events upon which the national social security regulations make the acquisition of social security benefits dependent on (Article 5). The principle of equal treatment of persons to whom the provisions of this Regulation apply, requires the insured to be treated in the same way as are treated the nationals of the Member State covered by the national social security system. Insured persons, nationals of a Member State and nationals of other EU Member States are entitled to the same social benefits from social security and subject to the same obligations established by the national social security legislation in force in different Member States. Exceptions to the principle of equal treatment of insurance on grounds of nationality may be established solely by the provisions of Regulation No. 883/2004.

Equal treatment of benefits, income, facts or events is to level, according to the legal terms, the same social benefits and allowances paid out, equivalent to the particular type of insurance risk in any Member State of the European Union. The legal basis of this obligation of equal treatment of identical and/or comparable social security benefits received after the qualified person meets the conditions laid down by national rules on social security or by the income acquired in another Member State is established by the provisions of Article 5, point "a." In particular, that provision applies to the assessment of events and processes certified by the national social security law as industrial accidents, occupational diseases, assessments of the degree of disability, entitlement to monetary social security benefits available in the event of an accident at work or an occupational

disease (Article 40, paragraph 3). The introduction of this standard was necessary because of the differences in the legal definition of an accident or occupational disease by the national social security laws of the Member States. A necessary condition for the application of the coordination laws to compensation payable in respect of accidents at work or occupational disease, is for the insured to receive such benefits as based on the previously applicable national legislation (Article 40, paragraph 3, points "a"–"b").

Equal treatment of facts or events which the national social security regulations make the acquisition of social security benefits dependent upon, requires the use of a legal fiction according to which, if national social security law of a specific country shall make the existence of certain legal effects (acquisition, use, proliferation of social rights to social security), authorities of other Member States must take into account similar facts or events occurring in each Member State, as if the above facts and events occurred within their territory (Article 5, point "b").

§ 4. Aggregation of periods of social security

A competent social security institution of a Member State is one whose existing social security law makes:

- the coverage of the insured mandatory through national social security legislation;
- the access to or exemption from the obligation to participate in the national social security system (mandatory or voluntary);
- the acquisition, retention, duration or recovery of entitlement to social security benefits subject to compliance with the provisions laid down in national social security laws on the following conditions: to have an adequate insurance period, remain in work, professional self-employment or have residence, taking into account periods of insurance, employment, occupation or residence in any Member State as if the above requirements have been met by virtue of the institution of the national system of social security rights (Article 6).

In order to comply with the obligations referred to in that provision, Article 6 of Regulation No. 883/2004, the Implementing Regulation No. 987/2009 requires the competent institution to call on the institutions of the Member State whose legislation was subject to social security before the insured person to provide information about the periods of insurance employment, business or residence in that State (Article 12, paragraph 1). Presented in accordance with Article 6 of Regulation No. 883/2004 the principle of legal fiction by which periods of insurance, employment, occupation or residence in one Member State are taken into account, to the extent specified in Article 6 of the Regulation, shall be deemed satisfied by the social security rules enforced in another Member State. Article 12, paragraph 2 of the Implementing Regulation No. 987/2009 requires

the competent insurance institution, acting in the Member State in which the decision is taken to extend or exempt from the obligation to include social security, establishing entitlement to social security benefits, social welfare payments to social security to be added to periods of insurance, employment, occupation or residence in that state, periods of insurance or residence in another Member State, where under national social security laws enforced in the first of these countries to acquire, maintain or regain rights to social security benefits taking into account these periods in another Member State. A necessary condition set by the coordinating laws the periods of insurance, working life period, period of being active professionally or residence in one country governed by the same periods of social security law in force in another Member State, is not to overlap between these periods. In Article 12, paragraph 2 in the Implementing Regulation No. 987/2009 the periods entitling social security benefits in one country are only counted from the moment the social security law of another Member State grants these rights provided that the periods in each of these countries do not occur at the same time. This provision prohibits the social security institutions to count the periods of insurance or residence periods parallel to the insurance periods in another Member State. Article 12, paragraph 2 of this Regulation uses the legal concept "completed the period of insurance or residence." It defines these periods as periods of "completed under the social security legislation of a Member State." *A contrario*, periods considered by the national social security legislation of the Member States to be "incomplete" may not be included in the same or similar periods in another Member State. Article 12, paragraphs 3–4 of the Implementing Regulation No. 987/2009 for the Regulation No. 883/2004 the coordinating rules describe the overlapping periods of compulsory insurance and voluntary insurance or residence periods of the equivalent periods in two Member States. The crucial factor in deciding which of the two periods remaining in conjunction is included in the general classification of the insurance period as "completed" and "incomplete." In the case where a period of insurance or residence which is "completed" in accordance with compulsory insurance under the legislation of a Member State coincides with a period of insurance completed on the basis of voluntary insurance or continued optional insurance under the legislation of another Member State, only the period "completed" on the basis of compulsory insurance shall be taken into account. (Article 12, paragraph 3). If the period of insurance or residence other than an equivalent period "completed" under the legislation of a Member State coincides with an equivalent period on the basis of the legislation of another Member State, only the period other than an equivalent period shall be taken into account (Article 12, paragraph 4). The legal status of equivalent periods of duration of employment, professional activities or periods of residence is defined in Article 12, paragraph 5 of the Implementing Regulation. According to this provision, each equivalent period, which under the national social security legislation should be included when calculating the length of the

period of insurance is taken into account only by the competent bodies administering social security benefits of the Member State whose regulations the insured person was last under. Depending on the legal regulations in force in a given national social security scheme according to which the mandatory provisions of social security may use as a criterion for social insurance obligations employment as part of employment relationships, self-employment or residence, which forms part of the insurance record including only those periods equivalent, following directly after one of these three periods. If the insured person concerned was not compulsorily subject to the legislation of a Member State before that period, the latter shall be taken into account by the institution of the Member State to whose legislation the person concerned was compulsorily subject for the first time after that period (Article 12, paragraph 5). The equivalent period is to be inclusive of the insurance period of the last or first Member State in which the person was insured by virtue of employment under the employment relationship, self-employment or residence. "Completed" periods of insurance are important aids to determine the overall period of insurance. The obligation of aggregation of insurance periods is laid down in Article 6 of the Regulation No. 883/2004 concerning the "completed" periods of insurance. However, in cases where the competent institution of social security cannot strictly define a point in time in which certain periods of insurance or residence are completed, Article 12, paragraph 6 of the Implementing Regulation No. 987/2009 adopted a presumption that these do not coincide with periods of insurance or residence periods recognised as "completed" by national security legislation of another Member State. In such a case, the "incomplete" periods of insurance are included "to the extent in which they can be taken into consideration." In the glossary of legal concepts in Article 1 of Regulation No. 883/2004 there are twenty-seven definitions of legal terms (letters "a" to "z"). *Inter alia* defined legal concepts such as "employment" (letter "a")[184] "self-employment" (letter "b")[185] "insured person" (letter "c")[186] "residence" (letter "j")[187] "period of insurance" (letter "t")[188] "period of employment"

[184] The term "paid work" means any employment or equivalent situation, regarded as such for the purposes of the legislation of social security of the Member State in which such work or an equivalent situation occurs.

[185] The term "self-employment" means all work or an equivalent position, treated as such for the purposes of the legislation on social security of the Member State in which such work or an equivalent situation occurs.

[186] With regard to social insurance departments covered by Title III, Chapters 1, 3 of Regulation No. 883/2004, the term "insured" means any person fulfilling the conditions required under the legislation of the Member State responsible under Title II of the Regulation, to have the right to benefits.

[187] The term "residence" means the place at which a person normally resides.

[188] The term "insurance period" means contribution periods, periods of employment or self-employment, as defined or recognised as periods of insurance by the legislation under which they

(letter "u")[189] "period of residence" (letter "v")[190]. The provisions of Regulation No. 883/2004 do not contain autonomous definitions of these legal concepts. For the purpose of the Regulation legal definitions of these concepts are used by the national social security legislation of the Member States. In the case of the general clauses, vague concepts including the wording set out in Article 12, paragraph 6 *in fine* of Implementing Regulation No. 987/2009, we are dealing with the directive addressed by the European legislator to the relevant institutions administering social security benefits in the Member States of the European Union. The certainty of legal relations governed by social norms coordinating national social security systems require that the relevant national social security institutions interpret identically when calculating the insurance record of "unfinished" periods of insurance or residence. Due to the assisting status of these periods, Article 12, paragraph 6 must be interpreted in a manner which requires such institutions to calculate these periods into the overall period of insurance to the extent to which they do not overlap with the "completed" periods of insurance or residence in another Member State.

Article 13 of the Implementing Regulation No. 987/2009 for the Regulation No. 883/2004 sets out uniform rules for counting periods of insurance. This provision applies when the national social security laws define "complete" insurance periods in units of measurement different from those that are applied in the national social security legislation. In such a case, it is necessary to make the conversion of these periods for aggregation purposes. The conversion should be made in accordance with the following principles:

- one day is equivalent to 8 hours, 8 hours is one day;
- five days is equivalent to one week, a week is 5 days;
- twenty days is equivalent to one month, a month is 20 days;
- three months or thirteen weeks or sixty-six days shall be equivalent to one quarter, a quarter is 3 months, 13 weeks or 66 days.

It is therefore clear that the conversion of weeks into months and months into weeks shows that both units of measurement of time (weeks and months) are converted into days. As a result of the conversion rules of measurement used in the Member States to determine the insurance period, the number of periods of insurance "completed" within one calendar year may not exceed 264 days or 52 weeks or 12 months or 4 quarters. If the periods of insurance "completed" in accordance with national social security legislation in a Member State shall be

were completed or have been satisfied and all periods timed as such, unless they are regarded by that State as equivalent to periods of insurance.

[189] The term "period of employment" or "period of self-employment" means periods defined or recognised as such by legislation under which they were completed, and all periods treated as if they are regarded by that legislation as equivalent to periods of employment or self-employment.

[190] The term "period of residence" means periods defined or recognised as such by the legislation under which they were satisfied or shall be considered fulfilled.

expressed in months, the days, which represent a fraction of a month, are considered as a full month.

The social security benefits established under the relevant national social security legislation established using the coordination rules regulated by Regulation No. 883/2004 shall not be subject to any reductions, alterations or confiscations. Payment entitlements to these benefits shall not be suspended, and the same benefits are not suspended for this reason that the beneficiaries or their family members reside in a Member State other than the one in which the competent institution of social security was responsible for paying those benefits (Article 7).

§ 5. The relationship between Regulation No. 883/2004 and the other social security benefits coordination instruments

Regulation No. 883/2004 replaces by the law all the conventions (bilateral and multilateral) of social security insurance, applicable between Member States. The derogation encompasses only the substantive aspects of the Regulation (Article 8, paragraph 1). From the above principle automatic replacement of other international regulations, standards containing coordinating national social security provisions, Article 8, paragraphs 1 and 2, introduces two exceptions. The first applies to social security conventions concluded between Member States of the European Union prior to the date of application (entry into force) of the Regulation. The provisions of these conventions shall continue to apply, if they are more favourable to the beneficiaries than the coordination laws of the Regulation. This is the first reason given by the legislature of the EU to maintain the effect *bi-* or *multi-* lateral provisions of the Convention on social security concluded by the Member States forming the European Union. It finds that Regulation No. 883/2004 replaces by law, without exception, all the conventions to which EU Member States are parties as well as third countries. Coordinating laws of national social security systems are not directly applicable to the provisions of these conventions in the field of social security entered into by the EU Member States with third countries, which in the light of Article 8 of Regulation No. 883/2004 meet the requirements to be included into the conventions "under specific historical circumstances." The Article uses undefined phrases, in addition referring to the concepts that are not part of social security law. There are no indications whether the subjects of international law (the countries or EU institutions that have signed the Convention) are competent to identify the "specific historical circumstances" deciding upon retaining the power of the conventions governing the same matters as Regulation No. 883/2004, meaning *de facto* the Member State authorities will decide on whether the coordinating rules will be applied. Any adjustment in the difference of opinion on the historic importance of previously concluded conventions on social security will be introduced on the basis of Article 8

of Regulation No. 883/2004, during the standard limiting the use of previously concluded, which are more favourable to the beneficiaries or to the historical circumstances of the Convention in the field of social security.

Where appropriate, Member States may conclude conventions with each other based on the principles of Regulation No. 883/2004 and in accordance with its provisions (Article 8, paragraph 2). The above provision shows that the authorities of the Member States in international relations can make arrangements, which deviate from the provisions of Regulation No. 883/2004, provided that the conventions *bi-* or *multi-* lateral are entered into complying with the "spirit" of Regulation No. 883/2004.

Member State authorities decide about the scope of the application of the Regulation No. 883/2004. They are obliged to notify the European Commission of any statement to exclude or limit the application of this Regulation because of convention or other reasons specified in the analysis of the Regulation respecting the provisions of this Regulation.

Chapter 3

The Determinants of Coordinating Laws

§ 1. General principles

Article 11, paragraph 1 of Regulation No. 883/2004 as a basic principle uses the legislation of only one Member State when applying to the laws to an insured person. The applicable national social security legislation applicable to the insured is indicated by using determinants listed in Title II, "Determination of the applicable legislation" of the regulation (Article 11–Article 16). Under the provisions of Article 12–Article 16 of the Regulation:

- persons in a Member State carrying out employment or self-employment are subject to national social security law in force in the country in which the work is carried out. The law applicable to the social security of the persons (*lex securitatis*) are the provisions of creating the insurance status in the workplace (*lex loci laboris*) (Article 11, paragraph 3, point "a");
- civil servants subject to the legislation of a Member State to which the administration employing them is subjected to (Article 11, paragraph 3, point "b"). If a civil servant carries out business in another Member State, the competent social security institution informs the pre-designated institution in that Member State (Article 15 of the Implementing Regulation No. 987/2009). Used in Article 15 of the Implementing Regulation No. 987/2009 are the terms "competent institution" and "designated institution," which are defined in the glossary of legal terms set out in Article 1 of Regulation No. 883/2004. The term "institution" means any body or authority responsible for implementing all or part of the legislation relating to social security branches and schemes specified in Article 3, paragraph 1 of the Regulation. The term "competent institution" is used in the Regulation to specify the institution where the person concerned is insured at the time of application, or from which the person concerned has the right to obtain social benefits or would have such a right if the insured or members of their family were resident in a Member State in which such an institution was located. The competent institution is also the institution designated by the authority of another Member State. Article 15 of the Implementing Regulation No. 987/2009, describing the procedure of exercising Article 11, paragraph 3, point "b" of the Regulation No. 883/2004 requires Member State authorities, in which a civil servant – subject to social security legislation of the country whose rules apply to the administration

employing him – is subjected to, in connection with the activities of territorial change, social security law in force in another country;
- the person receiving unemployment benefit, living in a different Member State than a "competent State," i.e. the State in whose territory the competent institution of social security is subject to the provisions in force in the country of residence (*lex domicilii*) (Article 11, paragraph 3, point "c");
- a person called up or recalled for service in the armed forces or for civilian service in a Member State shall be subject to the legislation of that Member State (Article 11, paragraph 3, point "d").

Other insured persons not mentioned in the article referred to above, Article 11, paragraph 3, points "a" to "d" of the Regulation are subject to national social security law in force in the Member State in which such persons are domiciled (*lex loci habitationis*). Subjecting these persons to the provisions in force in the Member State in which their place of residence does not deprive these people the entitlement to social benefits and the collection of such benefits under the national social security legislation in force of one or more Member State (Article 11, paragraph 3, point "e").

Insured persons in employment or self-employment on board a ship at sea flying the flag of a Member State shall be considered as working or employed in a Member State under whose flag the ship is sailed. However, a person employed on board a vessel flying the flag of a Member State and remunerated for such activity by an undertaking or a person whose registered office or place of business is in another Member State shall be subject to the legislation of the latter Member State if he/she resides in that State (Article 11, paragraph 4). This regulation requires the insured person to be subjected to the applicable law of the employer's registered office or his/her place of business activity from the place of residence in the same Member State of the employee or the self-employed, employed on a sea vessel.

According to *lex loci delegationis* employees and the self-employed posted by the employer to work in another Member State are subjected to social security. Article 12, paragraphs 1 and 2 of Regulation No. 883/2004, states that the said persons shall remain subject to the legislation of the Member State in which they are employed or pursuing a business activity in spite of their assignment to work abroad, provided that the anticipated duration of employment in another Member State shall not exceed 24 months. A further condition for the maintenance of social security legislation in force in a fixed place of employment of the delegated person may be the order of persons posted to work as a substitute for another employee, previously seconded to the provision of such work. A necessary condition for the application to the insured persons of social security legislation in force in the country to which they are posted to is temporary, and is not longer than a 24-month business, commercial activity or service by an employer employing foreign workers. The same rules apply to persons employed on their own account,

going to another Member State in order to perform the same or similar activity to that normally carried out in another Member State. Submission of social security provisions in force in the home state of these persons are dependent on not exceeding 24 months of postings abroad. In order to prevent the misuse of the extension of the posting, Article 14, paragraph 1 of Implementing Regulation No. 987/2009 to Regulation No. 883/2004 requires that the self-employment not be "similar" to activities normally conducted in another Member State based on the criterion of the actual nature of this business and not a legal basis for the exercise and the fact that these activities qualify for the sub-category of work, provided under an employment relationship (employment) or self-employment.

The procedure for implementing the obligations referred to in Article 12, paragraph 1 of Regulation No. 883/2004 has been determined in the provision of Article 15, paragraph 1 of the Implementing Regulation No. 987/2009. The employer posting the employee to another Member State is obliged to pre-notify the competent social security institution of that Member State whose social security provisions are applicable to the posted worker. The competent social security institution informs the other institution in the Member State where the worker is being posted to about the posting. Identical obligations are imposed by Article 16, paragraph 2, point "s" of the Implementing Regulation No. 987/2009 on the self-employed persons, working abroad for a period of 24 months in another EU Member State.

Workers employed simultaneously in two or more Member States are under social security law of that Member State in which they reside, provided that they carry out a considerable part of their work in this country. If they are employed by various undertakings or various employers whose registered offices or places of business are in different Member States, the worker is subject to the legislation of the Member State of residence (Article 13, paragraph 1, point "a"). A necessary condition to change the determinant in applying the regulations in force at the place of the registered office of the employer or place of business, rather than the place of residence, is to carry out a smaller part of the work in the country in which the insured has his habitual residence (Article 13, paragraph 1, point "b"). A person who normally performs their activities as a self-employed in two or more Member States is subject to social security legislation in force in the Member State in which the person resides, provided that they pursue a significant part of their activity in that country (Article 13, paragraph 2, point "a"). This determinant is used when an insured person does not live in one of the Member States, where they pursue a significant part of their work (Article 13, paragraph 2, point "b"). The Article uses subjective terms such as "a substantial part." Article 14, paragraph 2 of the Implementing Regulation No. 987/2009 defines the above terms by paying attention to the relationship between the material in a quantitative form of the activity of the employee or self-employed in relation to all of the activity. According to Article 14, paragraph 2 of the Implementing Regulation No. 987/2009, a "substantial part" is not necessarily the largest part of the activity.

According to the Implementing Regulation No. 987/2009 part of the activity is not in any event considered to be material if it covers less than 25% of the total activity performed by the worker or a professional person who is self-employed. The measure used to calculate the relationship between work or activity carried out in a Member State and the total amount of activities of an employee or self-employed person, is the turnover of the self-employed person, the working time of an employee, the amount of remuneration for the work performed in the different Member States or – in the case of the self-employed – profits from the activity. As an alternative determinant in Article 13, paragraph 2, point "b," the national social security legislation in force in the country in which the focus of the activities performed is indicated.

According to Article 14, paragraph 3 of the Implementing Regulation No. 987/2009 in Article 13, paragraph 2, point "b" of the Regulation No. 883/2004 as a point of selecting the appropriate national social security legislation of one of two or more Member States must be the professional "centre of interest" of the insured. This centre, referred to as the seat or place of business shall be determined by taking into account all elements involved in the activity of the insured person, such as a place where there is a permanent place of business of the insured, the type, nature or duration of the activity, the Member State in which the person is employed or self-employed, subject to tax regardless of the source of income. Article 14, paragraph 3 of the Implementing Regulation No. 987/2009 requires also to take into account the will of the interested person covered by social insurance. If a person performs work in two or more Member States for the employer who is located outside the European Union, and when the insured is resident in a Member State of the Union and does not perform in that country major activities, is subject to social security legislation of that Member State where they reside (Article 14, paragraph 4). In case of overlapping periods of insurance in respect of employment under the co-employment relationship and professional self-employed in different Member States of the European Union, the insured is subject to social security of the State in which the subordinate carries out his work as an employee (he is employed under a contract of work). Then, when the insured performs work under an employment relationship between two or more Member States, the collision of national standards of social security provisions are solved in accordance with Article 13, paragraph 1 of Regulation No. 883/2004, by using determinants of a place of residence or the seat of the employer or the place of work (Article 13, paragraph 3).

Coordinating laws of national social security provisions set out in the provisions of Article 11–Article 13 of Regulation No. 883/2004 shall not apply to voluntary insurance, unless, with respect to one of the branches of social security listed in Article 3, paragraph 1 of the Regulation in question in a particular Member State where there is only a voluntary system of social security (Article 14, paragraph 1). In accordance with the principle outlined previously, an insured

person subjected to compulsory insurance in one Member State cannot also be subject to a voluntary social insurance scheme in another Member State of the European Union. In all other cases in which, for a given branch, there is a choice between several voluntary insurance schemes, the person concerned shall join only the scheme of their own choice, choosing between several systems of voluntary social insurance (Article 14, paragraph 2). Article 14, paragraph 3 of the Regulation however provides an exception to this, in respect of invalidity, old age and survivors' benefits. In relation to these benefits, the person concerned has the right to join the voluntary system of social insurance in one Member State, even if he/she is covered by mandatory social insurance in another Member State. The implementation of this right is dependent upon the employment under an employment relationship or professional self-employment and the social security provisions of the Member State firstly mentioned. A necessary condition for derogating from the principle of participation in the social security system of one Member State is an express or implied acceptance of the accumulation of invalidity benefits, retirement and family benefits and the social security legislation in force in the first of the two mentioned Member States (Article 14, paragraph 3 *in fine*). National social security legislation of a Member State may make joining the voluntary insurance system dependent upon residency. In this case, formulated in the provision of Article 5, point "b" the principle of equal treatment of the insured person residing in another Member State which requires the competent institution of social security to the treatment of certain circumstances or events upon which the national social security laws make certain legal consequences in cases of the social benefits of the voluntary social security scheme should be included only if the insured person has previously been subjected to social security law in that Member State, in which is now entering into a voluntary system of social insurance (Article 14, paragraph 4).

Principles outlined above have limited application to the insured persons who are employed as support personnel in the institutions of the European Communities. Members of the support personnel of the EU institutions are also subject to the provisions of one national social security scheme of a European Union Member State. Their separate treatment by the coordinating laws of national social security systems governed by the provisions of the Regulation is based on granting a limited choice of national systems of social security legislation of a Member State, to which, before joining the staff in the institutions have been or are bound by virtue of current or former employment or citizenship. Support staff of the European Communities have the right to choose the social security law of the country in which they are employed. They may choose to continue to be covered by the social security, which covered them prior to joining the workforce in the EU institutions. They finally have the right to choose the social security laws of a European Union Member State, on which they are its citizens. The limited nature of the right to choose the national system of social security law is also expressed in

the choice between all the listed in Article 3, paragraph 1 of the Regulation No. 883/2004 branches of social security, except for family benefits (Article 3, paragraph 1, point "j"). Conditions for acquiring benefits and payments are governed by separate provisions of social security, which apply only to the support staff of the European Communities. Members of the support staff of the EU institutions select the competent national social security system at the time of entering into the employment contract (Article 18 of the Implementing Regulation No. 987/2009 to the Regulation No. 883/2004). The right to choose may be made only once and become effective from the date of employment (Article 15 *in fine* of the Regulation No. 883/2004). The authorities of the EU institutions notify the designated institution of the Member State whose social security laws are deemed as appropriate, with the exception of the rules governing entitlements to family allowances, by the support personnel member of the European Communities (Article 18 *in fine* Implementing Regulation No. 987/2009).

§ 2. Exceptions to the general principles

Article 16 of Regulation No. 883/2004 introduced a legal basis for establishing exceptions to the general principles set out in Article 11–Article 15. The first can be created by the authorities of two or more Member States of the European Union (the governmental agreement, an international agreement, the convention) or bodies designated by the authorities (the agreement concluded by the central authorities of the national social security institutions). The provision of Article 16, paragraph 1 of the Regulation empowers the authorities of the Member States or bodies designated by the authorities to conclude an agreement on the introduction, in the interest of certain individuals or certain groups of the insured, of exceptions to the rules laid down in the provisions of Article 11–Article 15 of Regulation No. 883/2004. From the wording of the exception from the general principles established by Title II of the Regulation one can only conclude that the scope of this agreement may cover only single person and/or a group of the insured. *A contrario*, the agreement may not cover all the insured. Therefore, the agreements referred to in paragraph 1 of Article 16 of Regulation No. 883/2004 cannot exclude the application of coordination laws laid down in the Regulation in social security relations, in which there are foreign elements. One can only assume that the scope of international agreements may cover all sections of social security, including family allowances, mentioned in Article 3, paragraph 1 of Regulation No. 883/2004.

The second basis for an exemption from the provisions of Article 11–Article 15 of Regulation No. 883/2004 is an administrative decision by the competent institution of a Member State administering social security benefits. Article 16, paragraph 2 of the Regulation authorises the competent social security institu-

tion of that Member State in which the insured resides receiving the retirement benefit or pension granted under the national social security legislation of two or more Member States to decide whether to release the insured from obligation to include in the national system of social security legislation of a Member State in which the person resides. The basis for this decision may be a request of an interested person. The right to make a request applies only to the retiree or the pensioner who receives at least one benefit (retirement benefit or pension) granted under the social security law of other Member State than the one in which he/she resides. The entitlement to make such a request by a person residing in the State of X for an exemption from the obligation to cover the social insurance regulated social security provisions in force in that country, may be submitted by an insured person who receives the retirement benefit or pension under the social security legislation in force in country Y. The legal basis for making such an application can be the attainment of retirement and/or pension benefits and regulated and subjected to the provisions of social security legislation applicable in countries Y and Z or Y and X. In the latter case the reason for granting a positive outcome to the application will be the submission of the insured under a social security system of one of the foreign countries (Y).

Benefits from a foreign social security system, justifying the insured to apply for an exemption from social security cover in the country in which the person is entitled, is only applicable to the retirement benefit or pension. Legislative technique used by the EU in Article 16, paragraph 2 of the Regulation No. 883/2004, which consists of the use of three alternatives: first – a pension (singular), second – pensions (plural), third – either pension or pensions, is justifiable to consider whether the request for an exemption of social security legislation in force in the country which is home to the person concerned, may only be applicable to a person receiving benefit from two or more uniform benefits (pensions) or a person benefiting from two different benefits (pension or pensions). The basic rule of textual interpretation of legal norms opposes the replacement of conjunctions used by the legislature in the analysed legal standards. Since Article 16, paragraph 2 uses the conjunctions "or", "and", it is obvious that applying this provision the authority has been faced with the necessity of choosing one of two mutually exclusive possibilities. But we should not treat this finding as an obstacle to the formal release of the person concerned, sampling two different benefits (pensions) to provide insurance as governed by the social security of the country in which the insured is residing in. The reason for justifying the decision of social security exemption is receiving from a foreign social security system at least one of the two benefits identified in the article: a pension.

The competent social security institution may exempt a person making a request (asking) for an exemption from social security in the Member State where that person lives. Proceedings in this case are governed by the national social security law, which is subject to the competent institution of social security. Social

security provisions of that State also govern decisions to dismiss. Coordinating laws introduce a condition of the decision on exemption from social security of the person referred to in Article 16, paragraph 2 of Regulation No. 883/2004. It is not to submit the national social security legislation of the State in which the person lives applying for exemption because of the performance of employment or professional activity. Exemptions from social security in the Member State in which a pensioner has settled in and is in receipt of social security benefits (pension or pensions) according to the requirements of social security legislation of the country in which he/she resides, may be a person who is not working in the country of residence.

§ 3. Specific provisions for different categories of social security benefits

SICKNESS, MATERNITY AND EQUIVALENT PATERNITY BENEFITS

Benefits in kind

All insured persons and their family members, with the exception of pensioners and their family members residing in a Member State other than the competent State – the Member State in whose territory the competent institution administering the benefits of social security (Article 1, point "s") are replaced by the Member State in which they reside to provide the benefits in kind granted in case of sickness, maternity and equivalent paternity benefits. These benefits are provided by the institution of the place of residence, which acts on behalf of the competent institution of social security (Article 1, point "q"). Decisions on matters regarding the granting of these benefits are taken under regulations in force at the residence of the insured. These provisions are applicable to the insured as appropriate provisions. Article 17 of Regulation No. 883/2004 lays down the legal fiction according to which the institution of residence is required to treat the insured persons who live in another country as if they were insured under the social security legislation in force at their place of residence. Article 24 of the Implementing Regulation No. 987/2009 requires these persons to register with the institution of residence. A necessary condition for registration of this institution is to provide evidence of entitlement to benefits in kind, which can be achieved at the expense of the competent Member State. This document is issued by the competent institution of social security. If the insured person or the members of his/her family do not submit such a document, a social security institution in the place of residence is obliged to ask the competent institution to obtain necessary information regarding the status of the person applying for benefits in kind. In order to demonstrate financial settlements between social security institutions,

the institution of residence shall inform the competent institution of any registration of the insured.

The insured and members of his family residing in a Member State other than the competent State shall be entitled to benefits in kind of social security during their stay in the competent Member State. Benefits are granted by the competent institution at its own expense in accordance with the provisions of its own legislation, as if the persons concerned were living in that country (Article 18, paragraph 1). During the stay of persons entitled to social security benefits in another Member State than the country of residence than the competent State shall be entitled to receive the necessary benefits in kind (Article 19, paragraph 1). The procedure for granting these benefits is the same as the procedure laid down in Article 17 of Regulation No. 883/2004.

Insured persons and their family members are entitled, after obtaining authorisation from the competent institution, to go to another Member State to receive social security benefits. Subject to the authorisation is the classification of benefits in kind, which the insured is seeking in another Member State, to the categories of benefits regulated by the social security law in force at the residence of the insured. A further condition for granting the authorisation is the lack of possibility to obtain medical treatment in the country of residence of the insured, within a reasonable time-frame from a medical point of view (Article 20, paragraphs 1 and 2). The eligibility to apply for a permit is not structured as a claim. Article 33 of the Implementing Regulation No. 987/2009 provides authorisation only to employees or persons engaged in self-employment, to those who are injured in an accident at work or with a work-related disease. The competent institution may not refuse to allow those persons if in the Member States of residence the person cannot obtain within a reasonable period, treatment for their health, from a medical point of view.

Cash benefits

The insured and their family members residing or staying in a country other than a Member State are entitled to cash benefits provided by the competent social security institution. This institution, exporting cash benefits abroad to another Member State, follows the existing rules. By way of an agreement concluded by the competent institution and the institution of the place of residence or stay of a person eligible for monetary benefits for sickness and maternity benefits may be paid at the expense of the competent institution by the institution of the place of residence or stay. Change in the payer of the cash benefits does not affect the procedures and the legal basis. The procedure, which sets out the rules of conduct of the insured person as eligible for social security benefits and the two institutions involved in the process of providing the benefits in kind and cash benefits from social security (the competent institution and the institution of the place of resi-

dence), are defined in Article 27 of the Implementing Regulation No. 987/2009. It is based on the close cooperation between these institutions. On behalf of the competent institution, the institution of the place of residence verifies the entitlement to benefits, and exercises supervision over how to receive benefits in kind. The competent institution shall inform the institution of the place of residence of the amount of cash benefits, deadlines by which they are to be paid and the maximum duration for which the benefits were granted.

HEALTH CARE ENJOYED BY PENSIONERS

Benefits in kind

Persons receiving a pension or pensions under the social security legislation of two Member States, one of which is the country where the pensioner resides, shall receive benefits in kind regulated by social security legislation in force in the country of residence if they meet the conditions for acquisition and the use of such benefits. Benefits in kind are provided to the insured and members of his/her family by the institutions of the place of residence and paid on their account. The insured is treated by the institution as if he/she were entitled to a pension solely on the basis of social security legislation in force at the place of residence (Article 23). Implementing Regulation No. 987/2009 extends the scope of this provision for civil servants in one of the Member States who collect a pension under the social security system that was created for civil servants and a pension under social security legislation of a Member State.

Pensioners mentioned in Article 23 of Regulation No. 883/2004, not entitled to benefits in kind in the country of residence, however, receive these benefits in the country of residence as laid down in Article 23 of Regulation No. 883/2004, where they would be entitled to such benefits under the relevant provisions, if they resided in the territory of that country (Article 24, paragraph 1). The benefits are provided by the institution of residence on behalf of the competent institution of social security (Article 24, paragraph, 2 point “a”). If the pensioner is entitled to benefits in kind under two or more Member States, the cost of benefits in kind shall be borne by the competent institution of that State, to whose legislation the person has been subject for the longest period of time (Article 24, paragraph 2, point “b”). In the case of applying the principle formulated in Article 24, paragraph 2, point “b” of Regulation No. 883/2004 it would spread the burden of benefits on several national social security institutions. The institutions where the pensioner was last insured bear the costs of benefits of social security. If a person entitled to a pension is resident of a country where social security provisions do not make the entitlement to benefits in kind from the length of social security insurance, employment under a work agreement, or a self-employed business, and not receiving a pension under the social security legislation of that

country, the costs of benefits in kind shall be borne by the social security institution of the Member State in which the person has been granted the entitlement to a pension. The indication of this institution is based on Article 24, paragraph 2 of the Regulation. Members of the family of a pensioner residing in a Member State other than the pensioner shall be entitled to benefits in kind from the social security institutions of the country in which they reside. This institution in deciding on the provision of these benefits, applies the current social security provisions. However, the scope of benefits in kind from the social security of a family member of a pensioner are laid down by the law of that State, under which the pensioner benefits from exercising their rights to such benefits. The costs of benefits in kind paid to members of the family of a pensioner shall be borne by the institution responsible for the payment of expenses for benefits in kind provided to the pensioner in the Member State in which he/she has his/her habitual residence (Article 26).

Article 32 of Regulation No. 883/2004 provides for the prioritisation of rights to benefits in kind. It stipulates that an independent right to benefits in kind which is given on the basis of national social security legislation or under the provisions of Chapter 1 of Title III of the Regulation takes precedence over the derivative right to benefits for family members of the insured. Derivative right to benefits, however, have priority over the independent rights to benefits in kind in cases in which these allowances are paid directly to the person entitled under the conditions of residence of the person concerned in that Member State, in which a guarantee to entitlements to benefits in kind has been given. If the members of the family of an insured person reside in a Member State under whose legislation the right to benefits in kind is not subject to conditions of insurance or activity as an employed or self-employed person, benefits in kind shall be provided at the expense of the competent institution in the Member State in which they reside, provided the spouse or the person caring for the children of the insured person pursues an activity as an employed or self-employed person in the said Member State or receives a pension "from that Member State on the basis of an activity as an employed or self-employed person." (Article 32, paragraph 2). A necessary condition for obtaining the benefits derived from social security by a person not in employment or professional activity, from a social security institutions in the country of residence is to remain in marriage, or exercise the care of children of a person covered by social security because of employment or self-employment.

Benefits in kind classified by Article 33 of the Regulation No. 883/2004 as "the provision of substantial value" (dentures, bulky equipment) allocated to the insured or their family members before taking the social security legislation of another Member State are entitled to the cost of social security institutions of the first Member State in which they were previously insured, even if these benefits have been realised at the time when the person entitled to such benefits was included in the social security system of another Member State.

In the event of overlapping entitlements of cash benefits paid by social security institution of one Member State to the benefits in kind provided by the institution of another Member State of a person residing or staying in that country, apply a general prohibition of overlapping of benefits established in Article 10 of the Regulation, if the above, non-uniform social security benefits serve the same purpose. Committing to the use of non-cumulation of social security benefits, provision of Article 34 of Regulation No. 883/2004 lays down the limit in relation to the insured person receiving benefits in kind in country X, who is seeking payment of cash benefits in the same way in country Y. If the worker receives cash benefits from country Y, the amount of the benefit is reduced by the value of benefits in kind which have been delivered or could be provided from the state insurance agency X obligated to cover the cost of this benefit. The provisions of Regulation No. 883/2004 have established the principle of full reimbursement of the costs of benefits in kind provided by the security of a Member State, acting on behalf of the institution of another Member State (Article 35, paragraph 1). Proceedings in these cases are governed by Article 61 of the Implementing Regulation No. 987/2009. The provision of Article 35, paragraph 2 of Regulation No. 883/2004 decided only that the returns of benefits in kind are determined and made on the basis of proof of actual expenses or the lump-sum. The last method of accounting of benefits in kind between the social security institutions of Member States can only be used by those Member States whose legal or administrative structures prevent any reimbursement based on actual expenditure. Article 35, paragraph 3 of the Regulation authorises the Member States and their competent authorities administering social security benefits to conclude bilateral or multilateral agreements defining other methods of billing expenses and reimbursement of benefits in kind from social security. It permits state authorities or the authorities of social security institutions to waive the obligation to carry out financial accounting and reimbursement of costs of property of social security benefits.

Cash benefits

The institution of social security benefits in kind, bearing the cost of social security provided to pensioners in the Member State of residence, is obliged to pay cash benefits due to the persons under the terms of Article 21 of Regulation No. 883/2004 (Article 29). If the institution of a Member State, which is responsible under the legislation it applies for making deductions in respect of contributions for sickness, maternity and equivalent paternity benefits, may request and recover such deductions, calculated in accordance with the legislation it applies, provided that the benefits granted by an institution operating in the country of residence of the person entitled to benefits are chargeable to the competent social security institution, operating in another Member State (Article 30, paragraph 1).

BENEFITS FOR ACCIDENTS AT WORK AND OCCUPATIONAL DISEASES

The right to benefits in kind and cash

The provisions of Article 17, Article 18, paragraph 1, Article 19, paragraph 1 and Article 20, paragraph 1 of Regulation No. 883/2004 shall apply to benefits for accidents at work or occupational disease (Article 36, paragraph 1). The insured person who has sustained an accident at work or is affected by occupational disease, and is resident in a Member State other than the competent State shall be entitled to specific benefits in kind under the social security system covering work accidents and occupational diseases. These benefits are granted by the institution of residence or stay on behalf of the competent social security institutions under social security legislation in force in the country of residence or domicile of the interested persons entitled to benefits from an accident at work or occupational disease. Article 36, paragraph 2 of the Regulation uses the legal fiction ordering to treat the person concerned as if they were covered by social security in the Member State in which the person resides or stays. The competent social security institution, which disputes the application of social security on accidents at work or occupational diseases under Article 36, paragraph 2 of Regulation No. 883/2004 by the institution of residence, shall immediately notify the institution of residence or stay of providing benefits in kind. Objecting does not deprive the legal nature of the benefits in kind which are still considered to be social security benefits enjoyed in the event of an accident at work or occupational disease (Article 35, paragraph 1 of the Implementing Regulation No. 987/2009). The issue of a final decision on these benefits, the competent institution shall inform the institution of residence or stay of the person concerned. Determining a lack of eligibility to benefits in kind payable to a person injured in an accident at work or occupational disease does not result in loss of entitlement to benefits in kind if the person receiving these benefits has a right to them under a different title than an accident at work or occupational disease (Article 35, paragraph 2 of the Implementing Regulation No. 987/2009).

The injured person in an accident at work and a person who has contracted an occupational disease are taken to the place of residence or to a hospital in the Member State in which they reside at the expense of the competent social security institutions, provided that social security provisions in force in the competent Member State shall provide for recovery of these costs and the relevant social security institution has agreed to take the injured person to the appropriate place in the territory of another Member State in which such a person resides (Article 37, paragraph 1). The cover of costs of transporting such a person is determined by the competent institution of social security. Regulation No. 883/2004 requires only that the institution covers the costs of transport to another Member of the insured person who has died following an accident at work (Article 37, paragraph 2).

The granting of benefits for accidents at work or an occupational disease

If the insured person is suffering from an occupational disease and was employed in two or more Member States and carried out work which due to its nature could cause the disease due to such risks in several Member States, social security benefits to which that person or his/her survivors after the person's death may be eligible shall only be granted on the basis of social security legislation of that Member State in which the victim last carried out his/her work (Article 38). The procedure in cases of worker exposure to the risk of an occupational disease in several Member States is governed by Article 36 of the Implementing Regulation No. 987/2009.

In the event of aggravation of an occupational disease for which a person suffering from such a disease has received or is receiving benefits under the legislation of a Member State, and is not in an employment relationship and did not carry out self-employment activities, the competent institution of social security bears the costs (Articles 39, paragraph 1). However, if the injured person while in receipt of benefits was employed or self-employed in another Member State and was therefore exposed to the same occupational risk that gave rise to the occupational disease, the competent institution shall bear the costs of social security benefits, not including the cost of aggravation of an occupational disease process. However, the competent institution of the Member State in which the person was in receipt of social security benefits and the person was working during such receipt, the first Member State grants the insured a supplement. The amount of the supplement is defined by the difference between the amount of social security benefits due after the aggravation of the occupational disease and the amount of these benefits, which were granted before that date. The legal basis of the supplement is governed by the Member State in which the aggravation of the occupational disease took place (Article 39, point "b"). The rules concerning reduction, suspension or withdrawal laid down by the legislation of a Member State shall not be invoked against persons receiving benefits provided by institutions of two Member States (Article 39, point "c").

The rules for taking into account the laws governing the separation of certain benefits for accidents at work and occupational diseases

If there is no insurance against accidents at work or occupational diseases in the Member State in which the person concerned resides or stays, or if such insurance exists but there is no institution responsible for providing benefits in kind, those benefits shall be provided by the institution of the place of residence or stay responsible for providing benefits in kind in the event of sickness (Article 40, paragraph 1). Despite the lack of insurance against accidents at work and occupational diseases in the Member State in which the person resides who has

sustained an accident at work or contracted an occupational disease at the time of residence or stay in another Member State, the provisions of Chapter 2 of Regulation No. 883/2004 on benefits in kind shall apply to the person entitled to benefits in case of sickness, maternity benefits or equivalent paternity benefits. The cost of these benefits shall be borne by the institution responsible for benefits in kind. The boundaries of the obligations of the institution are governed by the relevant social security legislation of a Member State (Article 40, paragraph 2). These are provisions in the Member State in which the place of damage to the insured person occurred (*lex loci damni*). The already mentioned Article 5 of the Regulation applies to social security institutions in the Member State in relation to the equivalence of work accidents and occupational diseases that either occur or are recognised as such under the laws of the social security of another Member State, when assessing the degree of disability, entitlement to social security benefits, and the amount of those benefits. Article 40, paragraph 3 of this Regulation requires the application of Article 5, under which an accident at work or occupational disease should be considered as an event from which the social security provisions in force in the place of the incident make use of the competent institution of social security protection provisions in force in that country since the victim was not entitled to social security benefits in the event of an accident at work or occupational disease in the State of incident (accident or occupational disease), and State domicile or residence of the victim (Article 40, paragraph 3, points "a"–"b"). The aim of this Regulation is to prevent overlapping entitlement to cash benefits in kind in respect of accidents at work and occupational diseases that occurred or were considered work-related accidents or occupational diseases by the institutions of two different Member States. Benefits in kind provided to persons injured by the Member State on behalf of the institution of another Member State must be reimbursed. Article 35 of the Regulation is applicable to these benefits. Reimbursement is made based on actual costs incurred (Article 41, paragraph 1). Member States or competent authorities of those countries administering social security benefits may agree to other methods of reimbursement or waive all refunds between institutions of social security.

SOCIAL SECURITY BENEFITS GRANTED IN THE EVENT OF DEATH OF THE INSURED

In principle, social security benefits enjoyed by the insured in case of death, i.e. death grants are paid by the competent institution of social security. This institution, however, is required to pay such benefits to insured persons who at the time of death resided in the territory of the competent Member State. Accordingly, Article 42, paragraph 1 of Regulation No. 883/2004 uses the legal fiction whereby the death of the insured or a family member, which took place on the territory of another Member State than the State appropriate by the competent social

security institutions be treated as if this event occurred on the territory of the competent Member State. Article 42, paragraph 2 of the Regulation obliges the competent authority to grant social security benefits for the death of the insured or a family member, payable by virtue of its national social security scheme, even if the recipient of such benefits is resident in another Member State. These rules also apply when the cause of death of the insured was due to an accident at work or an occupational disease. Social security benefits are paid to eligible survivors of the deceased family members at the expense of the competent institution of social security as if the person who exercises the above provision (pensioner) was living at the time of the death on the territory of the competent Member State (Article 43, paragraphs 1 and 2).

INVALIDITY BENEFITS

Due to the two different models of social security generally used in mixed form in the Member States of the European Union, in accordance with Title 4 of Regulation No. 883/2004 (Article 44–Article 49) there are two types of social security: A and B. National social security provisions referred to as "Type A legislation" include the national social security schemes of Member States under which the amount of invalidity benefit is not dependent on the length of periods of insurance or residence. Countries whose social security laws were placed in this category are listed in the annex to the Regulation. The second category – "legislation type B" provisions are included in the national social security legislation of other Member States. The insured person, who was subject successively or alternately to the provisions of national social security classified in category "A" acquires the right to social security benefits (disability pension) solely on the basis of social security law, which he/she was subjected to at the time when the incapacity for work was followed by invalidity (Article 44, paragraph 2). An application for a disability pension should be sent to the institution of the Member State whose legislation the victim was subject to at the time of incapacity to work followed by invalidity or deterioration in health of the person entitled to a pension ("the aggravation of disability") (Article 45, paragraph 1 of the Implementing Regulation No. 987/2009). A person not entitled to invalidity benefits under the national legislation referred to using the determiner listed in Article 44, paragraph 2 of Regulation No. 883/2004, receives social security benefits to which he/she is entitled to under the national social security legislation of another Member State (Article 44, paragraph 3). There are provisions in force in the country where the insured person resides, and is subjected to the laws. For this reason, Article 45, paragraph 4 of the Implementing Regulation No. 987/2009 requires that the insured persons applying for disability pensions and other benefits in respect of bodily injury classified as a disability, requested payment of benefits from social security institutions of residence, or from institution of the Member State whose

legislation the persons were subjected to. The competent institution of a Member State whose national social security regulations make the acquisition, retention or recovery of entitlement to social security benefits available to the invalidity of the periods of insurance or residence is required for the aggregation of insurance periods governed by the national social security legislation of another State or of other Member States (Article 45). This provision requires the appropriate use of Article 51, paragraph 1 of Regulation No. 883/2004, which sets out the rules for counting periods of insurance, from the laws granting social security pensions and survivors from the period of insurance.

Insured persons subjected successively or alternately to the national social security legislation of two or more Member States, of which at least one does not belong to category "A," are entitled to invalidity benefits under the provisions of Chapter 5 of Regulation No. 883/2004 (Article 50–Article 60) governing the acquisition of retirement and survivors' benefits (Article 46, paragraph 1). From the above principle of indicating international standards coordinating disability benefits acquired under the provisions included in category "B," an exception was made for insured people who were under the previous B-type legislation and become incapable of working followed an invalidity, which occurred under the legislation of type A. Such persons receive invalidity benefit under the provisions set out in accordance with the directives set out in Article 44 of Regulation No. 883/2004, provided that:

- such persons meet the conditions required by type A legislation only or through other legislation of the same type. It is permissible to aggregate insurance periods under the terms of Article 45 of the Regulation. But one cannot take into account the insurance periods or residence completed by the provisions of the Regulation as a "legislation type B";
- the person concerned does not apply for retirement benefits to which the provision of Article 50, paragraph 1 of the Regulation (Article 46, paragraph 2) applies.

In all cases where the provisions of Chapter 4 of Regulation No. 883/2004 are applied, the institutions considering applications for disability benefits are bodies empowered to determine the damage to health and disability status of the person applying for an invalidity pension. The decision taken by the institution involves other institutions of Member States, where the compatibility between the national social security provisions of Member States on the conditions relating to the degree of invalidity is acknowledged in Annex VII of the Regulation (Article 46, paragraph 3). Article 49, paragraph 1 of the Implementing Regulation No. 987/2009 has decided that the institution receives the application to determine the degree of disability of the insured person interested in obtaining a disability pension and other social security benefits granted in the case of the determination of invalidity and shall make a decision once that person satisfies the conditions of the national social security law, which is required to apply, making the entitlement to benefits

in the event of disability. If the applicant does not meet the requirements other than those based on knowledge of invalidity established through the competent social security provisions relating to the acquisition of entitlement to disability benefits, the investigating institution is obliged to immediately inform the competent institution of that Member State to whose social security legislation the insured was last subjected. Compliance of the requirements by the applicant of the appropriate law in force in the Member State whose national law of social security the worker was last subjected to, provides the legal basis for the transfer of competence in matters relating to the decision about the state of invalidity of the claimant by the competent institution of social security, with references made to the determinants in Article 46 of Regulation No. 883/2004, of the social security institutions with the power to make decisions under the social security law, which was last applied to the applicant (Article 49, paragraph 1 of the Implementing Regulation No. 987/2009).

In the case of aggravation of the invalidity for which a person is receiving benefits under the legislation of one or more Member States, the benefits shall be provided in accordance with Chapter 5 of the Regulation applied, according to the rules applicable to pensions and survivor's pensions (Article 47, paragraph 1, point "a"). If the person concerned was subject to two or more national systems of social laws, regarded by the Regulation into category "A" legislation and from the day of using invalidity benefits is not subject to social security law of another Member State, the disability benefits are awarded in accordance with the principles of Article 44, paragraph 2 of the Regulation, which under the legislation of the country was applicable at the time of the incapacity for work resulting in the invalidity (Article 47, paragraph 1, point "b"). If the amount of invalidity benefits due is lower than the amount of the benefit which the person concerned was receiving at the expense of the institution previously competent for payment, that institution shall pay him/her a supplement equal to the difference between the two amounts pursuant to the provisions set out in Article 44 and Article 45 of the Regulation and the provision granting the amount (due to the aggravation of the invalidity) on the basis of the relevant provisions referred to using the determinants listed in Article 47, paragraphs 1–2.

The provisions indicated by the determinants coordinating the entitlements to invalidity benefits are appropriate in cases where the invalidity benefits are converted into old-age pensions (Article 48, paragraph 1).

OLD-AGE AND SURVIVORS' PENSIONS

Standards Coordinating rules for determining entitlement to benefits and pensions require the competent social security institutions to disclose to the insured the circumstances upon which the national social security legislation makes the entitlement to those benefits dependent (Article 50, paragraph 1). An insured

person who is or was subjected to national social security legislation of two or more Member States shall submit an application for social security institutions of the Member State whose legislation was applicable at the time the person met the conditions for the acquisition of social security benefits. An application for benefits made to the social security institution of one Member State makes the simultaneous automatic determination of benefits under the national social security legislation to which the insured was subjected, and who meets the requirements established by those rules (Article 45 B, point 7 of the Implementing Regulation No. 987/2009). The institution where the application was filed provides information about the contents of the application to the social security institutions of other Member States where the applicant was insured. If on the date of application the applicant does not meet the conditions for the entitlement to social security benefits prescribed by the regulations of all Member States in which the person was insured, the institution where the application was filed takes into account only periods of insurance that have been completed (Article 50, paragraph 2). If the national social security provisions make the grant of social security benefits from the completion of periods of insurance only to do a particular job or some kind of activity, covered by a specific system of social insurance, social security, the competent institution takes into account periods of insurance completed under the provisions of social security in force in other Member States only if the person applying for social security benefits was covered by the same or similar social security schemes. In cases where an applicant for social security benefits does not meet the requirements from which the national social security provisions make the acquisition of certain social security benefits through a separate system of social security, insurance periods are taken into account when deciding whether to grant the benefit of the general social security scheme (Article 51, paragraph 2). Periods of insurance completed under the rules governing the conditions for the entitlement to benefits in country A are taken into account when deciding whether to grant the benefit of the general social security system according to the social security legislation in force in another Member State, even though they are included in the first country A (Article 51, paragraph 2). In case where the provisions of social security legislation of a Member State make the acquisition, retention or recovery entitlement to social security benefits on whether an applicant on the above benefits was insured at the time of the risk, this condition shall be deemed completed, if the applicant was under a social security scheme in another Member State (Article 51, paragraph 3). Article 6 (aggregation of insurance periods), Article 50 (general provisions relating to old age and survivors' pension), Article 51, paragraph 3 (required to treat the insured according to the laws of another Member State as the insured person in that Member State in which it applies to the acquisition, retention or recovery of entitlement to social security benefits), Article 59 (re-calculation and restoration of social security benefits) are, *mutatis mutandis*, to persons covered by a special security system civil

servants (Article 60, paragraph 1). However, when the appropriate legislature of a Member State makes the acquisition, retention or recovery of entitlement to benefits from social security under the special social security system for civil servants as to whether all periods of insurance have been completed on the basis of one or more special schemes for civil servants in that Member State or whether they are regarded by the social security provisions equivalent to those periods, the competent social security institution of that State only takes into account the periods which can be considered insurance under its own national social security scheme. If, account having been taken of the periods thus completed, the person concerned does not satisfy the conditions for the receipt of these benefits, these periods shall be taken into account for the award of benefits under the general scheme or, failing that, the scheme applicable to manual or clerical workers, as the case may be (Article 60, paragraph 2).

The amount of cash benefits due in social security is determined in accordance with the rules used by the institution of social security (independent benefits). This institution first determines the theoretical and the actual amount due in social security benefits (benefits in proportion). The theoretical amount of the benefit is equal to the provision of social security which the person concerned could claim if all periods of insurance and/or residence, from which national social security provisions make the entitlement to benefits, had been completed under the rules applied by the competent institution of social security (Article 52, paragraph 1, section "b," point "i"). After determining the theoretical amount of the benefit, the competent institution of social security shall determine, based on the relationship between the insurance periods completed under the national social security legislation of all Member States concerned in relation to the maximum period of insurance, the actual amount of the *pro rata* benefit (Article 52, paragraph 1, section "b," point "ii"). In order to calculate the theoretical and proportionate amounts of social security benefits standards coordinating national social security systems require the following procedures:

– where the total length of the periods of insurance and/or residence completed before the risk materialised under the legislations of all the Member States concerned is longer than the maximum period required by the legislation of one of these Member States for receipt of full benefit, the competent institution of that Member State shall take into account this maximum period. This method of calculating social security benefits does not burden the social security institutions with higher costs of a benefit from the full benefits provided under the applicable provisions of its social security (Article 56, paragraph 1, point "a");
– if the legislation of a Member State provides that the benefits are to be calculated on the basis of incomes, contributions, bases of contributions, increases, earnings, other amounts or a combination of more than one of them (average, proportional, fixed or credited), the competent institution shall determine the

basis for calculation of the benefits in accordance only with periods of insurance completed under the legislation it applies and uses, in order to determine the amount to be calculated in accordance with the periods of insurance and/or residence completed under the legislation of the other Member States, the same elements determined on the basis under the legislation it applies (Article 56, paragraph 1, point "c," points "i"–"ii"). Basis for assessing the benefits from the special social security scheme for civil servants is the last received revalued salary or salary received by the person concerned during the period or periods in which the insured was subject to a special social security scheme for civil servants (Article 60, paragraph 3). In case there is a change in the method of calculating social security benefits or rules for calculating benefits, the competent institution of social security is required to recalculate the benefits. Social security benefits should be recalculated in the event of alterations to the personal situation of the recipient (Article 59, paragraph 1). There is no obligation to re-calculate benefits in the event of a change of rate or amount or value of social security benefits. On the other hand, if, by reason of an increase in the cost of living or changes in the level of income or other grounds for adjustment, the benefits of the Member State concerned are altered by a percentage or fixed amount, such percentage or fixed amount shall be applied directly to the benefits determined in accordance with Article 52 of the Regulation No. 883/2004 (Article 59, paragraph 2).

Notwithstanding Article 52, paragraph 1, point "b" of the Regulation, the institution of a Member State shall not be required to provide benefits in respect of periods completed under the legislation it applies which are taken into account when the risk materialises, if the duration of the said periods is less than one year, and when taking only these periods into account no right to benefit is acquired under that legislation (Article 57, paragraph 1). From this principle there is an exception made in a situation where the application of Article 57, paragraph 1 of the Regulation, which would exempt from the obligations all concerned social security institutions in Member States. In this case, Article 57, paragraph 3 of the Regulation provides that social security benefits are granted solely on the basis of social security provisions of the last of those Member States whose conditions are met. All periods of insurance completed and taken into account by social security institutions under the provisions of Article 6 (aggregation of periods of social security) and Article 51, paragraphs 1 and 2 (special provisions for the aggregation of insurance periods) of Regulation No. 883/2004 shall be deemed satisfied on the basis of social security legislation of the last Member State.

The coordinating national social security provisions contained in Chapter 5 of the Regulation devoted to the regulation of pension and survivors' benefits conferred under social security legislation of one or more Member States shall lay down rules for the prevention of accumulation of social security benefits, designate the collision of the rules that are the same or different social security benefits.

They apply to the benefits for invalidity, old age and survivors and are treated by the coordinating provisions as of the same type (Article 53, paragraph 1). They also apply to other social security benefits (accumulation of various types of benefits) (Article 53, paragraph 2). In the case of overlapping of the same kind of benefits for different types of income or another person entitled to social security benefits, the competent institution of social security benefits takes into account the income earned in another Member State only when it applies to the national rules provided for consideration of social security benefits or income earned abroad (Article 53, paragraph 3, point "a"). The competent institution of social security takes into account the amount of benefits to be paid by the insured in another Member State before the deduction of tax, social insurance premiums, fees and other personal deductions. It does not include benefits received under social security law of another Member State on the basis of voluntary insurance (Article 53, paragraph 3, point "c"). In the case of anti-cumulation rules a single Member State applies rules to prevent overlapping because the person concerned receives benefits of the same or of a different kind under the legislation of other Member States or income acquired in other Member States, the benefit due may be reduced solely by the amount of such benefits or such income (Article 53, paragraph 3, point "d"). The rules prevent accumulation of social security benefits regulated by national social security laws and do not apply to proportionate benefits (Article 54, paragraph 1). They are used for the benefit of independent benefits if they are benefits which are not dependent on the periods of insurance or residence (Article 54, paragraph 2, point "a"), and if another period belonging to the period of insurance is considered by the legislature as fulfilled, which falls between the risk and the later date, colliding with the same type of benefit (Article 54, paragraph 2, point "b", "i") or social security benefits, whose amount is not dependent on the duration of insurance or residence (Article 54, paragraph 2, point "b", "ii"). This means that the non-accumulation of social security benefits does not apply to social security benefits dependent on the period of paying social security contributions or taxes paid by persons resident in Member States where social security benefits are entitled to residents.

In those Member States whose national social security provisions apply to prevent accumulation of various types of social security benefits or social security benefits with other income achieved by the persons entitled to these benefits, the standard coordinating national social security system of European Union Member States requires the competent social security authorities to:

- breakdown the amount of independent income or other benefits that were granted by a number of benefits subject to the rules preventing accumulation of social security benefits established by the provisions of Regulation No. 883/2004. Application of the principle of coordinating laws against the overlapping of social security benefits cannot deprive the person concerned the status of a pensioner (Article 55, paragraph 1, point "a");

- the application mentioned in Article 52, paragraph 1, point "b", "ii" of the techniques for calculating the actual amount of the proportional benefits in the event of overlapping proportionate or to other incomes with those benefits (Article 55, paragraph 1, point "b");
- the application of the techniques listed in Article 52, paragraph 1, points "a"–"b" in the case of overlapping of one or more of the independent benefits or one or more benefits proportionate to the independent benefits (point "a") and for proportional benefits (point "b").

The recipient of benefits to whom the coordination rules of the Regulation No. 883/2004 apply may not, in the Member State of residence and under whose legislation a benefit is payable to him/her, be provided with a benefit which is less than the minimum benefit fixed by that legislation for a period of insurance or residence equal to all the periods taken into account for the payment (Article 58, paragraph 1). If as a result of the coordination laws governed by the provisions of Regulation No. 883/2004 the person entitled to benefits receives less than the minimum set of benefits on the basis of the provisions mentioned in Article 58, paragraph 1, the competent institution shall pay him/her throughout the period of his/her residence in its territory a supplement equal to the difference between the total of the benefits due under Chapter 5 and the amount of the minimum benefit (Article 58, paragraph 2).

Unemployment benefits

The specificity of the standards coordinating the payment of unemployment benefits expressed in permitting to take into account only "as necessary" by the competent social security institutions of Member States of periods of insurance, employment or self-employment recognised by the social security legislation of the competent Member State to be completed, provided that the applicable legislation for the eligibility for unemployment benefits makes the benefits eligible according to one of those periods. When the applicable national legislation makes the right to benefits conditional on the completion of periods of insurance, the periods of employment or self-employment completed under the legislation of another Member State shall not be taken into account unless such periods would have been considered to be periods of insurance had they been completed in accordance with the applicable legislation (Article 61, paragraph 1). Application of the provision Article 65, paragraph 1 of Regulation No. 883/2004 is subject to compliance with the requirements set out by the concerned social security provisions of the relevant Member State for periods of insurance, employment, self-employment, if the relevant national social security legislation grants the rights to unemployment benefits according to the periods of insurance, periods of employment and periods of self-employment (Article 61, paragraph 2). With the exception of the situation mentioned in Article 65, paragraph 1, point "a" concerning

persons wholly unemployed, who during their last employment or professional activity resided in a Member State other than the competent State, still living in the country or returning to that country, entitled to apply for unemployment benefit in one of the two social security institutions: located in the country of residence or in the State of last residence, are treated by one of these two social security institutions as if subjected to applicable national social security provisions, Article 61, paragraph 2 prohibits the use of alternating periods of insurance, employment or professional activities by self-unemployed person, seeking in the appropriate Member State unemployment benefits.

The basis for the unemployment amount is the previous salary or professional income taken into account, which has been received by the person concerned (Article 62, paragraph 1). This provision applies in cases in which national social security rules define specific terms of reference (for example, six-month period in the last year before losing their jobs) for the purpose of determining the remuneration for work (Article 62, paragraph 2).

Eligibility for unemployment benefits do not expire if the unemployed move within the European Union, if the unemployed:

- at least for a period of four weeks before moving to another Member State is registered as a jobseeker and has remained at the disposal of the employment services of the competent Member State. With the consent of the competent institution, the unemployed person can go to find work in another Member State prior to that date (Article 64, paragraph 1, point "a");
- is registered as a person seeking work with the employment services of the Member State to which he/she has gone, is subject to the control procedure organised there and adheres to the conditions laid down under the legislation of that Member State (Article 64, paragraph 1, point "b").

Unemployed persons who have left to seek work in another EU Member State shall retain the right to unemployment benefits for a period of three months from the date they cease being available to the Member State that they have left. A period of three months may be extended to six months. The total period for which the unemployed seeking work in other EU Member States must not exceed the collection period for unemployment benefits to which the unemployed are entitled under social security legislation in force in the competent Member State (Article 64, paragraph 1, point "c"). The same time limits set forth in the coordinating laws in collecting unemployment benefits between the two periods of employment (Article 64, paragraph 3). These periods may be extended on the basis of national social security legislation. Unemployment benefits are paid by the competent institution of social security in accordance with the applicable national social security rules at their own expense (Article 64, paragraph 1, point "d") Coordinating laws of national social security provisions establish the obligation to export unemployment benefits.

The return of the unemployed to the competent Member State before expiry of the period when the relevant social security institution is obliged to export social security benefits does not affect the entitlement to these benefits. The loss of the right to unemployment benefits is only when he/she does not return to the competent Member State before the expiry of the period in which he/she enjoys these benefits or to the end of this period (Article 64, paragraph 2).

Partially unemployed and the unemployed at certain intervals, who during their last employment or self-employment were residing in a Member State other than the one in which they were employed (the relevant country), remain available to the employment institutions of the competent Member State. They are entitled to unemployment benefits, as if they resided within its territory. These benefits are granted to them by social security institutions of the competent Member State (Article 65, paragraph 1). As discussed earlier, those who are wholly unemployed may also be available to the employment institutions in the Member State in which they reside (Article 65, paragraph 2). Once registered as unemployed at the employment office of the Member State of residence, a necessary condition is to remain at the disposal of the employment office of a Member State in which the person resides and the application of the provisions in force in the employment offices of that State (Article 65, paragraph 3). Unemployment benefits are paid according to the national social security legislature of residence. Previously cited Article 65, paragraph 5, point "a" requires to treat the unemployed as an insured person, subject to the legislation in the country of residence, despite them being employed or self-employed during this period within the territory of another Member State of the European Union. Unemployment benefits are paid by the institution of residence and at their expense. The competent social security institution whose legislation the insured is subjected to by reason of employment or self-employment in another Member State is obliged to reimburse to the institution of residence the full amount of benefits paid to the unemployed during the first three months of being unemployed. The amount of reimbursement may not exceed the amount due to the unemployed, which would be paid to him/her by the competent institution of social security, the administration of benefits for the unemployed in a Member State of last employment or self-employment (Article 65, paragraph 6). The reimbursement period for unemployment benefits may be extended to five months, if the unemployed during the past 24 months has been employed for at least 12 months in the competent Member State whose national social security legislation he/she were last subjected to (Article 65, paragraph 7). Coordination laws between Member States account for unemployment benefits paid to allow the authorities of the countries concerned to agree on other means of reimbursement of benefits paid. The authorities of the Member States may abandon settlements made between social security institutions under their jurisdiction (Article 65, paragraph 8). If the authorities have not concluded agreements on the settlement of making unemployment benefits, Article 70 of the

Implementing Regulation No. 987/2009 requires the institution of social security of the place of residence to transfer to the institution of a Member State whose legislation the insured unemployed was last subjected to, applying for reimbursement of unemployment benefits during the six months from the date of last payment of unemployment benefits. The application should be determined by the amount of benefits paid to the unemployed for a period of three or five months, given the period during which these benefits have been paid and on the identity documentation of the unemployed.

Family benefits

Members of the family of the insured are entitled to social security benefits, regardless of place of residence, based on national social security legislation in force in the country of employment or business of the insured, which involves their ties of kinship or affinity. Article 67 of Regulation No. 883/2004, which lays down rules for the acquisition of entitlement to those benefits requires the competent social security institution to treat residents of other countries and the family members of the insured as well as those residents living in the country concerned. The exception to this rule was introduced to pensioners. The right to family benefits of such persons are governed by the provisions of social security of the countries which determine the pension and old-age entitlements. In cases where under the legislation of two or more Member States there are entitlements to family benefits in the same period and for the same eligible family members of the insured, coordination laws determine the following priority principles in cases of overlapping entitlement to these benefits:

Various types of family benefits

When benefits are paid by more than one Member State, in different ways, the first to be paid are family members of an insured employee or person engaged in self-employment. Next to benefit are family members of the pensioner. Finally, family benefits are paid, according to the period of residence of the insured in a Member State (Article 68, paragraph 1, point "a").

Family benefits paid according to the same criteria

In the case of benefits paid by more than one Member State on the same basis, the order of priority is determined by applying the following additional criteria:

- in the event of employment or self-employment, additional criteria are: the place of residence of the children to whom family benefits are paid and the highest amount of family benefits provided for by social security, which are in conflict with the others (Article 68, paragraph 1, point "b", "i"). If the place of residence of the children does not determine the order of precedence of family benefits, each of the Member States concerned, whose legislation is in conflict,

determines the amount of family benefits for all insured children including those who do not reside in the country. The competent social security institution, which provides the highest family benefits, grants the amount of these benefits to the entitled person. The social security institution of the second Member State concerned shall repay half of that amount, within the amount provided for in national laws that apply to social security, to the competent social security institution of the first country (Article 58 of the Implementing Regulation No. 987/2009);
- in the case of family benefits received by virtue of a pension by the insured, the additional criteria are: children's place of residence, provided that the pension is paid on the basis of national social security legislation of a Member State in which they reside, and the beneficiaries of the longest period of insurance or residence may be in conflict governed by national rules on social security (Article 68, paragraph 1, point "b", "ii");
- in the case of family benefits derived on the basis of residence, an additional criterion is the domicile of children (Article 68, paragraph 1, point "b", "iii").

In case of overlapping entitlements to family allowances, benefits are awarded in accordance with the principles of priority under the provisions of Article 68, paragraph 1, points "a"–"b") of the analysed Regulation. Entitlements to family benefits granted on the basis of other national social security rules are levelled to the amounts of benefits paid under the relevant provisions of social security. If the benefits payable under the relevant provisions are lower than the amount of the benefits regulated by the social security of other Member States, competing with the relevant provisions of social security, the persons entitled to these benefits are entitled to the difference paid. National social security legislation cannot grant this allowance to children residing in another Member State where the entitlement to family benefits arises exclusively from the place of residence of the recipient (Article 68, point 2).

If, on the basis of the relevant national social security legislation that are in accordance with the coordination rules and Articles 68 and 67 of the Regulation, orphans do not acquire rights to additional or special family benefits of social security, and such benefits are paid according to the national social security legislation of that Member State, in which the deceased employee was covered for the longest period. Where these provisions do not guarantee social security for orphans and any right to family benefits from social security, entitlement to such benefits are considered on the basis of national social security legislation of other Member States which were applicable to the insured before his/her death. Family benefits are granted in order of decreasing length of periods of insurance or residence on the territory of each Member State before the death of the insured person (Article 69, point 1).

SPECIAL NON-CONTRIBUTORY CASH BENEFITS

The term "special non-contributory cash benefits" governed by the provisions of Chapter 9 of the Regulation No. 883/2004, are benefits which are provided under legislation which, because of its personal scope, objectives and/or conditions for entitlement, has characteristic of the social security legislation (Article 70, paragraph 1). For purposes of applying the standards laid down by the coordination rules, the term "special non-contributory cash benefits" means benefits which are intended to provide:

– supplementary, substitute or ancillary protection against risk covered by social security referred to in Article 3, paragraph 1 of this Regulation, guaranteeing the concerned the minimum subsistence income (Article 70, paragraph 2, point "a", "i"). The social minimum of the guaranteed social security benefits or social assistance should be tailored to the social and economic situation of individual Member States;
– special protection to persons with disabilities, closely determinanted to the said person's social environment (Article 70, paragraph 2, point "a", "ii").

A characteristic feature of non-contributory benefits is to finance the cash benefit from the funds coming from taxes and no dependence between the benefits and monetary obligation to pay contributions. This is not a mandatory requirement, since Regulation No. 883/2004 includes the category of "special non-contributory cash benefits" also as social security benefits paid from funds collected from contributions, which aim to complement other basic benefit schemes. Thus, the most important characteristic of the special non-contributory cash benefits is complementary nature of these benefits paid to people whose income does not assure the basic social security benefits required to sustain a subsistence level.

Special non-contributory cash benefits are paid to people in need by the competent social security institutions of Member States in which the concerned reside. Conditions entitling to benefits and rules of conduct of social security institutions governing the granting of allowances and the payment of benefits, are regulated by national social security legislation in force in the country of residence of the applicant. The costs of special non-contributory social security benefits are borne by the institution administering the social security funds, from which the benefits are paid. The appropriate social security institution is the institution of the place of residence of the person interested in obtaining those benefits. Other determinants, besides that of residency of the person entitled to the special non-contributory social benefits, do not apply to such benefits (Article 70, paragraph 3).

CONCLUSION

Coordinating standards of social security benefits included in the Regulation No. 883/2004 shall be guided by similar principles, which were formulated in Regulation No. 1408–1471. They are:

- exclusivity and unity used as the appropriate national social security scheme;
- the binding nature of the social security legislation of that Member State, which has been identified on the basis of determinants listed in Regulation No. 883/2004;
- the obligation to equal treatment of persons entitled to cash benefits and use of social security benefits in kind;
- respect by the national social security institutions of Member States of the acquired rights and expectations to benefits from social security;
- aggregation of periods, from which national social security regulations make the acquisition, maintenance, growth and size of social security benefits;
- export of social security benefits within the European Union.

Regulation No. 883/2004 contains two types of rules of private international labour law: coordinating standards and substantive standards, setting out how the relevant social security institutions should assess the situation of applicants to determine the powers and to provide cash benefits and social security in kind and make decisions to grant or refuse the payment of these benefits. Both types of standards qualify for the recognition of *sui generis* conflicts of substantive labour law, which are part of private international labour law, because in the Polish system of law social security is part of labour law and the norms of the law governing the legal relations between the persons covered by social protection, guaranteed by the state and the institutions managing the provision of social security.

Coordinating standards contained in Regulation No. 883/2004 ensure the continuation of conduct developed by the European Court of Justice on the basis of Regulation No. 1408/71.

Part VI

International procedural labour law of the European Union

Chapter 1

The subject of international procedural labour law

§ 1. Introduction

The subject of private international labour law consists of the procedural laws governing the scope of the labour courts in disputes against the background of industrial relations with a foreign element. The procedural norms of international labour law determine the jurisdiction of the labour courts and the recognition by courts and enforcement authorities of judgements in matters of employment law issued by foreign labour courts. Procedural norms of international labour law also set out the rules for enforcement of foreign labour courts and other competent authorities to resolve disputes of claims stemming from an employment relationship with an international element. International procedural labour law does not include standards for ruling in conflicts between the relevant provisions of procedural law, although usually in conflict with the provisions remain in force in the Member State in which courts are established and the rules of the country or countries in which the parties are resident or established in reside parties of a dispute involving an employment relationship with an international element. In principle, labour courts ruling in cases involving such claims make decisions according to the procedural laws applicable in the Member State in which the jurisdictional court *meriti* is located. The competent courts, therefore, rule on the basis of *lex fori*. It should be noted, however, that appropriate with national rules, procedural rules often contain special rules that apply to employment relationships involving a foreign element. Therefore also for the rules which are specific to the procedural private international law rules, classified by labour lawyers specializing in private international law as the procedural standards that are demarcating and substantive. However, these two aspects of the process are indicated much less in labour relations involving foreign element than in the cases of conflict of substantive labour law. For this reason, I thought that it would be most appropriate to entitle the part VI of this book as "International Procedural Labour Law," although originally I wanted to give the volume the following title, "The Conflict Standards of Procedural Labour Law." The chosen title "International Procedural Labour Law of the European Union" better reflects the scope of the changes that have occurred during the last 40 years in the European Union and its prior organisations in matters relating to standardised procedures for recognition of civil

and commercial matters, including matters involving labour in legal relations (labour relations), in which there are foreign elements. Unification of the procedural standards was initiated in the countries of the European Economic Community, which on September 27, 1968 signed the Brussels Convention on the Jurisdiction and the Enforcement of Judgements in Civil and Commercial Matters.[191] The main advantage of this convention was to give national courts the competence of international jurisdictions (within the EEC), *inter alia*, in matters of employment law. The "Brussels" Convention indicated an appropriate determinant or a combination of determinants deciding on the application of the relevant national proceedings in civil and commercial matters, including in matters of employment law that apply to legal relationships involving foreign elements, including labour relations.

Outside the jurisdiction, international labour law regulates procedural matters related to the recognition of foreign judgements and their enforcement by the relevant regulatory authorities of other Member States. It also lays down rules for taking evidence and legal assistance to the authorities (labour courts or other institutions) to hear disputes about claims of the parties to employment relationships involving a foreign element. The literature on private international law stresses the close relationship between the rules of civil procedure governing the jurisdiction of the courts and the recognition and enforcement of judgements and the rules of substantive law. The principle of territoriality, which underlies the jurisdiction and enforcement of judicial decisions, requires the judiciary to extend the legal relationships that are not in close connection with the *forum* country. A labour court ruling issued in the Member State X is valid in a theoretical sense in other Member States of the European Union. For the same reasons it may be enforceable in other Member States whose national labour laws have no connection with the employment relationship in which there are foreign elements. According to M. Bogdan, the above regularity is the key objective, as it prevents in the EU the emergence of an international organisation based on the fundamental freedoms of movement of employers and employees within the common market in a legal vacuum, impeding or precluding the acceptance of foreign jurisdiction and the recognition of judgements of foreign courts and the implementation of these decisions by the institutions involved in the enforcement of final and enforceable judgements in other Member States of the Union.[192] Parties to contractual relationships in which there are foreign elements usually cite as the appropriate procedural law, whose provisions will apply in the event of disputes over claims to the employment relationship with an international element, the right process to the state of which the substantive labour laws are set or selected as competent to regulate labour relations with a foreign element. This relationship

[191] Consolidated version OJ C 027, January 26, 1998, pp. 0001-0027.
[192] M. Bogdan, *A Concise Introduction to EU Private...*, p. 5.

between the norms of substantive law and procedural law standards are not one. The extension of the jurisdiction of a foreign court will occur when the parties to labour relations involving foreign element will apply foreign substantive law. At the core of this bilateral relationship between the procedural law and substantive law is the conviction supported by practical experience of the parties to the labour relations, including the party relations with a foreign element, that a court adjudicating on the basis of substantive law has a natural tendency to use the procedural law of the country in which the substantive laws apply. This relationship between the rules of substantive law and civil procedure is based on experiences stemming from the use of the courts *meriti* enforced by the rules of the procedure. In cases of labour law, an indication of the conflict rules of substantive labour law determinants *lex loci laboris* means the labour court adjudicating in the State in which the place of work is in the proceedings in cases involving employment claims, the rules in force in the county of jurisdiction, and therefore the district in which the employee performs work shall therefore apply. The coordination of procedural and substantive standards and legal issues in various fields of private law: civil law, to which we can include labour law, is dealt with by the international organisation (*The Hague Conference on Private International Law/Conférence de la Haye de droit international privé*). It "manages" 35 "Hague Conventions," to which belong 65 states, including all European Union Member States. These include the conventions which are discussed in this volume: "Brussels" and "Lausanne" on jurisdiction and enforcement of judgements in civil and commercial matters, including decisions in matters of employment law.

The first of these, the "Brussels" Convention, was signed on September 27, 1968. Article 62 of the Convention provides that it shall enter into force on the first day of the third month following the date of signature by the last Member State of the European Economic Community. Article 63 of this Convention established an obligation to ratify its provisions by all Member States of the European Economic Community. The original text of the Convention was prepared in four languages, Dutch, French, German and Italian. Each of these versions is authentic. All these language versions of this Convention have been filed in the Registry of Council of European Communities (Article 68). The "Luxembourg" Protocol supplements the "Brussels" Convention and the Joint Declaration by the authorities of State Parties to the Brussels Convention. These documents were signed on the same day as the Convention. The Brussels Convention and the Luxembourg Protocol of 1968 is completed by the second Luxembourg Protocol, signed on March 06, 1971, in which the EEC Member States, granted the European Court of Justice the power to a binding interpretation of the Convention and international documents supporting it. In the years 1978–1996 the instruments of accession to the Convention were filed by the following Member States of the European Communities: Denmark, Ireland, and Great Britain on October 09, 1978 ("Luxembourg" Convention), Greece on October 25, 1982,

("Luxembourg" Convention), Spain, Portugal on May 26, 1989, (Convention of San Sebastian), Austria, Finland, and Sweden on November 29, 1996. A number of the original provisions of the Brussels Convention, of 1968, which entered into force on February 01, 1973, after the ratification of signatures by representatives of six Member States of the European Economic Community and the Protocols of 1968, 1971, the Convention of 1978, 1982, 1989, were supplemented at the time of the accession with documents for the following Member States to the Convention, and supporting it with international instruments. The final consolidated version of the Brussels Convention was published in the Official Journal of the European Communities on January 26, 1998.[193] The term "Brussels Convention" in the literature on private international law was understood as a group of international treaties signed by Member States of international organisations, prior to the current European Union, whose objective was the implementation of the idea formulated in the old provision of Article 220 (Article 293) of the Treaty establishing the European Community, which in the final, fourth sub-paragraph, the authorities of those countries committed to the simplification of formalities governing the reciprocal recognition and enforcement of judgements and arbitration awards. Article 293 was repealed by the Treaty of Lisbon TofEU (General and final provisions, point 280). Chapter 3 (Article 65 TofEU) states that "The Union shall develop judicial cooperation in civil matters having cross-border implications, based on the principle of mutual recognition of judicial and extra-judicial."To achieve this aim the European Parliament and Council adopt legislative measures to ensure the reciprocal recognition and enforcement by Member State judgements, cross-border service of documents and notices of judicial and extra-judicial documents; compliance of conflict rules, cooperation in gathering evidence, effective access to justice, and removing obstacles to the proper conduct of proceedings in civil cases. In the preamble to the Convention it was decided that a necessary condition for achieving this goal is to define the jurisdiction of the courts in the Member States to facilitate the recognition of judicial decisions issued by judicial authorities in the Member States within the Community and the introduction of effective procedures for enforcement of judgements, decisions and viable settlements. The Brussels Convention established in the Member States of the European Economic Community, European Communities, the European Community and the European Union uniform rules of jurisdiction, recognition and enforcement of judgements in civil and commercial matters, including decisions in matters of employment law. Parties to the Brussels Convention

[193] The official text of the consolidated version of the "Brussels" Convention is accompanied by three declarations: 1978 released in conjunction with the international convention for the occupation of ships, 1989 the ratification of the "Brussels" Convention, by the authorities of Spain and Portugal and 1996 determining the jurisdiction of the courts in matters relating to posted workers by employers providing services in another Member State. An earlier version of the Consolidated "Brussels" Convention has been published in the OJ EC C 189 of July 28, 1990.

could only be the Member States to international organisations, the predecessor of the current European Union. Following the conclusion on September 16, 1988 in Lugano, the Convention on Jurisdiction and Enforcement of Judgements in Civil and Commercial Matters by the Member States which, at the opening for signature of the Convention, were members of the European Communities or the European Free Trade Association (Article 60, point "a"), in the preamble to the Convention's version of 1989 adopted after the accession to the Convention, Spain and Portugal agreed that the principles laid down are applicable to the parties to the "Lugano" Convention. Parties to the Lugano Convention can also be – except countries mentioned in Article 60, point "a" – countries that after the opening of the Lugano Convention for signature, become members of the European Communities or European Free Trade Association (Article 60, point "b") and countries which at the request of a Member State addressed to a depositary country of the Convention will be invited by the state – the depositary to accede to this Convention. Poland ratified on August 26, 1999[194] that a necessary condition for accession by any State not being a member of one of these two international bodies: the European Communities or the European Free Trade Area, is to obtain approval for accession to the Lugano Convention by all States which have signed the Convention, as well as all the Contracting States referred to in Article 60, points "a"–"b") of the Lugano Convention. The Lugano Convention entered into force on February 01, 1992. Poland was invited to accede to the Convention on August 26, 1999 and became a party to it from February 01, 2000.[195] Annexes to the Lugano Convention are documents referred to in Article 65 of the Convention. They are: Protocol No. 1 on certain questions of jurisdiction, procedure and implementation, Protocol No. 2 on the uniform interpretation of the Convention, Protocol No. 3 on the application of Article 57 of the Lugano Convention, a rule establishing the relationship between the Lugano Convention and other conventions, which are party or in the future will become Member State parties to the Lugano Convention.

The "Brussels" Convention was replaced on March 1, 2002 by the Regulation of the Council (EC) No. 44/2001 of December 22, 2000 on the jurisdiction and recognition of judgements in civil and commercial matters – "Brussels I" (Article 68, paragraph 1).[196] This does not mean that the "Brussels" Convention completely lost its effect. It is still applicable in those cases in which – on the basis of Article 68, paragraph 1 of Regulation No. 44/2001 – this Regulation did not

[194] OJ dated 18.02.2000. No. 10, pos. 133.

[195] OJ 2000, No. 10, pos. 132.

[196] Official Journal of the European Communities L 012 of January 16, 2001, pp. 0001–0023. On the Regulation No. 44/2001, see: B. Ancel, *The Brussels I Regulation: Comment*, "Yearbook of Private International Law" 2001, Vol. 3, p. 101 et seq.; J.-P. Beraudo, *Le Règlement (CE) du Conseil du 22 décembre 2000 concernant la compétance judiciare, la reconnaissance et l'exécution des Decisions en matière civile et commerciale*, "Journal du droit international (Clunet)" 2001, Vol. 4, p. 1033 et seq.

replace the "Brussels" Convention. These are matters which concern the territories of Member States of the European Union, within the scope of the Convention, excluded by Article 299 (former Article 227) of the Treaty amending the Treaty of European Union and the Treaty establishing the European Community. Article 299 of the EC Treaty stated that this treaty applies to European metropolitan territories of all Member States listed in that provision (paragraph 1), for whose external relations are the responsibility of the authorities of that Member State (paragraph 4), some French overseas departments listed in the first paragraph of the provision in paragraph 2 and the Aland Islands (paragraph 5). However, in relation to other non-metropolitan territories of certain Member States listed in Article 299, paragraph 2, point "ii" of the EC Treaty, the Council by majority laid down on a proposal from the Commission, after consulting the European Parliament, the rules of the EC Treaty and issued pursuant to the European provisions of the Treaty in relation to the French overseas departments, the Azores, Madeira and the Canary Islands. The EC Treaty is of limited use to the Channel Islands and the Isle of Man. It applies only to the extent necessary to ensure the implementation of regulations relating to such islands in the Treaty on the accession of new Member States of the European Economic Community and the European Atomic Energy Community dated January 22, 1972 (paragraph 6, point "c"). There is no application to the Faroe Islands and the British Sovereign Base Areas in Cyprus (clause 6, points "a"–"b"). In Article 311a TofEU retained the wording of Article 299, paragraph 2, the first section, and Article 299, paragraphs 3–5 with the modifications set out in paragraph 293. Article 311a TofEU a new rule was added (paragraph 6) empowering the European Council, at the request of the Member State concerned, to adopt a decision amending the status to the Danish, French or Dutch territories within the Union or non-metropolitan countries.

The "Lugano" Convention is applicable in the legal relations between the countries of the European Free Trade Area (Iceland, Norway and Switzerland) and the European Union Member States (Denmark), to which the Regulation No. 44/2001 is not applicable. To the legal relations with the countries of the European Union Convention applies the above Convention to all court cases that were initiated before the entry into force for each Member State Regulation No. 44/2001. Thus, reflection on jurisdiction, recognition and enforcement of judgements governed by the "Brussels" and "Lugano" Conventions are not only historical in character. The basis of legal argument about the procedural international labour law of the EU will be established by Regulation No. 44/2001 ("Brussels I").

§ 2. The EU basis for the legal regulation of international procedural labour law

The Treaty of Rome of 1957 contained one provision – Article 215 (now Article 288) relating to matters of private international law. In this provision, TofEU has changed the content of the third paragraph. By way of exception to the rule formulated in Article 288 the second paragraph of the EC Treaty, maintained in force by TofEU, the European Central Bank has committed to remedy, in accordance with the general principles common to Member States, the damage caused by it or by its servants in the performance of their duties. Former Article 215 of the Treaty of Rome (now Article 288 of the EC Treaty and TofEU) is a norm of substantive law which indicates the appropriate provisions applicable to the contractual liability of the Community (first paragraph), non-contractual liability of the Community (second paragraph), the liability of the staff of the Community for damage caused by the performance of official acts (third paragraph) and the liability of Community employees of the Community against the Community (fourth paragraph). In matters of international procedural law, the cited above provision, the former Article 220 (ex Article 293 of the EC Treaty, now Article 65 of TofEU) served as the basis for action by the authorities of the Member States of the EEC, and then the European Communities, to undertake negotiations in order to ensure that nationals of Member States, the predecessor of the modern European Union, enjoy the following legal guarantees:

- legal protection, that is, to exercise the powers and rights such as are ensured by Member States to its own citizens;
- elimination of double taxation within the Community;
- mutual recognition of companies within the meaning of Article 48, second paragraph (ex Article 58), preserving the legal personality to the transfer of registered office from one Member State to another Member State of the Community and the possibility of mergers that are subject to the laws of different Member States. The concept of the company is understood by Article 48 according to civil and commercial law, including cooperatives and other legal persons under public law and private, except those which are not created for commercial purposes; Article 48 was maintained in TofEU;
- the simplification of formalities governing the reciprocal recognition and enforcement of judgements and arbitration awards.

The involvement of the Community and its institutions at the beginning of the creation and functioning of the market in issues related to international procedural law, including the issues related to international procedural labour law, was not large. In the early period the Community institutions were busy solving administrative problems involved in the creation of a common market. As part of one of the four fundamental freedoms guaranteed by the original provisions

of Community law – freedom of movement for workers, the Community institutions were mainly busy regulating the conditions of entering into the labour markets for workers of Member States, nationals of the other associated countries in international organizations prior to the modern European Union.

The wording at the beginning of the rule of law enshrined in the former Article 220 (Article 293) of the EC Treaty makes the negotiations by making Member States in the cases presented in the four paragraphs of this provision outlined above from the position of the authorities of those countries. Member States, "if necessary," take the negotiations between the regulation of equal treatment of citizens and other legal entities operating within the Community. How matters were regulated in matters of private international law (conflict of laws rules, the substantive legal standards and norms of procedural law), one could conclude that the EC did not anticipate that the issues of private international law will fall within the scope of interest of the Community institutions. Certainly it can be stated that the Community institutions did not reserve an initiative for themselves in matters of regulating civil law issues in the market by private entities within the Community. In the literature on private international law it has even been expressed that former Article 220 (Article 293) of the EC Treaty did not play a role in matters relating to the creation of a uniform system of private international law in the current European Union.[197] I disagree with this viewpoint. The former Article 220 of the EC Treaty was cited as a source of inspiration for legal authorities of the Member States of the EEC, which prepared the Brussles Convention, an international treaty that allows the objective formulated in the final, fourth paragraph of the above-cited provision of the original Community law. Inspired by the former Article 220 of the EC Treaty, Member State authorities had begun the process of negotiating the Brussels Convention. Former provision Article 220 of the Treaty of Rome initiated a process of harmonization of private international law (conflict of law rules, substantive law and procedural law). The legal systems of Member States of the Community are varied, both in matters relating to the various ways of shaping the institutions of law and procedures, as well as the methods (techniques) of regulation. For this reason, there are no serious prospects for the enactment of a European civil, commercial, labour code as well as a Code of Civil Procedure regulating in an identical way the litigation norms, in matters regulated by civil, commercial and labour law. Not only in *Common Law* (Great Britain, Ireland) systems as well as in Scandinavian countries, but also in other countries of continental Europe, labour codes do not constitute a complete set of rights and obligations for parties to employment relationships. Germany does not have a labour code. Poland does not have a codified collective labour law. The French Labour Code (*Code du Travail*) is a set of rules enacted by the state from 1910 (*loi du 28 décembre 1910*) until now. As part of a systematic

[197] M. Bogdan, *Consice Introduction to EU Private...*, p. 7.

trend of modernising labour law (*Modernisation à droit constant*) French authorities are currently enforcing sets of individual and collective labour law rules as the "Labour Code." Codification of the various branches of law should not be the responsibility of the Community institutions. The Community shall act within the limits of the power conferred by the provisions of the EC Treaty and the objectives set out in the original Community law. The creation of legal norms in the field of civil, commercial, labour and other laws has not been recorded into the EC Treaties as matters to be concerned with by the jurisdiction of the Community institutions. Therefore, in areas which are not within its exclusive competence, the Community is empowered to act on the principle of subsidiarity, and only to the extent and only when certain activities may not be sufficiently achieved by Member States. There is no reason to believe that the Community is better than the Member States in regulating the rights and obligations in a single piece of legislation, comprising a set of standards specified as a branch of substantive law (labour, trade, civil), or process, because, due to traditions and needs of individual countries, Member States have not issued full sets of standards for specific branches of law (employment law is the best example of this). Therefore, substantive standards in the field of private international law, especially international procedural law today is only possible with the aim to harmonise the different national procedural law systems of the Member States of the Community. The conventions presented in the VI part entitled "International Procedural Labour Law" of the book are: the Brussels Convention, the Lugano Convention, and Regulation No. 44/2001 governing the jurisdiction, recognition and enforcement of judgements in civil and commercial matters and other international legal instruments in the field of procedural law (regulations and directives). These Conventions have an important role in the process of harmonisation of national law. They ensure equal treatment of citizens and other legal entities regulated by private law through the national courts and arbitration bodies entrusted with the administration of justice in matters of civil, commercial and labour law in the Member States of the European Union.

The field of private international law as the beginning of the process of shaping the legal sources and the harmonization of private law is indicated by the Maastricht Treaty, which introduced into Title VI, provisions Articles K.1–K.3 (Article 29–Article 31 EC Treaty), creating the basis for judicial cooperation. M. Bogdan included these provisions of the original Community law into the "third pillar" of the Community.[198] Following the reforms of the title in the Amsterdam Treaty, the literature on private international law expressed the conviction that the cooperation of judicial authorities of the Member States of the Community in civil matters has been raised to the rank of the "first pillar" of the

[198] Ibid., p. 8.

Community.[199] The problem is that Title VI of the Treaty contains the provisions on police and judicial cooperation in criminal matters. Therefore there was no legal basis to recognise this title as the primary source of judicial cooperation of Member States in civil matters. However, Article 29 of the EC Treaty expressed the belief that the European Union is "an area of freedom, security and justice" and the obligation to the authorities of EU Member States is to develop joint actions of Member States. Although the cited provision defines the scope of these activities, the commentary to Article 29 (former Article K.1) of the Treaty states that "the actual scope of the regulation exceeds the scope specified within the title."[200] Despite these optimistic views about the importance of Title VI of the Treaty of Amsterdam on judicial cooperation in civil matters presented in Polish and foreign literature of European law, I am of the opinion that there was no basis for creating rules that respect the role of the primary sources of judicial cooperation Member States in civil cases and other related matters such as labour law. In my opinion, as the legal basis of cooperation of judicial authorities of the Member States of the Community should be indicated by Article 61, point "c" of the Amsterdam Treaty (former Article 73, point "i"). This provision enabled the Council to adopt measures in the field of judicial cooperation in civil matters in accordance with the provisions of Article 65. However, Article 65 of the EC Treaty (former Article 73, point "m") stipulated the following measures:

- improving and simplifying cross-border service of judicial and extra-judicial documents, cooperation in taking evidence, recognition and enforcement of judgements and decisions of judicial and extra-judicial documents in civil and commercial matters;
- promoting the harmonization of the conflict and jurisdiction rules in Member States;
- removing obstacles to smoothly conduct civil proceedings, if necessary by promoting the harmonisation of rules of civil procedure applicable in the Member States. The situation changed after the Treaty of Lisbon entered into force. Chapters 3–5 TofEU contain the legal standards defining the rules for cooperation between Member States in civil, criminal and police matters. The civil remedies for this cooperation shall be adopted and implemented in accordance with the ordinary legislative procedure.

Material scope of application of the measures in the field of judicial cooperation in civil matters listed in Article 65 of the EC Treaty was limited to their usefulness to ensure the smooth functioning of the common market within the European Union. The boundaries of judicial cooperation of Member States

[199] C. Kohler, *Interrogations sur les sources de droit international privé européen après le traité d'Amsterdam*, "Revue Critique de droit international privé" 1999, p. 1 et seq.

[200] S. Hambura, M. Muszyński, *Traktat o Unii Europejskiej z komentarzem* (S. Hambura, M. Muszyński, *Treaty on European Union with Commentary*, Bielsko-Biała 2001, p. 139).

of the Community designated the need for a common market. This type of determination provided an excellent basis for the actions of the administrative affairs of the Community institutions in the process of drafting the action plans aimed at implementing the drafted directives contained in the original Community law. Article 65 of the EC Treaty formulated several plans for cooperation between judicial authorities of the Member States in civil matters and their derivatives. On March 19, 1998 a plan was adopted aiming to implement the Amsterdam Treaty guaranteeing the gradual construction of an area of freedom, security and justice.[201] Based on the conclusions of the Tampere European Summit, which took place on October 15–16, 1999, the Council developed in 2004 a programme to strengthen the European area of freedom, security and justice[202] in which, *inter alia*, adoption of a Regulation of the European Parliament and Council No. 861/2007 of July 11, 2007 establishing European Small Claims proceedings[203] and discussed in Part IV of this volume (the "Rome II" Regulation). Taking steps to ensure effective collaboration between the judicial authorities of the Member States in civil and commercial matters and to allow individuals access to justice in these cases in other Member States, Community institutions have set up a European Judicial Network, whose mission is to exchange information on civil cases conducted by the courts arbitration bodies and the Member States and fostering the cooperation of the judiciary in adjudicating these matters in various countries. Article 65 of the Amsterdam Treaty (former Article 73, point "m") was regarded as the standard to promote action to enable judicial cooperation in civil matters. However, in the literature on international procedural law that provision was treated as a legal basis for efforts to standardise the rules of procedure in civil cases.[204] The first act of international procedural law in matters of jurisdiction and enforcement of judgements in civil and commercial matters was the Brussels Convention of 1968. By adopting this Convention the Community limited the powers of the States to enter into other similar conventions in both legal relations with Member States and third countries. Article 55 in Title VII of the Brussels Convention refers to the relationship between the Convention and thirty other conventions concluded by the Member States. Article 55 of the Brussels Convention establishes the principle that the provisions of this Convention shall supersede all provisions listed in the standard thirty other conventions. This legal regulation was confirmed in the European Court of Justice on March 31, 1971 matter of *Commission v. Council* concerning the European Agreement on the drivers of the European international transport (*ERTA*).[205] It expressed the view the law was upheld by the assembly of judges of the European Court of Justice's legal opin-

[201] OJ C 19, 1999, p. 19.
[202] OJ C 53, 2005, p.1.
[203] OJ L 199, 2007, p. 1 et seq.
[204] M. Bogdan, *Concise Introduction to EU Private...*, p. 12.
[205] Case 22/70, 1971 ECR 263.

ion, adopted on February 07, 2006 concerning the powers of the Community in concluding the new Lugano Convention.[206] The European Court of Justice ruled that in all cases where the Community shall adopt legislation to implement the principles of public and social policy in the provisions of the original Community law, Member States of the Community have no right to enter into international agreements with third countries, if such an agreement would have impact on the rules established by the Community. This right, however, could allow the Community as an international organization to act on behalf of the Member States. By way of exception to the above rule, the Council adopted a declaration authorising individual Member States to sign these conventions, whose accession is to the interest of the Community.[207] Not all Member States of the Community are treated equally in matters relating to the ratification of conventions with third countries. Article 69 (Article 73, point "q") of the EC Treaty limited the application of the provisions of Title IV of the Treaty in relation to Great Britain and Denmark in the wording of the Protocol, which was contained in the Annex to the EC Treaty relating to these Member States. The situation changed after the entry into force of the Treaty of Lisbon. The new provision, Article 49c as set out in paragraph 60 of TofEU lists all EU Member States that are to apply it (paragraph 1). In paragraph 2 of TofEU it was agreed that the territorial scope of treaties adopted in Lisbon on December 13, 2007 (Treaty amending the Treaty on European Union and the Treaty establishing the European Community) is further defined in Article 311a of TofEU.

In addition to the above provisions of the original law, the legal basis for the actions of the Community institutions on matters relating to the harmonisation of procedural law in Member States are Article 94 (former Article 100) and Article 95 (former Article 100a) of the EC Treaty. In the Treaty of Lisbon, these provisions have been maintained. Paragraphs 1980–1981 of TofEU only reversed the order of those provisions. Article 94 has been marked as Article 95, and Article 95 renumbered as Article 94. Article 94 (ex Article 100) of the EC Treaty empowers the Council to issue directives concerning the harmonisation of legislation or administrative measures which directly affect the establishment or functioning of the common market. These provisions may be issued unanimously on a proposal from the Commission and after consulting the European Parliament and the Economic and Social Committee. Presented in Part VI of the book is the Council Regulation (EC) No. 44/2001 of December 22, 2000 on the jurisdiction and recognition and enforcement of judgements in civil and commercial matters aiming to harmonise the laws affecting the single market. Although it has not been issued under Article 94 (former Article 100) of the EC Treaty, but based on Article 65 point "c" (former Article 73, point "m") of the EC Treaty requiring

[206] Opinion 1/03 of the ECJ, in 2006 ECR I-1145, sec. 3.1.
[207] OJ L 48, 2003, p.1.

the removal of barriers for the smooth conduct of civil proceedings by supporting the harmonisation of rules of civil procedure applicable in the Member States. Currently, this obligation is formulated in Article 65, point "f" of TofEU.

§ 3. The obligation of equal treatment of Community citizens in civil proceedings conducted by the courts of the Member States

The principle of a fair trial ("the due process of law") in civil matters, including matters of employment law in the European Union Member States, requires equal treatment of parties in the proceedings by the judicial authority exercising jurisdiction in these matters in the Member States of the Union. The obligation of equal treatment of nationals of other Member States has a double significance. It requires the courts and other authorities exercising justice in matters of employment law to apply the same measure to its own and foreign citizens. It undertakes to establish and maintain uniform standards of conduct in employment and social security claims by all Member States of the European Union. In the latter, the third paragraph of the introductory first chapter to the issue of international procedural law will work out the legal obligation of equal treatment of citizens in civil proceedings carried out by the courts and other competent institutions for settling disputes within a legal relationships regulated by labour law. The legal basis for this requirement was the provision of Article 12 (ex Article 6) of the EC Treaty, the standard prohibiting discrimination based on nationality. In the Treaty of Lisbon this assurance was formulated in Article 8 TofEU. This provision obliges the EU to respect "all actions" on the principle of equality of citizens. Article 8 TofEU requires the institutions, bodies and agencies of the European Union to treat the citizens of the Union "with equal attention." Cases regulated by labour law, in Title III of the EC Treaty, guaranteeing the legitimate use of fundamental freedoms: free movement of persons, services and capital, in Chapter I, entitled "Employees," the provision Article 39, paragraphs 1 to 2 (formerly Article 48) stated that to guarantee the free movement of workers entails the abolition of all discrimination based on nationality against workers of Member States in relation to recruitment, remuneration and other terms of employment. The interpretation of the provisions in the categories of primary norms of EU law – Article 8 TofEU in conjunction with 39 as amended in paragraph 50 of TofEU, leads to the conclusion that, except as otherwise expressly stipulated in the provisions of primary Community law, it is strictly prohibited to differentiate the legal situation of European Union citizens on the basis of their belonging to different Member States of the Union. In particular, discrimination is prohibited based on nationality of EU citizens in labour relations. The above-cited provisions of the

Treaty lay down the principle of equality between nationals of Member States. At the time when these provisions were enacted, the concept of a single European Union citizenship was discussed. The concept of "citizenship of the Community" was introduced later, when the concept of citizenship was not only conceded as a sort of "pass," allowing entry of economically active persons onto the common market, but as a power to exercise political, social and economic rights regulated by European law. Analysing the citizenship status of the Community, views have evolved from emphasising the lack of a uniform concept of citizenship of the European Union[208] by the idea, according to which citizenship is a confirmation of entry into the labour market of each Member State ("market citizenship")[209] to the concept according to which citizenship guarantees the freedom of movement, active and passive voting rights to representative bodies, the right to petition the European Parliament and the right to apply to the Ombudsman of the Union and ensure diplomatic and consular protection of the Union while staying in the territory of a third state. European Union citizenship is associated with the legal status of single individuals – citizens of the Member States and civil rights arising from it ("union citizenship").[210] In the process of evolution of the concept of European Union citizenship, the least advanced legislation is that which assures equal compliance of social and economic rights or powers regulated by labour law and social security law. Citizenship of the European Union from the perspective of labour law and social security law is seen as a general legitimacy to the use of minimum social rights, the identical regulation by Member States of benefits entitlements, and a comparable level of social protection. The assurance of a *European Social Space,* comparable to the protection of social rights, is treated in the literature on European labour law and social security as an absolute priority. Awaiting the "new" Member State citizens of the European Union, citizenship is seen as the legal title to a dignified life, and not solely as a ticket to the local markets in the economically developed Member States of the "old" Union. The effect of this perception of citizenship of the Union of European law is not trampled as *lex mercatoria* but as *lex sociales*.[211] The European social space is considered to be

[208] N. Beenen, *Citizenship, Nationality and Access to Public Service Employment. The Impact of European Community Law*, Groningen 2001, p. 430 et seq.

[209] E. Maris, *From Market Citizen to Union Citizen* [in:] M. Marias (ed.), *European Citizenship*, Maastricht 1994, p. 3 et seq.; M. Everson, *The Legacy of Market Citzen* [in:] J. Shaw and G. More (eds.), *New Legal Dynamics of the European Union*, Oxford 1995.

[210] S. O'Leary, *The Evolving Concept of Citizenship Community: From the Free Movement of Persons to Union Citizenship*, The Hague, London, Boston, 1996, p. 34 et seq.; J. Shaw, *The Transformation of Citizenship in the European Union. Electoral Rights and the Restructuring of Political Space*, Cambridge, 2007, p. 47.

[211] A. M. Świątkowski, *European Union Citizenship and the Rights of Access for Welfare State. A Comparison with Welfare Rights Guaranteed by the Council of Europe as Seen from the Perspective of a New Member State* [in:] U. Neergaard R. Nielsen, L.M. Roseberry (eds.), *Integrating Welfare Functions into EU Law–From Rome to Lisbon*, Copenhagen 2000, p. 123 et seq.

an area where European Union citizens are guaranteed and can benefit from equal rights to live in prosperity. The European Court of Justice treated Articles 12 and 39 of the EC Treaty (now Article 8 and Article 39 of TofEU) as the basis for issuing a ban on the discrimination of nationals of Member States by national laws governing the conduct of civil and labour relations. The ban on discrimination on the basis of nationality laid down in the original Community law was the legal basis for recognition as valid rules of procedural law of the Member States of the European Union, which impose on nationals of Member States with a civil proceeding in the courts of another Member State the obligation to pay a security deposit for court costs (*cautio judicatum solvi*),[212] the seizure of property as a security,[213] and the execution of a judicial decision.[214] In matters of employment law the European Court of Justice in its judgement on April 30, 1996, ruled in *Ingrid Boukhalfa v. Bundesrepublik Deutschland*[215] cited the provision of Article 48, paragraph 2 (ex Article 39, paragraph 2) of the EC Treaty, which has retained the numbering of TofEU and of Article 7, paragraph 1 and paragraph 4 of the Council Regulation No. 1612/68 of October 15, 1968 on the free movement of workers within the Community[216] and held that the obligation of equal treatment of nationals of Member States and the prohibition of discrimination in labour relations is applicable to the national of a Member State of the Union, residing permanently in a third country, employed under contract by the diplomatic representative of another European Union country on the basis of an employment contract which should be controlled by the labour law in force in the country of the employer.[217] The European Court of Justice held that the provisions of the Community, prohibiting discrimination against citizens based on nationality are also applicable in the territory of third countries provided that the employment relationship has sufficiently strong ties with the law of the country – a member of the Community.[218] The conflict rules of private international law and private in-

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[212] Hubbard v. Hamburger, C-20/92, 1993 ECR I-3777; Date Delecta AB v. MSL Dynamics Ltd., C-43/95, 1996 ECR I-4661. See: M. Bogdan, U. Maunsbach, *EU Private International Law: An EC Court Casebook*, Groningen 2006, p. 144 et seq.; Hayes. Kronenberger, C-323/95, 1997 ECR I-1711.

[213] Mund & Fester v. Hatrex, C-398/1992, 1994 ECR I-467. See: M. Bogdan, U. Maunsbach, *EU Private...*, p. 116 et seq.

[214] See: M. Bogdan, *Concise Introduction to EU Private...*, pp. 21–22.

[215] C-214/94, 1996 ECR I-2253. See: M. Bogdan, U. Maunsbach, *EU Private...*, pp. 143–144.

[216] OJ L 257, October 19, 1968, p. 2.

[217] The employer, the German federal diplomatic representation in Algeria, applied to its workers – being German nationals – the German labour law. By contrast, the employer employed the remaining workers, nationals of other countries, on the basis of *lex loci laboris,* labour laws in force in Algeria. The plaintiff being a Belgian citizen, permanently residing in Algeria, demanded to have his contract of employment come under the provisions of the German labour law.

[218] The European Court of Justice cited the decision handed down on July 12, 1983, in the case of Podest v. Caisse d'Assurance Maladie primair de Paris, C-237/83, 1984 ECR 3153, § 6;

ternational labour law shall continue to have little use in labour relations with a foreign element. Thus, neither the nationality of the parties to the employment relationship, nor *lex patriae* played a more serious role in the doctrine and judicature of private international law. The European Court of Justice advised the matters in which the nationality of the parties was regarded as a point of indicating the proper national system of private law (the case in the field of family law) in a way that emphasised that the prohibition of discrimination applies only to matters governed by the provisions of European law.[219] It cannot therefore be applied to cases which are not regulated in this area of law.[220] This argument does not apply in civil cases, because – according to the provisions of Article 61 (former Article 73, point "i") and Article 65 (former Article 73, point "m") of the Treaty, all the cases classified as "civil" are now covered by the application of European law of equal treatment of parties in the various proceedings included in the category of "civil proceedings" and the non-discrimination of those proceedings on grounds of nationality. The situation has not changed after the Treaty of Lisbon entered into force. Article 61 of TofEU calls the European Union an "area of freedom, security and justice with respect for fundamental rights." The previously cited Article 65 of TofEU requires the Union to develop judicial cooperation in civil matters having cross-border implications. From this finding, some lawyers involved in the private international procedural law make a proposal to ban discrimination in civil proceedings on the grounds of nationality. The legal basis of this prohibition is indicated by Article 12 (former Article 6) of the EC Treaty.[221] The lawyers note, however, that this rule is not mandatory in nature, because in matters governed by the provisions of family law, family relationships, the nationality of the parties is considered by the rules of private international law as the main determinant.[222] In the remaining cases belonging to the "civil" category, any restriction on freedom of movement within the European Union, including discrimination on the grounds of nationality, shall be treated as a breach of European law.[223] A principle applies to legal relations regulated by procedural law that the parties meeting the requirements laid down by the rules of procedural law in country X should be treated on an equal basis in the processes carried out in the courts of other European countries. This principle was based on two fundamental legal concepts, the "country of origin principle" and "the principle of mutual recognition." The party regarded by the law of country X has a procedural right to

September 27, 1989 Lopes da Veiga v. Staatssecretaris van Justitie, C-9/88 1989 ECR 2989, § 15; Aldewereld v. Staatssecretaris van Financiën, C-60/93, 1994 ECR I-2991, § 14.

[219] Collins v. Intrat, C-92/92, C-326/92, 1991 ECR I-5145.

[220] Jutta Johannes v. Hartmut Johannes, C-430/97, 1999 ECR I-3475.

[221] M. Bogdan, *Concise Introduction to EU Private...*, p. 23.

[222] Ibid., pp. 24–25.

[223] Procurer du Roi v. Dassonville, C-8/74, 1974 ECR 878, Rewe-Zentral v. Bundesmonopolverwaltung, C-120/78, 1979 ECR 649 – "Cassis de Dijon."

expect similar treatment in the process in any other Member State since joining the Community and the authorities of the Member States have accepted the idea of progressively building the area of freedom, security and justice mentioned in Article 61 of the EC Treaty.

European legislation introduced exceptions to the above principles. The legal basis for these exceptions are the original provisions of Community law to allow exemptions from the restrictions of free movement of goods (Articles 28–29, the former Articles 30 and 34 of the EC Treaty). The Lisbon Treaty has not changed the provisions of Chapter 2, which ban the use of quantitative restrictions between Member States of the European Union (Articles 28–31). Articles 30 (former Article 36) of the EC Treaty provides that the above-cited "provisions of Article 28 and 29 do not violate bans on export restrictions, import and transit which are justified on grounds of public morals, order and security, health and life of humans, animals and plants, national cultural heritage of artistic, historic or archaeological value or functional and commercial property. It should be considered whether Article 30 and Article 293 of the EC Treaty enter into a relationship that allows for the introduction of general clauses set out in Article 30 for the equal treatment of nationals of other Member States of the European Union in civil proceedings conducted by the judicial authorities of other countries and in their activities in order to simplify the formalities governing the reciprocal recognition and enforcement of judgements and arbitral awards. In the Lisbon Treaty Article 30 has remained unchanged. Following the repeal of Article 293 of the EC Treaty, the function of this provision has been undertaken by Article 65 of TofEU. Therefore, the original Community law is valid in the context of consideration of the relationships which exist between the provisions of Article 30 and Article 65 of TofEU. Some lawyers specialising in private international law take for granted the existence of these dependencies.[224] They refer to the judgements of the European Court. They do not take into account that this decision has been issued in the matter relating to the Community policy on the free movement of goods (Part Three, Title I of the EC Treaty) and not on matters governed by the general and final provisions of the EC Treaty (Part Six). Article 293 of the EC Treaty concerns the legal and administrative obligations of the authorities of the Member States of the European Union, which were supposed to allow the citizens to exercise their rights not only in matters relating to the exchange of material goods, but in all cases, including those that are the subject of civil proceedings conducted by the judicial authorities of the Member States. In the Lisbon Treaty, Article 65 contained in Chapter 3, the section entitled the "Area of Freedom, Security and Justice" of TofEU. For this reason, there are legal grounds for taking advantage of some of the clauses listed in Article 30 of the EC Treaty, such as for example: morality, order and security, health and human life in pro-

[224] M. Bogdan, *Concise Introduction to EU Private...*, p. 27.

ceedings conducted by the judicial authorities of the Member States. In matters governed by labour law general clauses can be applied to protect workers as the "weaker" party to the individual employment relationship. In view of this protection, the rules of civil procedure chosen by the parties to employment relationships involving a foreign element or indicated by the determinant specified in the procedural rules of international labour law, applicable to separate proceedings, which may be replaced by mandatory rules normally applied by the courts *meriti* in a *forum* country. Referring to the arguments presented in Part I, Chapter 2, of the Polish version of the present book on the *mandatory* obligations by the provisions of substantive and procedural law must be borne on the admissibility of dealing with them solely for the use within the limits of a real need, only in order to protect the higher value of goods listed in the provision of Article 30 of the EC Treaty with a view to protect against unequal treatment of parties in a procedural relationship because of their nationality.[225] The *country of origin principle* does not need to be treated by the procedural labour law as an obligation to be used by the labour courts of the Member State rules of civil procedure, applicable in matters of employment law in that Member State in which the proper jurisdiction of the district court hearing the case is located. The provisions chosen by the parties, and as indicated by the determinants regulated by the procedural international labour law may not give rise to unequal treatment of the parties because of their citizenship or nationality. The obligation of equal treatment of parties in civil proceedings is dictated by the guiding principle of the free movement of EU citizens within the Community. I share the sentiment expressed in the literature on private international law that provides for the compulsory application of the "territoriality principle" in a civil action by the national courts exercising jurisdiction in these cases would lead to a breach of the obligation of equal treatment of the parties – citizens of other Member States if the procedural rules in force in the country or countries whose citizens are parties to the proceedings were to impose more stringent procedural rules. I agree with the opinion expressed by M. Bogdan that the "territoriality principle" serves as a corrective course of proceedings conducted in accordance with procedural rules chosen by the parties or designated by using a determinant as defined by the procedural rules of international labour law.[226] The author illustrates the application of this principle on the example of civil proceedings in economic matters. The principle of conducting a business as established in Chapter 2 of Title III of the EC Treaty (former Article 43–Article 48) prevents the competent authorities of Member States to reject an application for registration of a company branch incorporated in another

[225] Gebhardt v. Consiglio Avocati degli, C-55/94, 1995 ECR I-4165.
[226] M. Bogdan, *Concise Introduction to EU Private...*, p. 27.

Member State in accordance with the provisions of its private economic law.[227] As I indicated this earlier, the section on the right of establishment (Articles 43 to 49) of the Lisbon Treaty does not introduce substantial changes (points 52–54 of TofEU). The previous submissions are still valid. Noting the obligation of equal treatment for companies doing business in the European Union by the judicial authorities of the Member States, the European Court of Justice in the second part of the ruling relied on the decision stated that the interpretation of original Community law within the first part of the analysed ruling does not prevent the competent authorities of the Member States to prevent abuse, which could cause a lack of oversight by the bodies in the appropriate state in the registration process of business being active in another Member State. However, in other rulings the European Court of Justice has defined the limits of such control. The competent authorities of another Member State do not have the right to challenge decisions of the competent Member State concerning the legal capacity of a registered trader.[228] There are also laws which make involvement in the legal system in another Member State subject to additional requirements.[229] The principle of equal treatment of the parties, nationals of Member States with cases heard in courts and arbitration bodies of other EU Member States, is to grant and exercise by foreign citizens the same procedural rights as are enjoyed by nationals of that State in which the judicial body is hearing the case. This principle is based on the same or comparable position for all citizens of EU Member States in proceedings conducted by national courts in civil matters. Codification of such rules of procedure in civil cases in disputes is defined in private international law literature as the "Europeanisation of international procedural law."[230]

[227] European Court of Justice on March 09, 1999, in Centros Ltd. v. Ehverss-og Selskabsstyrelsen, C-212/97, 1999 ECR I-1459. See: M. Bogdan, U. Maunsbach, *EU Private...*, p. 172 et seq.

[228] European Court of Justice on November 05, 2002 ruled in the case of Überseering BV v. Nordic Construction Company Baumanagement GmgH (NCC), C-208/00, 2002 ECR I-9919. See: M. Bogdan, U. Maunsbach, *EU Private...* p. 232 et seq.

[229] Kamer van Koophandel v. Inspire Art, C-167/01, 2003 ECR I-10155.

[230] A.V.M. Struycken, *Les consequences de l'integration européenne sur le développement du droit international privé*, "Recueil des cours de l'Académie de Droit International de la Haye" 1992, Vol. 232, p. 257 et seq.; P. Lagarde, B. von Hoffman (eds.), *L'européisation privé du droit international – Die Europäisierung des internationalen Privattrechts – The Europeanisation of the International Private Law*, Köln 1996; A. Briggs, P. Rees, *Civil Jurisdiction and Judgments*, London 1997; K. Boel-Woelki, R.H. van Ooik, *The Communitarization of Private International Law*, "Yearbook of Private International Law" 2002, p. 1 et seq.

Chapter 2

Jurisdiction, recognition and enforcement of judgements in matters of employment law

§ 1. Introduction

The Brussels Convention was adopted on September 27, 1968.[231] It entered into force in 1973 after ratification by six countries of the EEC. Since the beginning of its drafting the Convention was intended as a legal instrument that fulfils two basic functions in international processes of civil cases. It governs both the national courts' jurisdiction in proceedings involving an international element, and lays down the conditions for recognition and enforcement of judicial authorities of other Member States. Recognising the relation between these categories of cases to a large extent contributed to equal treatment of parties. It also promoted the unification of the rules of civil procedure due to the necessity of recognition of judgements handed down in cases handled by the same or different procedural rules. This caused the rules of conduct to resemble each other. The success of the Convention consisted of rapprochement and unification of rules of civil procedure in force in six Member States of the EEC. These concepts have gained acceptance not only in the Member States of the European Economic Community, but also in the countries of the European Free Trade Association – EFTA, which are not members of the EEC. Article 63 of the Brussels Convention obliges Member States to the EEC, the European Communities, the European Community to accept its provisions. Its scope is limited to the Member States that are members of one of these international organizations in Europe, the predecessor of the Eu-

[231] G.A.L. Droz, *Pratique de la Convention du Bruxelles du 27 septembre 1968*, Paris 1973; G.A.L. Droz, *Entrée en vigueur de la Convention de Bruxelles révisée sur la compétence judiciaire et l'exécution des jugements*, Revue Critique de droit international privé, 1987, p. 251 et seq.; M. Wesser, *Convention communautaire sur la compétence judiciaire et l'exécution des Decisions*, Bruxelles 1975; F.K. Juenger, *La Convention de Bruxelles du 27 septembre 1968 et la courtoisie internationale. Réflexion d'un American*, Revue Critique de droit international privé, 1983, p. 37 et seq.; P. Gothot, D. Holleaux, La Convention de Bruxelles du 27 septembre 1968, Paris 1985; K. Hertz, *Jurisdiction in Contract and Tort under the Brussels Convention*, Copenhagen 1998; M.R. Moura Ramos, *Public Policy in the Framework of the Brussels Convention. Remarks on Two Recent Decisions of the European Court of Justice*, Yearbook of "Private International Law" 2000, Vol. 2, p. 25 et seq.; J. Harris, *Stays of Proceedings and the Brussels Convention*, "International and Comparative Law Quarterly" 2005, Vol. 54, p. 933 et seq.; L. Merrett, *The Enforcement of Jurisdiction Agreements Within The Brussels Regime*, "International and Comparative Law Quarterly" 2006, Vol. 55, p. 315 et seq.

ropean Union. Due to this obstacle, the Member States of the European Communities and the European Free Trade Association in order to strengthen legal protection of persons residing in these countries have concluded on September 16, 1988 the Lugano Convention on Jurisdiction and the Enforcement of Judgements in Civil and Commercial Matters.[232] This convention repeats the provisions of the Brussels Convention. The comparison of the texts of both Conventions justifies the idea of bringing closer the content and the layout of the two Conventions. Because of certain minor differences in the content of legal regulation of Article 5, paragraph 1, Article 16, paragraph 1, Article17, Article 55 and Article 57 as well as the introduction of the new Article 54, point "b" in the Lugano Convention, one cannot put the hypothesis that these conventions are identical to documents of private international law.

In contrast to the Brussels Convention, which is complimented by the Joint Declaration by the authorities of Belgium, France, Holland, Luxembourg, Germany and Italy, the Lugano Convention is not subject to a binding interpretation of the European Court of Justice, which under the Protocol of March 06, 1971 is competent to interpret the Brussels Convention. However, Protocol No. 2 to the Lugano Convention, entitled "On the uniform interpretation of the Convention," in which the preamble highlighted the relevant relationship between the Convention and the Brussels Convention, was adopted in order to prevent diverging interpretations of similar or identical provisions of both Conventions and the achievement of a uniform interpretation of these provisions requiring the courts of each contracting State to include the interpretation of provisions of the Lugano Convention by the courts of other Contracting States (Article 1) and the European Court of Justice. The Brussels Convention was applicable to the relations between the Member States of the European Community. In the relations between Member States of the Community with three countries (Iceland, Norway and Switzerland), which did not form part of the European Union, but are associated with the European Economic Area, the matters of jurisdiction and enforcement of judgements are governed by the provisions of the Lugano Convention. On March 1, 2002, the Brussels Convention has been replaced by the EC Council Regulation No. 44/2001 of December 22, 2000 on the jurisdiction and recognition of judgements exercised in civil and commercial matters.[233] Based

[232] See: P. Jenard, G. Möller, Official Journal 1990, C 189, p. 57; M. Bogdan, *The "Common Market" for Judgements: The Extension of the EEC Treaty Jurisdiction and Enforcement in Nonmember Countries*, "Saint Louis University Public Law Review", No. 9, 1990, p. 113 et seq.; A. Briggs, P. Rees, *Civil Jurisdiction...*, p. 179 et seq., pp. 332–333, *L'espace judiciaire européen. La Convention de Lugano du 16 septembre 1988*, N. Gillard (ed.), Lausanne 1992; Wahl, *The Lugano Convention and Legal Integration*, Stockholm 1990; P. Byrne, *The European Union and Lugano Conventions on Jurisdiction and the Enforcement of Judgements*, Wicklaw 1994.

[233] See: G.A.L. Droz, H.Gaudemet-Tallon, *La transformation de la Convention de Bruxelles du 27 semptembre 1968 en règlement du Conseil concernant la compétence judiciaire, la reconnaissance et*

on Article 1, paragraph 3 of Regulation No. 44/2001, the Brussels Convention is still applicable in legal relations regulated by civil and commercial law with Denmark and the territories of Member States – Parties to the Convention, of the territorial scope of the Convention, which under Article 299 (former Article 227) of the Treaty shall be excluded from the scope of Regulation No. 44/2001.

§ 2. The scope of the Brussels Convention, Lugano Convention and the EC Council Regulation No. 44/2001 of December 22, 2000 on the jurisdiction and recognition and enforcement exercising in civil matters

CIVIL CASES

The Brussels Convention and the Lugano Convention were enacted with a view of identifying international jurisdiction of the courts in the Member States, to facilitate national courts to recognise foreign judgements, to introduce an expeditious procedure for securing the enforcement of judgements, and the recognition of official documents and court settlements. Conventions apply in civil and commercial matters pending before the competent courts in the Member States. The nature of matters, in particular the classification of cases to the category of "civil and commercial matters" is done by the legislative authorities of the Member States. In all Member States matters related to labour law and social protection are included within the category of civil cases. The Conventions also stipulate that whether the courts hearing disputes in "civil and commercial matters" apply the Conventions is decided by Member States' authorities solely entitled to determine the substantive jurisdiction courts in these matters. The Conventions use legal concepts developed by the rules of civil procedure in the Member States. These concepts as well as legal concepts have different meanings in the procedural legislation of the Member States. For this reason, Article 1 of both of these Conventions, finds that they apply in "civil and commercial matters whatever the nature of the court." This claim plays an important role in matters of employment law that are recognised in the first instance in some Member States, by the specialised labour courts or quasi-jurisdiction bodies (industrial tribunals, arbitration committees).

The European Court of Justice, interpreting the provisions of the Brussels Convention, represents the position that in the process of interpretation of legal terms used in this Convention all possible and available means of understanding

l'exécution des Decisions en matière civile et commerciale, "Revue Critique de droit international privé" 2001, Vol. 90, No. 4, p. 601 et seq.

such terms should be used.[234] The European Court of Justice ruled that the term *the place of performance* of the obligation in question, used in Article 5, paragraph 1 should be understood in such a manner in which the law defines it applied for the contractual relationships involving a foreign element.

The legal terms used in the Brussels Convention not having a direct relationship with the substantive or procedural law of a Member State acquire the status of autonomous concepts.

They should be interpreted using the methods of functional interpretation in order to allow the parties to contractual relations, and judicial authorities, the resolution of disputes about claims in these relations the most effective accomplishment of their legitimate claims.[235] Autonomous interpretation of legal terms used in the Convention should take into account the objectives and basic principles of procedural law (domestic and international).[236] The preamble to the EC Council Regulation No. 44/2001 stressed that the European Union set itself the objective of maintaining and developing an area of freedom, security and justice. The responsibility of the Community institutions is the systematic building of this area.

In matters governed by rules of civil procedure, the gradual construction of this area lies in the unification of rules concerning the jurisdiction in civil and commercial matters and the simplification of procedural formalities due to the rapid and simple recognition and enforcement of judicial authorities of the Member States in these matters. The differences between the procedural provisions of Member States on jurisdiction and recognition of judgements constitute a serious impediment to the proper functioning of the common market. According to the EC Council, it is necessary to ensure the free movement of judgements in civil and commercial matters within the European Union. This objective can be achieved by regulation – through statutes of the Community, which are binding and directly applicable. Regulation No. 44/2001 refers to the corrected text of the Brussels Convention and the Lugano Convention, because the the Council agreed on the contents of these conventions, and introduced them to the Regulation.

Paragraph 7 of the preamble to the Regulation stresses that the scope of that Regulation covers the main areas of civil and commercial law. In Article 1, paragraph 1 of the Regulation the scope covers all categories of civil and commercial matters dealt with by the courts "of any kind," except as specified, for example, in revenue, customs or administrative matters. Article 1, paragraph 2 contains a complete list of matters to which the regulation does not apply. Matters relating

[234] The case handed down on October 06, 1976 in Industrie Tessili Italiana Como v. Dunlop AG, C-12/76, 1976 ECR 1473. See: M. Bogdan, U. Maunsbach, *EU Private...*, pp. 1–2.

[235] ECJ ruling on Suhadiwarno Panjan, C-440/97, 1999 ECR I-6307.

[236] M. Audit, *L'Interpretation Autonome du droit international privé communautaire*, "Journal de droit international (Clunet)" 2004, No. 3, p. 789 et seq.; M. Bogdan, *Concise Introduction to EU Private...*, p. 37.

to issues regulated by international labour law are procedural matters relating to the legal capacity to act (Article 1, paragraph 2, point "a") and social security (Article 1, paragraph 2, point "c"). From the scope of Regulatory provisions of Regulation No. 44/2001 were also excluded cases for arbitration (Article 1, paragraph 2, point "d"). Article 1 of the Regulation contains a definition of autonomous civil cases, encompassing the essential part of the law. Definition of the civil concept was adopted in the cited provision of the Regulation and does not match the terms used by the rules of civil procedure in each Member State. In Poland, Article 1 of the Code of Civil Procedure includes cases in civil law proceedings in matters of social security. The discrepancies between the definition of civil cases in Regulation No. 44/2001 and the provisions of the Member States were the basis for the interpretation of these concepts through the European Court of Justice.[237] The Court clearly and unequivocally stated that the interpretation of "civil case" used in Article 1 of the Brussels Convention, which term was entirely taken up by Article 1 of Regulation No. 44/2001, should not be assessed under the provisions of civil procedure in the Member State concerned, but primarily against the objectives and legal structure governed by the Convention. In second place, the Court mentioned the general principles of law of the Member State. Ordering the use of these criteria in the interpretation of legal concepts in the provisions of international procedural law, in particular, the term "civil and commercial matters whatever the nature of the court," the European Court of Justice has sought to clearly define the border between the judgements issued in cases belonging to private law, since neither the Brussels nor the Lugano Convention or the Regulation No. 44/2001 regulates the conflict of law governing procedural issues and not the jurisdiction, recognition and enforcement of judgements between the dispute settlement bodies or public authorities and individuals and entities under private law.[238] However, they do not lose their nature of "civil cases" claiming repayment of benefits, from a public social security institution (social assistance) to persons not entitled to cash benefits, provided that the social security legislation of a Member State governing claims of recourse in the universally applicable regulations that apply to all persons and entities appearing in the legal regulated

[237] Judgements of the ECJ: October 14, 1976 in the case of LTU Luftransportunternehmen GmbH & Co. KG. KG v. Eurocontrol, C-29/76, 1976 ECR 1541. See: M. Bogdan, U. Maunsbach, *EU Private...*, pp. 3–4; July 14, 1977 in the case of Bavaria Fluggesellschaft Schwabe & Co. KG and Germanair Bedarsflufttfahrt GmbH & Co. KG. KG v. Eurocontrol, C-9, 10/77, 1977 ECR 1517. See: M. Bogdan, U. Maunsbach, *EU Private...*, pp. 10–11; February 22, 1979 in the case of Henri Gourdain v. Franz Nadler, C-133/78, 1979 ECR 733. See: M. Bogdan, U. Maunsbach, *EU Private...*, p. 19 et seq.; December 16, 1980 in the case of Netherlands State v. Reinhold Rüffer C-814/79, 1980 ECR 3807. See: M. Bogdan, U. Maunsbach, *EU Private...*, pp. 28–29.

[238] A. Briggs, P. Rees, *Civil Jurisdiction...*, p. 30 et seq.; T.C. Hartley, *Civil Jurisdiction and Judgements*, London 1984, p. 11 et seq.; P. Kaye, *Civil Jurisdiction and Enforcement of Foreign Judgements*, Abingdon 1987, p. 1962 et seq.; D. Lasok, P.A. Stone, *Conflict of Laws in the European Community*, Abingdon 1987, p. 166 et seq.

private law and public law.[239] In support of the case of *Gemeente Steenbergen v. Luc Baten* (points 45–48), the European Court of Justice ruled that the concept of *social security* listed in Article 1, paragraph 2, point "c" of the Brussels Convention only locates matters governed by the provisions of Regulation No. 1408/71, coordinating social security systems. On this basis, the literature on private international law formulated an opinion on the futility of social security exemption subject to regulation as a public law from the scope of Regulation No. 44/2001, for these things, because of their classification as a special kind of administrative matter governed by public law, should not be subject to all matters to which the provisions of private law apply.[240] I do not share the above views. In earlier sections of this volume I have tried to present the specificities of the conflict rules of substantive labour law used for decades by the Community institutions to coordinate separate national social security systems. Excluding the material which is governed by the provisions of social security law does not exclude the use of Regulation No. 44/2001, in cases of supplying pensions, social security and social assistance. Issues related to the determination of jurisdiction, recognition and enforcement of judgements of the courts having jurisdiction in matters concerning the supply of pensions, social assistance and social security law, which are not classified as part of the field of social insurance and are regulated by international procedural labour law.

Regulation No. 44/2001 and the Brussels and Lugano Conventions do not exclude from its regulation the scope of collective labour law, although it does not fall within the category of civil cases, subject to regulatory rules of civil procedure. In these cases, the subject of disputes are not subjective rights which are given to eligible entities (employees and the insured), but the collective interests of employees represented by trade unions (the principle of monopoly trade unions), or other representative organisations of workers. In all Member States collective disputes may be subject to the outcome of social arbitration bodies. Article 1, paragraph 2, point "d" of the Regulation No. 44/2001 exempts from its scope matters falling within the jurisdiction of the arbitration and settlement tribunals.[241] This does not mean that these bodies performing judicial roles due to the will of the parties cannot apply the legal rules on jurisdiction, recognition and enforcement of regulation set out in the Regulation.[242]

[239] See: judgements of the ECJ: November 14, 2002 in the case of Gemeente Steenbergen v. Luc Baten, C-271/00, 2002 ECR I-10489. M. Bogdan, U. Maunsbach, *EU Private...*, p. 238 et seq.; January 15, 2004 in the case of Freistaat Bayern v. John Blijdenstein, C-433/01, 2004 ECR I-981. M. Bogdan, U. Maunsbach, *EU Private...*, p. 258 et seq.

[240] M. Bogdan, *Concise Introduction to EU Private...*, p. 40.

[241] A. Briggs, P. Rees, *Civil Jurisdiction...*, pp. 33–34.; T.C. Hartley, *Civil Jurisdiction...*, p. 22; P. Kaye, *Civil Jurisdiction...*, p. 146 and seq.; D. Lasok, P.A. Stone, *Conflict of Laws...*, p. 185 et seq.

[242] M. Bogdan, *Concise Introduction to EU Private...*, p. 40.

LEGAL RELATIONSHIPS INVOLVING A FOREIGN ELEMENT

Provisions of international procedural labour law apply to relations and some relations of social security (excluding social security relations), in which there are foreign elements. I share the views expressed in the literature on private international law that the provisions of Regulation No. 44/2001 and the Brussels and Lugano Conventions will only apply to disputes of international character.[243] This view is shared by the European Court of Justice, which handed down a judgement on March 01, 2005 by the Grand Chamber in the case of *Andrew Owusu v. N.B. Jackson, Trading as "Villa Holidays Bal-Inn Villas," Mammee Bay Resorts Ltd., Mammee Bay Club Ltd., the Enchanted Garden Resorts & Spa Ltd., Consulting Services Ltd., Town & Country Resorts Ltd.*, which held that the Brussels Convention does not require that a necessary condition for the application process is a collision of a Member State and a third country. Article 2 of the Convention and Regulation No. 44/2001 does not make use of the standards of international procedural law in choosing between the rules of procedural law in force in two different countries where people are resident defendants. The international character of proceedings in any civil case, including the rules of substantive law governed by labour laws, determines the presence of a foreign element in the legal relations which are the subject of the dispute.

These disputes are international in nature according to the understanding of international labour law litigation, if the rules of procedural law of each Member State shall submit the dispute to the outcome of any court. The decisive condition for the application of Regulation No. 44/2001 and the Conventions is to refer the matter to a judicial authority dealing in civil suits. Any court, administrative or even criminal, having the jurisdiction to issue a ruling on the regulated generally applicable rules regarding the relationship between any entities having the capacity to be obliged to apply the principles set out in Regulation No. 44/2001, is established to determine the jurisdiction of judicial authorities in EU Member States. This Regulation governs the jurisdictional competence of courts and tribunals, rather than the administrative bodies. For this reason, it only applies to the bodies referred to as the dimensions of the justice authorities. In some Member States (Sweden) the status of a judicial authority was granted by the Regulation (Article 62) to the enforcement authorities, empowered to issue rulings in the proceedings of payment and assistance.

[243] P. Kaye, *Civil Jurisdiction...*, p. 216 et seq.; Y. Donzallas, *La Convention de Lugano du 16 septembre 1988 concernant la compétence judiciaire et l'exécution de décision en matière civile et commercial*, Vol. 1, Berne 1996, p. 418 et seq.; R. Geimer, R.A. Schütze, *Europaeisches Zivilerfahrensrecht*, München 2004, p. 114 et seq., M. Bogdan, *Concise Introduction to EU Private...*, p. 41.

§ 3. Jurisdiction

FORUM DOMICILII

Persons residing in the territory of a Member State must sue, regardless of their nationality, before the courts of that State (Article 2, paragraph 1). In the cited provision of Regulation No. 44/2001 a basic determinant is included concerning the establishment of an appropriate national jurisdiction within the European Union. The Polish translation of the text of the Regulation committed a fundamental error in the translation of Article 2, paragraph 1. It is written that such a person "may be sued," while in the English text it is clearly stated that "persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State." In the literature on private international law prevails the view that the wording used in the English version of Regulation No. 44/2001 implies the redress against the persons residing in a Member State before the courts of that State.[244] The defendant's domicile, and the nationality of the parties to the dispute do not have legal meaning.[245] The addressees of this obligation are the individuals and other persons who have claims arising from legal relationships – relationships involving a foreign element. Those courts are obliged to rule on all contested civil and commercial matters, including matters of employment law arising from claims arising from legal relations regulated by civil, commercial and labour law, in which there are foreign elements. The European Court of Justice has explicitly ruled out the use of the theory *forum non conveniens* in the cases where obligation of the courts of the Member State in which the defendant resides are explicitly defined.[246] This sentiment was supported by the doctrine of private international law.[247] Persons residing in the territory of a Member State should be sued only in the courts of the Member State in which they reside. They can be sued in the courts of another Member State solely on the principles enshrined in the provisions of Sections 2–7 of Chapter II "Special jurisdiction" of the Regulation No. 44/2002 (Article 5, Article 7). Persons subjected to the special jurisdiction do not come under the provision set out in Annex No. 1 to the Regulation No. 44/2001. The annex indicates the national rules of civil proce-

[244] A. Dashwood, R.J. Hacon, R.C.A White, *A Guide to the Civil Jurisdiction and Judgement Convention*, Deventer 1987, p. 83 et seq.; P. Byrne, *The European Union and the Lugano Convention on Jurisdiction and the Enforcement of Judgements*, Delgany 1994, pp. 38–39; P. Kaye, *Civil Jurisdiction...*, p. 339 and seq., D. Lasok, P.A. Stone, *Conflict of Laws...*, p. 202 et seq.

[245] See: ECJ ruling on July 13, 2000 in the case of Group Josi Reinsurance Company SA v. Universal General Insurance Company (UGIC), C-412/98, 2000 ECR I-5925. See: M. Bogdan, U. Maunsbach, *EU Private...*, p. 203 et seq.

[246] See: Grand Chamber Judgement ECJ on March 01, 2005 in the case of Andrew Owusu v. N.B. Jackson etc., C-281/02, M. Bogdan, U. Maunsbach, *EU Private...*, p. 284 et seq.

[247] J. Harris, *Stays of Proceedings...*, p. 993 et seq.; T.C. Hartley, *The European Union and the Systematic Dismantling of the Common Law...*, p. 824 et seq.

dure by which proceedings are conducted in civil matters in the thirteen Member States of the European Union. Annex No. 1 to the Regulation No. 44/2001 was referred to in the literature of private international law as a "list of forbidden jurisdictional rules."[248] This firm statement can be upheld only in a context in which it is unacceptable to refer a matter to be resolved by another court, responsible to hand down a ruling in a dispute based on the procedural rules in force in another Member State than the Member State in which the defendant resides. The same conclusion can be reached based on the interpretation of Article 2, paragraph 1 of the Regulation without the need to interpret Article 3, paragraph 2, as well as on the Annex No. 1 to the Regulation No. 44/2001.

The choice of court is determined by the place of residency of the defendant in a Member State of the European Union. The citizenship of the respondent living in an EU Member State plays no significance. This statement applies to both the citizen of a Member State of the European Union residing in another EU Member State and third country nationals residing in EU Member States.

Regulation No. 44/2001 does not formulate an autonomous definition of place of residence of the individual. The general provisions contained in Chapter V of the Regulation left the matter to be settled by law of the relevant Member States. Article 59, paragraph 1 of the Regulation provides that in cases involving whether a natural person acting as a defendant in a civil or commercial matters in which the jurisdiction is governed by the provisions of international procedural law of the place of residence in a Member State whose courts are handling the matter, the court shall apply the law of that State. Conflicts of national substantive law determining the residence of the individual who is being handled by the courts of two or more Member States for living on their territory, shall be settled by means of provision of Article 27 of Regulation No. 44/2001. This provision obligates the court to which the matter was later brought before a court in another country, to suspend the proceedings because of the *litis pendentis*. Where proceedings involving the same cause of action and between the same parties are brought in the courts of different Member States, any court other than the court first seized shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seized is established (Article 27, paragraph 1). Where the jurisdiction of the court first seized is established, any court other than the court first seized shall decline jurisdiction in favour of that court (Article 27, paragraph 2). The indicator for determining the place of residence can be: permanent residence confirmed by an administrative decision (the official check-in), temporary stay, transient presence in a particular place with the intention of residence, an indication by the individual of a place considered to be their centre of living, or staying in a country where a person is its citizen. Procedural precautions cause that the plaintiff may apply, based on actions involving the same factual and legal basis, to

[248] M. Bogdan, *Concise Introduction to EU Private...*, p. 43.

courts of different Member States. The principle of primacy of the formal registration of confirmed cases in one of the competing jurisdictional districts selected by the plaintiff is critical in determining the jurisdiction of the court competent to hear the case at hand. Ruling on the lack of jurisdiction of the court does not automatically establish the jurisdiction of another Member State in which the claim was filed later. If the defendant is not residing in the Member State in which the matter was first brought before the court and this court finds no jurisdiction, means it is necessary to analyse the jurisdiction of the court to which the matter was filed at a later date. The Polish text of Article 27, paragraph 1 of the Regulation includes the wording of the absence of jurisdiction of the first court, to which the matter is then later filed. It may give rise to an erroneous conclusion that the order made by court X in the first State on the determination of a lack of jurisdiction, is to determine the appropriate jurisdiction of court Y, ruling in another Member State to which the plaintiff took the same claim at a later date. In the English text of Article 27, paragraph 1, there is no doubt that other courts, ruling in the other Member States to which the plaintiff subsequently filed identical claims against the same defendant are to suspend from office the proceedings in that case. This means that refusal of the jurisdiction of various courts, which previously received an action brought by the same plaintiff against the same defendant, cannot be identified with the court jurisdiction to which the action was later filed. The refusal of the jurisdiction can only mean that another court is obligated to undertake the litigation process in order to determine its jurisdiction. Article 28, paragraph 2 of Regulation No. 44/2001 interrupts the need to take these steps in the proceedings until the jurisdiction of the case by one of the courts is seised.

Similar rules for determining jurisdiction shall be applied by Regulation No. 44/2001 for the defendant companies and legal persons. Instead of the place of residence, which applies to the individual, in the case of the defendant companies and legal persons, used for determining the jurisdiction is the statutory seat of the entity or the place of the central administration or the principal place of business (Article 60, paragraph 1, points "a" to "c."). In the case of companies and legal persons registered in the UK and Ireland, the concept of a statutory seat shall be construed as the place of the registered office or the place of incorporation or the place under the law of which the formation took place (Article 60, paragraph 2).

If a natural person, company or legal person acting as a plaintiff or the defendant is not a resident or established in the Member States, whose courts are seized of the matter, and the action is not brought before a court of another Member State, the determination of jurisdiction of another Member States shall be decided at the request of the plaintiff, who has the right to identify the residency of the defendant in another Member State. The court to which the matter was brought and which declined jurisdiction is required to assess whether having jurisdiction

is the court of another Member State in which – according to the claims of the plaintiff – the defendant resides or whether the following is located in it: the seat, the main body, the main place of business of the company or the legal person. The court of State X decides on the jurisdiction of the court ruling in State Y under the relevant laws in force in country Y (Article 4, paragraph 1). This provision requires the courts of the Member States, ruling within the jurisdiction in the territory of the Member State in which the defendant is not domiciled, and the defendant is not resident in that country, to determine the jurisdiction of the courts of another Member State under the laws in force in that country. Both citizens of that country, as well as an alien, a citizen of another Member State and third country national residing in that country, with reference to the applicable regulations in the country of national jurisdiction, are entitled to bring proceedings under the national rules governing jurisdiction of the courts in that country, against a defendant who is not domiciled in the territory of any Member State. In matters of employment law against an employer who does not have residence, a registered office, a central place of business or a principal place of the establishment within the EU, may have a matter brought against it by a worker who is not a national of a Member State of the Union, a person not residing in the EU, but refers to the relevant rules of the jurisdiction within the particular Member State. As a rule, matters relating to property disputes, which are situated in a country, come under the national jurisdiction of a Member State.

FORUM PRIVILEGIUM

In Section 2 of Chapter II of the Regulation No. 44/2001 (Article 5–Article 7) the determinants indicate the courts referred to in the provisions of international procedural law, which thanks to the Community legislature may exercise a jurisdiction against defendant individuals or entities that neither have a place of residency or an established seat or a main management body in the Member State concerned. The provisions of this section of the Regulation shall grant the plaintiffs the right of redress before the court of another Member State than the one in which the defendant is a resident. The provisions of Chapter II, Section 2 of this Regulation is governed by commutative property courts in the Member States in civil and commercial matters. A basic condition for redress in the courts of another Member State than the State in which the defendant resides, or has its central administration or principal place of business, is a relationship of that person/entity to another Member State. Article 5 of Regulation No. 44/2001 authorises the plaintiff to file a claim with the court of another Member State against a person domiciled in the territory of another Member State. A "resident" includes, aside from natural persons, a legal person or a company, whose headquarters, central administration or principal place of business is located in another Member State. Article 5 sets out some general guidelines to determine

the courts before which suits can be filed by residents of another Member State. In contrast to Article 2, which established the principle of allowing legal action against a person residing in the country before the courts, Article 2 indicates the jurisdiction of the court to which the plaintiff is entitled to claim. They may be appropriate courts due to their place of implementing commitments (*forum solutionis*), the place of the incident where the damage was caused (*forum delicti commissi*), or the place of business activity (Article 5, paragraphs 1, 3, 5). In cases where the defendant is a combination of several persons or entities, an action may be brought before the court in whose jurisdiction resides one of the defendants (Article 6, paragraph 1). A precondition for jurisdiction of the court of residence of one of the defendants is a close connection between claims reported for all defendants, which makes it desirable to identify the total claims against two or more of the defendants on grounds of avoiding conflicting judgements (*forum connexitatis*) by courts of various Member States. In relation to a counter-claim in which the claims are based on the same contract or identical facts on which the claim was based, may be submitted to the court in which the claim is pending (*forum mutuae actionis*).

FORUM SOLUTIONIS

In matters relating to a contract or claims arising out of a contract, action may be brought before the courts in the place where the commitment was made or was to be performed ("place of performance") (Article 5, paragraph 1, point "a"). Interpreting the legal basis for specific jurisdiction, the European Court of Justice does not apply to the definition of contract law, adopted in civil and commercial law of the Member States. In support of its ruling of March 08, 1988, in the case of *SPRL Arcado v. SA Haviland*,[249] the Court held that the term "claim arising from the contract" is an autonomous concept, which should be subjected to a functional interpretation consistent with the "system and objectives of the Brussels Convention." Referring to the earlier ruling of March 22, 1983, the case of *Martin Peters Bauunternehmung GmbH v. Zuid Nederlandse Aannemers Vereniging*,[250] the European Court of Justice ruled that the term "claims arising from contract" is one of the criteria used by international civil proceedings to determine the specific jurisdiction of the courts of the Member States. Therefore, this concept can be interpreted in a different way than it is interpreted on the basis of national legislation in each Member State. The Court held that "claims arising from the contract" also includes disputes of membership relationships between sales representatives engaged in professional activities and the trade association of which they are members. With the term "contract" referred to in Article 5, paragraph 1, point "a"

[249] C-9/87, 1988 ECR 1539. M. Bogdan, U. Maunsbach, *EU Private...*, pp. 77–78.
[250] C-34/82, 1983 ECR 987.

of the Regulation, the European Court of Justice also understands the unilateral commitments[251] and contracts whose validity was questioned by the plaintiff.[252]

Article 5, paragraph 1, point "b" of the Regulation No. 44/2001 defines the place of performance. In the case of the provision of services, it is the place in a Member State where, under the contract, the services were provided or should have been provided (Article 5, paragraph 1, point "b", the second paragraph). The basis for the determination of the commitment is the place where the original commitment according to the contract was agreed upon by the parties.[253] In the absence of an agreement between parties to the place of performance, the applicable substantive law rules of conflict are applied, as were discussed earlier. The principle *sequitur accesorium* decides on the jurisdiction over the minor issues arising from the contract, which was the basic obligation set by the jurisdiction responsible for the principal place of performance.[254] I do not develop the themes relating to the interpretation of Article 5 of Regulation No. 44/2001, as the jurisdiction of the matters which are the subject of an employment contract and claims under those contracts are governed by the provisions of Section 5 "Jurisdiction over Individual Contracts of Employment" (Article 18–Article 20). I am limiting the considerations concerning Article 5 to the determination that the jurisdiction of matters relating to contracts or claims arising from contracts may be clarified by the parties by defining the place of performance.

The place of performance of obligations under the contract does not apply to contracts and claims arising from contracts in which the place of performance was established by the parties outside the European Union Member States[255]. The European Court of Justice ruled that the determinant used in Article 5, paragraph 1 of the Regulation for determining the jurisdiction cannot be applied in those cases where the parties do not specify the place of performance or define them imprecisely or too broadly, for example, by finding the commitment is to be achieved on the European continent "or anywhere on the Globe."[256]

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[251] Judgement of the ECJ on January 20, 2005 in the case of Petra Engler v. Janus Versand GmbH, C-27/02, ECR 2005 I-481. See: M. Bogdan, U. Maunsbach, *EU Private...*, p. 280 and seq.

[252] Judgements of the ECJ: December 14, 1977 in the case of Engelbertus Theodorus Sanders v. Ronald van der Putte, C-73/77, 1977 ECR 2383; March 04, 1982 in the case of Effer SpA v. Hans-Joachim Kantner, C-38/81, 1982 ECR 825. See: M. Bogdan, U. Maunsbach, *EU Private...*, p. 14, pp. 39–40.

[253] de Bloos v. Bouyer, C-14/76, 1976 ECR 1497 (from October 06, 1976). I refer to M. Bogdan, *Concise Introduction to EU Private...*, p. 47, footnote 62.

[254] Shenavai v. Kreischer, C-266/85, 1987 ECR 239 (from January 15, 1987). I refer to M. Bogdan, *Concise Introduction to EU Private...*, p. 49, footnote 69.

[255] Judgements of the ECJ: May 26, 1982 in the case of Roger Ivenel v. Helmut Schwab, C-133/81, 1982 ECR 1891; February 15, 1989 in the case of Six Constructions Ltd. v. Paul Humbert, C-32/88, 1989 ECR 341. See: M. Bogdan, U. Maunsbach, *EU Private...*, pp. 42–43, 81–82.

[256] Judgement of the ECJ of February 19, 2002 in the case of Besix SA v. Wasserreinigungsbau Alfred Kretzschmar GmbH & Co. KG (WABAG), Planungs-und Forschungsgeselschaft Dipl.

FORUM DELICTI COMMISSI

Matters relating to tort, delict or quasi-delict, may be considered by the courts in the place where the harmful event occurred or may occur (Article 5, paragraph 3). The victim following the tort, delict or quasi-delict, has the right to choose a competent court in the place of residence of the defendant or the defendant's establishment, or principal establishment (*forum domicilii*) (Article 2, paragraph 1 in conjunction with Article 60, paragraph 1) or because of the place of the tort, the delict or quasi-delict (*forum delicti*) (Article 5, paragraph 3). In those cases where the place of the tortious act is not identical to the place where the damage occurred which followed from the tort, an injured person, the plaintiff in the civil proceedings, has a right to choose between the three appropriate jurisdictions, because of the residence of the perpetrator of the injury (the defendant), the place of the act (the tort) and the place where the effects of events occurred.[257] In support of the decision in the case of *Bier v. Mines de potasse d'Alsace*, the European Court of Justice held that the wording used in Article 5, paragraph 3 of the Brussels Convention, repeated in Article 5, paragraph 3 of Regulation No. 44/2001, "the place where the harmful event occurred," leaves a great margin for the victim, who can choose the competent court of the place of incident or location of the injury, if the above two determinants (the tort and the injury) did not point to the same court. Because a tort may result in different consequences, which will be revealed in a specific time sequence, the ECJ decided that the injury as one of the jurisdiction determinants may be used only if a direct and an immediate consequence of the act can be established. In the decision of January 11, 1990, in the case of *Dumez France SA and Tracoba SARL v. Hessische Landesbank and Others*,[258] the European Court of Justice ruled that the place of the event listed in Article 5, paragraph 3 of the Brussels Convention, "is the place where the injured person has suffered direct injury, not a place where other people were injured following exposure to a person directly injured." The Court emphasised that the principal purpose of the establishment of a particular jurisdiction is to create for the victims the ability to choose between a general principle according to which the domicile or residence of the defendant decides to identify the proper court, and other especially important determinants, justifying a derogation from this rule. In the case of torts such a determinant is the damage/injury that remains in direct temporal relationship to the event that caused it. In subsequent rulings the European Court of Justice ruled that Article 5, paragraph 3 of the Convention

Ing W. Kretsschemr GmbH & Co. KG (Plafog), C-256/00, ECR 2002 I-1699. See: M. Bogdan, U. Maunsbach, *EU Private...*, p. 213 et seq.

[257] ECJ Judgement of November 30, 1976, in the case of Handelskwekerij G.J. Bier v. Mines de potasse d'Alsace SA C-21/76, 1976 ECR 1735. See: M. Bogdan, U. Maunsbach, *EU Private...*, p. 4 et seq.

[258] C-220/88, 1990 ECR I-49. See: M. Bogdan, U. Maunsbach, *EU Private...*, p. 1983 et seq.

(now Article 5, paragraph 3 of Regulation No. 44/2001), does not apply to events that are considered unlawful acts causing bodily injury, which then cause further financial loss due to the need to cover the cost of treatment and rehabilitation.[259] In matters governed by the substantive provisions of labour law, such incidents are accidents at work or occupational illnesses. The worsening state of health of the worker injured, in a work accident or due to an occupational illness, classified under labour law, results in certain consequences. Another example of the injury controlled by labour law may apply to a tort committed by an employee representing the employer to another employee using electronic means of communication. A breach of employee's personal interest by incorporating the information to the Internet, accessible to users in many countries, causing damage across different countries allows an injured to sue the injuring party for damages to the amount the damage caused occurring in individual countries[260] or as a general rule, in the country of residence or establishment of the defendant. As explained in earlier parts of the book, if a tort occurs on a ship or an aircraft, which is located in an international area or an area subject to the jurisdiction of another country, the valid jurisdiction in which the injured party may file suit, is the country of the flag that is flown on the said vessel. An act causing the injury on board of such a ship or aircraft is considered as a special jurisdiction of the State in which this vessel has been registered.[261] I only mention this special jurisdiction, because in this case the general principle laid down in the provisions of Article 2, paragraph 1 in respect of Article 60, paragraph 1 of Regulation No. 44/2001 is usually kept. The judgement in the case of *Danmarks Rederiforening v. LO* deserves a more detailed discussion, because it relates to the consequences caused by the collective action which is subject to the regulation of collective labour law, in which the employer is the victim, presents an objection to the collective action's compliance with the law

[259] Judgements of the ECJ: on September 19, 1995 in the case of Antonio Marinari v. Lloyd's Bank plc and Zubaidi Trading Company, C-364/93, 1995 ECR I-2719; June 10, 2004 in the case of Kronhofer Rudolf v. Marianne Maier, Christian Möller, Wirich Hofius, Zeki Koran, C-168/02, 2004 ECR I-6009. See: M. Bogdan, U. Maunsbach, *EU Private...*, p. 139 et seq., pp. 267–268. In the first appointed judgements (Marinari v. Lloyd's), the ECJ ruled that the determination of wages "(...) where the harmful effect occurred (...) does not, on proper interpretation, cover of the place where the victim claims to have suffered financial damage following upon initial damage and suffering by him (...)." By contrast, in the second decision (Kronhofer v. Maier at al.), the Court held that the term "place of the event causing damage" may not occur or the claimant's domicile or the place where the assets are collected in property damage if the object is not the plaintiff's property values.

[260] Judgement of the ECJ on March 07, 1995 in the case of Fiona Shevill, Ixora Trading Inc., Chequepoint SARL and Chequepoint International Ltd v. Press Alliance SA, C-68/93, 1995 ECR I-515. See: M. Bogdan, U. Maunsbach, *EU Private...*, p. 130 et seq.

[261] Judgement of the ECJ on February 05, 2004 in the case C-18/02 Danmarks Rederiforening, acting on behalf of DFDS Torline A/S v. LO, and Landsorganisationen Sverige acting on behalf of SEKO Sjöfolk Facket för Service och Kommunikation, See: decision 2004, pp. I – 01417. See: M. Bogdan, U. Maunsbach, *EU Private...*, p. 260 et seq.

(legality). The legal problem in this case concerned the assessment of collective action undertaken in a port by the trade unions operating in country X against the employer (owner) in country Y, against whom the collective action was intended by the trade unions functioning in country Y. These unions took action to limit the employment of workers, nationals of country Y, on merchant ships managed by the company. In reality, all workers employed on merchant ships of the company were citizens of another Member State (State A). Trade union organisations operating in country X held protests against the shipowner in the port of that country, in order to manifest support for the intended (although cancelled) collective actions of country Y. The European Court of Justice considered whether the protest actions governed by collective labour law undertaken on land (in the port of country Y) may be considered by the international procedural labour law as actions on board of a commercial ship, flying the flag of a different Member State. The Court held that the place of the tort (the collective action), which caused material damage to the property owner, which occurred in another Member State, is regulated by labour laws of the country in which the damage occurred only if the protest action governed by collective labour law was organised on the commercial ship. The damage inflicted on land, in the port where the merchant vessel was moored, by the protest actions taken in solidarity with workers who, by virtue of citizenship and residence could be employed on this ship, are not subject to the laws of the country of the flown flag of the ship.

Article 5, point 3 of Regulation No. 44/2001 does not define the basic legal concepts used to determine jurisdiction over damages arising from torts, acts similar to a tort, or claims arising from such acts. A lack of an independent definition of these acts does not mean that the European Court of Justice is bound by legal definitions of these concepts used in national legislation of individual Member States. In private international law literature significant differences were found between the concepts in the substantive law between the Member States.[262] Without undue analysis of these concepts, it was found that for the purposes of international procedural law – Article 5, point 3 of the Brussels Convention (now Article 5, point 3 of Regulation No. 44/2001) in determining tort – tort and quasi-tort fit all acts that fall outside the regulatory provision of Article 5, paragraph 1 of this Convention, the rules governing jurisdiction in matters arising out of contracts or claims arising from contracts. These simple rules for determining jurisdiction in international procedural law have been incorporated into the judicature of the European Court of Justice in *Kalfelis v. Bankhaus Schröder*,[263] *Réunion v. Spliethoff*,[264]

[262] M. Bogdan, *Concise Introduction to the EU Private...*, p. 51.

[263] Judgement of the ECJ on September 27, 1988 in the case of Athanasios Kalfelis v. Bankaus Schröder Münchmeyer, Hengst and Co. and others, C-189/87, 1988 ECR 5565. See: M. Bogdan. U. Maunsbach, *EU Private...*, p. 79 et seq.

[264] Judgement of the ECJ, October 27, 1998 in the case of Réunion Européenne SA and Others v. Spliethoff's Bevrachtingskantoor BV and the Master of the Vessel Ablasgracht V002,

Taconi v. HWS.[265] According to the Court, the demarcation line adopted between the judicature provisions of contractual obligations and non-contractual obligations have been laid out carefully so as not to allow the interpretation of the facts subject to the provisions of Article 5, paragraph 1 and Article 5, paragraph 3 of the Regulation in a manner justifying the intersection ranges of the listed provisions. In the literature of private international law there is expressed a conviction that it would be more appropriate to divide the jurisdiction according to the criterion on dichotomous issues arising from *contractual liability* and non-contractual liability.[266] This breakdown of cases would refer to the divisions used in the conflict rules of substantive labour law set out in earlier parts of the book.

Article 5, point 3 of Regulation No. 44/2001 was worded in a way which enables the competent jurisdiction not only in cases where the damage occurred due to tort, but also in cases where there is a likelihood of a harmful event occurring. In matters governed by the substantive provisions of labour law, Article 5, point 3 of the Regulation should be treated as a procedural norm of international labour law governing jurisdiction in injunction proceedings, provided that existing in the Member States of the substantive provisions of labour law gives employees, employee representative bodies or national labour inspectors competence in matters initiating injunctions in case of threat to the health or life of employees in the workplace. Other examples of preventive action may provide the legal regulations of collective labour law enabling employers threatened by a strike or other protest action planned by employees or their representative bodies, to request an examination of the legality of actions by employees and/or their representatives (unions), to assess planned legal action, and – in the event of non-compliance with the provisions of collective labour law proposed collective action – to issue an injunction ruling.

Steps in the procedure for preventing damage that may arise from torts can be initiated not only by natural persons or other entities at threat. Article 5, point 3 of the Regulation does not limit the types of parties entitled to take such steps. It states only that these procedural steps shall be initiated in courts located in places where there may be an event causing the damage.

Claims for civil claim for damages or restitution resulting from unlawful acts, threatened with a criminal penalty come under the jurisdiction of the criminal court to which an indictment against the offenders has been made (Article 5, paragraph 4). A necessary condition for determining the properties of a judicial authority in a Member State must be granted by the rules of criminal procedure to the competent court hearing the indictment, to have the power to try the civil

C-51/97, 1998 ECR I-6511. See: M. Bogdan, U. Maunsbach, *EU Private...*, p. 162 et seq.

[265] ECJ Judgement on September 17, 2002, Fonderie Officine Meccaniche SpA v. Taconi Heinrich Wagner Sinto Mashinenfabrik GmbH (HWS), C-334/00, 2002 ECR I-7357. See: M. Bogdan, U. Maunsbach, *EU Private...*, pp. 227–228.

[266] M. Bogdan, *Concise Introduction to EU Private...*, p. 51.

claims relating to the wrongful act, prohibited by the provisions of criminal law. In matters of individual labour law a decision of the employer, which maliciously or persistently infringes the rights of employees, and who in breach of existing labour law terminates the employment contract, may give rise to criminal proceedings against the employer. Filing a claim for the reinstatement of the work position of an employee who has had their employment contract illegally and unjustifiably terminated, is a type of claim which is treated by Article 5, paragraph 4 of Regulation No. 44/2001, in part relating to the reactivation of the previous *status quo*. Legal protection, secured by criminal penalties assured by collective labour law are subjected to the collective right to initiate industrial action and the conduct of the dispute in accordance with the provisions of the Act on the resolution of collective disputes. Criminal sanctions may also apply for failing to meet the obligations as defined in the Polish Act of May 23, 1991 on the resolution of collective disputes,[267] for leading a strike or other protest action, which is in violation of the statute (Article 26, paragraphs 1 to 2).

Being opposed to the use of criminal sanctions in labour relations (individual and collective) I would further strengthen the arguments put forward in the development of substantive law dealing with labour problems, pointing to the additional procedural arguments against the administration of such fines. In contrast to the substantive labour laws that are subject to the processes of harmonisation at the level and scale of the European Union, the provisions of criminal law are not coordinated. Without carrying out detailed studies of the kinds of legal interests protected by criminal law, in particular, discernment, work and social rights governed by the substantive labour law are done so through such legal protection that it cannot be seen if a claim filed for damages or the reinstatement of work in the EU Member States can be recognised as a criminal case carried out against an employer who is maliciously or persistently infringing the employees' work rights. Addressing this problem requires the pursuit of comparative studies on criminal procedure in the Member States. Article 5, paragraph 4 makes an indication of the proper determinant for a jurisdiction over tort claims facing criminal penalties by the national legislation of each country's criminal courts hearing labour cases as well as other civil matters. The denial of such rights by the criminal courts of the national legislature causes inability to use this determinant to determine the jurisdiction of illegal acts threatened with criminal penalties. It degrades the drastic violations of employee rights to the rank of "ordinary" tort, for which the determinant is the court in matters of employment claims and other issues of individual and collective labour law, in whose jurisdiction the incident qualified as tort occurred or was expected. Thus, in cases which cannot use the determinant

[267] OJ No. 85, item. 236. See: A.M. Świątkowski, *Ustawa o rozwiązywaniu sporów zbiorowych* (*The Act on The Resolution of Collective Disputes*) [w:] A.M. Świątkowski, *Zbiorowe prawo pracy*. [in:] (*Collective labour law*) Commentary, J. Wratny, K. Walczak (eds.), Warsaw 2009, p. 436 et seq.

– due to not meeting the conditions of the determinant applicable according to Article 5, paragraph 4 – the conflict rule of international procedural labour law of Article 5, paragraph 3 of Regulation No. 44/2001 applies. In matters regarding a dispute arising out of the operations of a branch, agency or other establishment, the appropriate jurisdiction is the court for the place in which the branch, agency or other establishment is situated (Article 5, paragraph 5).

The determinants indicated in Article 5, points 1, 3–5 of the Regulation will apply to those companies and legal persons appearing in civil and commercial litigation, including controversial issues regulated by individual employment laws, as defendants (individuals) or defendant parties (other parties). There is no legal basis to consider whether the provision of Article 5, point 5 is applicable to the plaintiff or the defendant.[268] The rule of law of point 5 forms part of an operative unit, which is the provision of Article 5 of Regulation No. 44/2001.

Although at the outset this provision states that it indicates the switching of jurisdiction in matters relating to people and not others, residing in a Member State, as the defendant, whose place of residence (in the case of a natural person), registered office, location of headquarters or principal place of business (in the case of a company or other entity) is critical in determining the competent court to hear civil litigation and commercial matters, including matters governed by the provisions of employment law (individual and collective), the cited provision must be interpreted in conjunction with Article 60, paragraph 1 of the Regulation which states that, for purposes of Regulation No. 44/2001, the company and legal persons are "domiciled" in the place where their bodies are located, or the companies listed, in the provisions of Article 60, paragraph 1, points "a"–"c."

In my opinion, there is therefore no legal basis to consider whether Article 5, paragraph 5 of the Regulation mentions a determinant stipulating the jurisdiction of the court, in whose district exist larger entity units acting as a party to the civil, commercial, or labour dispute as a plaintiff or as a defendant.

In Article 5, paragraph 5, similarly as in other, previously submitted to regulatory bodies provisions determining the location of a branch or agency has a decisive factor in indicating the jurisdiction in cases in which a defendant is mentioned in that provision, as an organisational unit (branch or agency).

In the judicature of European law in the wording of Article 5, paragraph 5 of the Regulation are considered legal concepts which should be defined by the Community institutions. In a decision issued in the case of Somafer SA v. Saar AG of November 22, 1978,[269] the European Court of Justice concluded that the provision of Article 5, paragraph 5 of the Brussels Convention, and reiterated in

[268] Doubts resolved in favour of the defendant are presented by M. Bogdan, *Concise Introduction to EU private...*, pp. 52–53.

[269] C-33/78, 1978 ECR 2183. See: M. Bogdan, U. Maunsbach, *EU Private...*, pp. 18–19.

Regulation No. 44/2002, requires an interpretation independent from that which may be proposed under the national law of the Member State concerned.

According to the rules of interpretation applicable to the interpretation of European law, a branch or an agency of the company should have the following characteristics: organisational dependence on the parent company, enabling the implementation of the organisational autonomy of the parent company of tasks, trade law with the parent company and having primary management authority abroad. An agency or a branch on the one hand should be an organization dependent on the parent company to which it is a part of. On the other hand, it should have a degree of independence allowing to act independently within the guidelines provided by the company managing the activities of subsidiary units. The main criteria for the recognition of the branch or agency of an undertaking is the degree of autonomy of the subsidiary entity. Organisational units, called branches, agencies or divisions of another company, do not have the internal organisational units, if they are equipped with the skills to act independently in the market.[270] They do not need not be related in an organisational sense to the parent company. They may take on the form of a separate legal institution or even of a natural person who is associated with the parent form.[271] This company may have its own management body, which can also be the managing body of the mother unit.[272] According to the European Court of Justice, it is essential that the subsidiary – branch or agency or other establishment of the joint venture – seeks to persuade customers and business partners that they act on behalf of the mother company.[273] Legal consequence of a specific organizational unit as an organizational unit of another entity independently functioning on the market should be treated as disputes concerning operations of a branch, agency or other establishment, which a central administration body is involved in.

JURISDICTION OVER INDIVIDUAL CONTRACTS OF EMPLOYMENT

The provisions of international procedural law, as well as standards of private international law, include the dispute over the individual contracts of employment to a separate type of case where the interests of the "weaker" party to the relationship are subject to special protection. For this reason, three sections (3–5) of Chapter II on the "jurisdiction" of Regulation No. 44/2001 constitute separate determinants, which should be the parties to legal relations governed by the pro-

[270] See: Judgement of the ECJ on March 18, 1981 in the case of Blanckaraet & Willems PVBA v. Luise Trost, C-139/80, ECR 1981 819. See: M. Bogdan, U. Maunsbach, *EU Private...*, pp. 29–30.

[271] M. Bogdan, *Concise Introduction to EU Private...*, p. 53.

[272] See: Judgement of the ECJ, December 09, 1987 in the case of SAR Schotte GmbH v. Parfums Rothschild SARL, C-218/86, 1987 ECR 4905. See: B. Bogdan. U. Maunsbach, *EU Private...*, pp. 73–74.

[273] SAR Schotte v. Parfums Rothschild..., p. 73.

visions of insurance law (Section 3, "Jurisdiction in matters relating to insurance," Article 8–Article 14), civil law to protect the rights of consumers (Section 4, "Jurisdiction in matters relating to contracts between consumers, Article 15–Article 17) and individual relationships established on the basis of a contract of employment (Section 5, "Jurisdiction over individual contracts of employment, Article 18–Article 21). The guiding idea, common to the three types of contracts, two of which are regulated by civil law (contract of insurance and consumer contracts), and the employment contract governed by individual employment law, implemented procedural rules that establish separate rules of jurisdiction in these matters, so as to defend the rights and interests of the weaker party (the insured person, the consumer and the worker), who should benefit from the recognition of the contested case by the courts of jurisdiction in those districts, in which individuals classified by the rules of private international law are seen as "weaker" to the legal relations, reside or are employed. The specificity of the concept of protection of the rights of individuals belonging to the category of persons who because of their unequal position in the legal relations with business entities regulated by civil law (insurance, trade) and labour law (conducting any activity that requires the employment of paid workers) requires that a privileged position is assured in litigation, regardless whether they are acting as plaintiffs or as defendants. This means that individuals placed by the provisions of international procedural law to the particular category of protected party due to the actual position in the legal relationships governed by the laws and procedures, have always enjoyed a privileged position in proceedings governed by separate rules of civil procedure. Given the scope of considerations in the further part of the argument, I focus exclusively on the issue of jurisdiction in matters arising under individual employment contracts. The rules governing separate insurance matters, do not apply to social security. Jurisdiction in matters relating to insurance only applies to the insured persons and to property insurance.

The provisions of international procedural law stipulating the jurisdiction in matters relating to individual contracts are mandatory standards. This means that previously presented provisions of Section 1 of Chapter II of Regulation No. 44/2001 on jurisdiction, do not regulate matters related to the determination of jurisdiction in contentious matters arising under individual employment contracts. The above conclusion can be reached after reading the provision of Article 18, paragraph 1 of the Regulation. The Community legislator establishes that in all cases in which "the subject of a contract of employment or claims arising out of the individual employment contract," the jurisdiction shall be governed by Section 5 of Chapter II of Regulation No. 44/2001. From this there are three types of exceptions. The first two are formulated in Article 18, paragraph 1 *in fine*, the third in Article 21 of the Regulation. Before analysing the first of three exceptions it should be noted that the procedural rules of international law govern the conflicts of norms of procedural law within the European Union. This statement

applies to all types of proceedings subjected to Regulation No. 44/2001. For this reason, separate rules of jurisdiction in disputes in which the legal basis of claims are individual employment contracts are not applicable in the relations process in which one party (the employee or employer is sued in his capacity as the defendant) is not domiciled, has a registered office, a principal management authority or the principal place of business within the EU. Therefore, the relationship process with the participation of such persons or entities are universally applicable rules of Article 4, paragraphs 1 and 2 of the Regulation. In matters of labour law, in which the subject is an individual employment contract or claim arising out of such a contract, the plaintiff (employee or employer) claiming relevant substantive labour laws applying to contracts involving a foreign element, appears to the court whose domicile jurisdiction to hear the case at issue, is referred to the national procedural law in force in a particular country (Article 4, paragraph 1 in conjunction with Article 18, paragraph 1). This is used by each person living in the EU regardless of their nationality (Article 4, paragraph 2 in conjunction with Article 18, paragraph 1). The right of *forum domicilli* is enjoyed, as I wrote before, by any person who appears in civil proceedings as a plaintiff, residing, or having a business seat, central administration or principal place of business in the EU Member State.

The second exception of the rules determining a jurisdiction in a separate proceeding in matters relating to individual contracts of employment, shall apply to those cases where the nature of the defendant are the entities mentioned in Article 5, point 5 of the Regulation – branch, agency or other establishment undertaking under the applicable law in some Member States of the European Union. Determining the jurisdiction under the provisions of Section 5 of Chapter II of the Regulation shall be without prejudice to the provisions of Article 5, paragraph 5. In matters relating to individual employment contracts or claims arising out of such an agreement, the jurisdiction in cases against a branch, agency or other entity providing commercial business, or a service, and for this purpose employing workers, are recognised by a court in those cases in which the jurisdictional district of the Member States of the European Union was a located branch, agency or branch of the entity employing the employee making the claim (Article 18, paragraph 1 in conjunction with Article 5, point 5). Having a branch, agency or other establishment in an EU Member State by the employer who does not have residency within the EU in the meaning of Article 60 of Regulation No. 44/2001, allows the employee who has filed a claim against such an employer to take steps in the proceedings on the same principles as those determined in the jurisdiction of employers subject to the provisions in force in EU Member States.[274] The Community

[274] Judgement of the ECJ on September 15, 1994 in the case of Wolfgang Brenner and Peter Noller v Dean Witter Reynolds Inc..., C-318/93, 1994 ECR I-4275. See: M. Bogdan, U. Maunsbach, *EU Private...*, pp. 123–124. This decision applies to civil law claims of a consumer contract. It expresses the regularity which applies to another contract, giving rise to claims regu-

legislature has treated Article 18, paragraph 2 of the Regulation as the legal fiction. The legislature has held that an employee employed by an employer without "residence" in the EU, but instead having a branch, agency or other establishment in a subsidiary body, is therefore eligible to use separate rules for determining jurisdiction in matters relating to individual employment contracts.

Separate provisions of international procedural law applicable to the jurisdiction in matters relating to individual employment contracts confer the claimant employee the right to choose the court. In such situations where there is residency of the employer or an established seat, the provisions allow for redress before the courts of the Member State in which the employer resides (or has his/her business seat etc.), or before the court of another Member State competent for the place where the employee habitually carries out his work or in the courts for the last place where he did so, 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 (Article 19, paragraphs 1–2).

Crucial for determining the jurisdiction in matters arising under individual employment contracts is to establish a permanent place of work by a plaintiff employee. *Forum loci laboris* constitutes the most serious alternative to the generally applicable *forum domicilii.* Particular difficulties occur in cases of temporary posted workers providing services in the territory of another Member State. Problems associated with resolving such a conflict of substantive rights of workers posted to work in another Member State is presented in the earlier parts of this volume. I pointed out that the conflict rules laid down in the Directive 96/71/EC of the employees posted to work in another Member State to opt for the use of *lex loci delegationis* with the obligation to apply the minimum standards for the posted workers, established by the labour law in force in the Member State where the work is being carried out. This makes the legal situation with regard to the status of posted workers similar to that of local workers, although there is no sufficient legal basis to believe that the legal status of posted workers is regulated *legis loci laboris.* The obstacle in this hypothesis is the transitory nature of their work in a workplace located in a country where other labour laws apply. A contrast to this is the situation in the event of an agreement by the employee sent by his employer to work abroad in another workplace. The close relationship between the employer organisation, serving as a "parent company" managing workers in the workplace of a "daughter company," located in another Member State, constitute a sufficient reason to change the legal position of the workers employed who are subjected – during the period of employment abroad – to the provisions of labour law of the place of rendering work. The first thesis of the decision handed down on April 10, 2003 in the case of *Giulia Pugliese v. Finmeccanica SpA, Alenia Aerospazio*

lated by separate provisions of procedural law laid down in the Brussels Convention, whose provisions were repeated by Regulation No. 44/2001.

Division,[275] the European Court of Justice ruled – when interpreting Article 5, paragraph 1 of the Brussels Convention, a standard which has been reproduced in Regulation No. 44/2001 – that in the event of a dispute between the employee and the employer (called by the ECJ, the "first employer") who directed this employee to work abroad with another employer (as defined by the ECJ as a "second employer"), the place of work for the "second employer" should be treated as the place where the employee habitually carries out his work. A necessary condition for eligibility of employment in the "second employer" as a permanent place of rendering work within the meaning of procedural rules of international labour law is the suspension of the employment relationship established with "the first employer" and entering into a contract of employment with the "second employer." Irrelevant for the determination of jurisdiction is to direct the employee to work abroad with the "second employer" and give him a period of temporary employment in another Member State of unpaid leave with the "first employer." The European Court of Justice applied in a separate proceeding, regulated by the procedural rules of international labour law, generally applicable conflict rules used to determine the jurisdiction in civil and commercial matters. The second argument in the decision *Pugliese v. Finmeccanica SpA* expressed the legal view of the need to interpret Article 5, point 1 of the Brussels Convention, for the purpose of determining jurisdiction, to treat temporary employment under a contract of employment for a specified period as the work done in the place where the person employed is only required to perform work duties specified in this contract. The Court did not consider the case of simultaneous, parallel work by the same employee for two different employers in two Member States. Article 19 of the Regulation No. 44/2001 permits such employees to take action against one employer in the country in which he is domiciled within the meaning of Article 60, paragraph 1 of the Regulation (Article 19, item 1) and against another employer before the court at the place where the employee habitually carries out the work or has recently carried out his work (Article 19, paragraph 2, point "a"). Formulated in Article 19 are alternative methods for determining jurisdiction in matters relating to individual employment contracts, which do not prevent workers from pursuing claims from various individual contracts of employment and having the right to simultaneously use two techniques to indicate the jurisdiction in each of the cases.

In the case of a worker working on a platform situated in a belt of marine coastal waters or on the boat, which does not exceed the area of the continental shelf of a Member State, the work carried out on the devices located on a strip of coastal waters is considered by the judicature as employment in that Member State which exercises control over that part of the sea basin.[276]

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[275] C-437/00, 2003 ECR I-3573. See: M. Bogdan, U. Maunsbach, *EU Private...*, p. 241 et seq.

[276] Judgement of the ECJ of February 27, 2002 in the case of Hebert Weber v. Universal Ogden Services Ltd, C-37/00, 2002 ECR I-2013 (first argument). See: M. Bogdan, U. Maunsbach, *EU*

The second argument in the case of *Weber v. Universal*, the Court considered the case of carrying out work for one employer by the same employee in several Member States. It ruled that a conflict of procedural laws should be decided in accordance with the principle which allows comparisons to be made between the duties performed by the employee in the individual Member States and to choose the most important of obligations.[277] According to the European Court of Justice, what may help in the decision of this case may be the time delay for the employee in the individual Member States.[278] In a situation where an employee is not rendering work normally in one Member State, the conflict rule of procedural law as laid down in Article 19, paragraph 2, point "b" gives the employee the right to file a claim before the court in whose district of jurisdiction is or was a branch of the employer who hired the employee.

The third exception to the rules set out in Section 5 of Chapter II of Regulation No. 44/2001 applies in a situation in which the parties in a separate proceeding of claims arising from the individual employment contract shall conclude an agreement to waive the rules on jurisdiction over individual contracts of employment. Accepting the conclusion of such an agreement I present in Chapter VI of this book, concerning the agreement of jurisdiction in separate proceedings in cases of disputes over claims of individual contracts of employment.

The employer and the employee may bring an action against a claim from the working relationship established on the basis of a contract of employment only in the courts of the Member State in whose jurisdiction the defendant employee is domiciled (Article 20, paragraph 1). However, the employer sued by an employee is entitled to bring a counter-claim before a court in which the main proceedings have begun (Article 20, paragraph 2). Article 20 of the Regulation gives the employer making the counter-claim the right to choose between the court of jurisdiction in the place of residence of the employee (*forum domicilii*) and the court having jurisdiction in the place of work rendered by the employee (*forum loci laboris*).

CONTRACTS CONCERNING THE JURISDICTION

The jurisdiction indicated on the basis of the determinants listed in the provisions of Regulation No. 44/200, which govern proceedings in separate cases relating to individual employment contract or claims arising from such contracts may be excluded on the basis of the contract parties in separate cases relating to employ-

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Private..., p. 217 et seq.

[277] "(...) Is the place where, or from which (...) he [the employee – A.M.Ś.] in fact performs the essential part of his duties *vis-a-vis* his employer."

[278] Judgement of the ECJ of January 09, 1997 in the case of Petrus Wilhelmus Rutten v. Cross Medical Ltd, C-383/95, 1997 ECR I-57. See: M. Bogdan, U. Maunsbach, *EU Private...*, p. 147 et seq.

ment, regulated by the rules of civil procedure of a European Union Member State.[279] The legal basis for concluding such agreements is the provision of Article 21 of the Regulation. In the initial sentence of this provision, the parties in a dispute can waive the provisions of Section 5 of Chapter II, "Jurisdiction over individual contracts of employment" (Article 18–Article 20). This legislation provides the basis for discussion within the literature of international labour law litigation on the scope of this authority. In the literature the sentiment was expressed concerning the right to enter into an agreement pursuant to which a particular court jurisdiction is excluded, deemed as appropriate to resolve contentious issues in the field of labour law in a particular Member State.[280] The literature also did not reject the hypothesis of the admissibility of an exemption, under the agreement of all parties, of the jurisdiction of all courts in certain types of cases in one, several, or even in all EU Member States. I will be presenting the view that the general rule regulating an agreement excluding the jurisdiction of Article 21 of Regulation No. 44/2001 allows the parties to the dispute to exclude the jurisdiction of judicial authorities recognized by the authorities of a Member State for the jurisdiction to hear contested cases[281] without the need to identify another body authorized by the parties to resolve the matter or litigation arising out of a legal relationship that developed on the basis of an individual employment contract. Because it is unlikely that the parties to a collective dispute left unresolved the matter of identifying and defining the characteristics of the bodies, which they believe are best suited to resolve a dispute occurring, it must be assumed that the natural consequence of the agreement to exclude the jurisdiction of the courts indicated by using the determinants included in the provisions in Section 5 of Chapter II of the Regulation will be an indication of the agreement of the competent authority to resolve the matter. This indication may take the legal form of the clause, according to which the competent authority to hear a dispute about a claim with the employment relationship will be the labour court in whose jurisdiction the legal process is or was a place of work (*forum loci laboris*).[282] The judi-

[279] See: A. Briggs, P. Rees, *Civil Jurisdiction...*, p. 125 et seq.; A. Briggs, *Agreements on Jurisdiction and Choice of Law*, Oxford 2008, p. 237 and seq.

[280] M. Bogdan, *Concise Introduction to EU Private...*, p. 65.

[281] In the judgement handed down on November 13, 1979 in the case of Sanicentral GmbH v. René Collin, C-25/79, 1979 ECR 3423, the European Court of Justice ruled it possible to refer the employment relationship matter to another body chosen by the parties to the contract concerning the jurisdiction rather than the body to which the regulations are issued by the state after the conclusion of such agreements granting exclusive jurisdiction to hear contested cases in the employment contract.

[282] In the judgement issued on November 09, 2000 in the case of Coreck Maritime GmbH v. Handelsveem BV and Others, C-387/98, 2000 ECR I-9337. See: M. Bogdan, U. Maunsbach, *EU Private...*, p. 208 et seq. ECJ approved how the parties to a trade agreement indicated the jurisdiction of the court in civil matters, bringing the dispute to the district court's jurisdiction, where the headquarters of the seller were located.

cature of the European Court of Justice accepted the agreement on the choice of jurisdiction, which was listed as the jurisdiction to hear contested cases in several courts and left the plaintiff to choose between them. It has been a well accepted method according to which each of the indication of competent jurisdiction will determine the defendant's domicile or the location of the office, statutory seat or the establishment of the defendant.[283] The latter indicates the jurisdiction in matters relating to the individual's right to work, may be approved as it is not incompatible with a clear regulation of the essential conditions of a contract to exempt jurisdiction specified provisions of Section 5 of Chapter II of Regulation No. 44/2001 in accordance with Article 21, paragraph 1 of the Regulation to exclude the jurisdiction and may be concluded in the contract by the parties when the dispute has arisen. This restriction applies to arrangements in matters relating to employment contracts and claims to the employment contract to the parties of individual labour relations under which the individual employment relationship may not *ex ante* conclude agreements exempting rules of jurisdiction laid down in Section 5 of Chapter II of the Regulation is contrary to the spirit of protecting the worker as the "weaker" party to the dispute. Article 21, paragraph 2 of this Regulation waived the above prohibition in cases where a contract is established to exclude the jurisdiction of the provisions of Section 5 of Chapter II giving the employee the right to bring proceedings to courts other than the courts specified in the provisions of this section. Because Section 5 of Chapter II cites only the jurisdiction in the place of residence of the employer or his business seat, or the location of the principal body and location of the main companies on the basis of consensus of individual employment relationships established on the basis of an employment contract, it is possible to submit future disputes to be resolved by courts or other bodies adjudicating on matters of individual labour law, when that agreement gives the employee the right to bring proceedings in courts other than those mentioned in the above provisions of the Regulation. Using the method of interpretation *a contrario* of Article 21, it can be concluded that provisions of Article 19 of the Regulation concerning jurisdiction principles are mandatory.[284] There are also legal grounds for claiming Article 21 excluding the existing rules in individual labour relations provisions of international procedural labour laws are also mandatory. Since Article 21 does not specify the conditions for the contract excluding the jurisdiction of individual contracts of employment, disputes shall be governed by Section 7 of Chapter II of Regulation No. 44/2001 which determines the conditions for conclusion and validity of the agreements in choosing

[283] Judgement of the ECJ on November 09, 1978 in the case of Nikolaus Meeth v. Glacetal, C-23/78, ECR 1978 2133. See: M. Bogdan, U. Maunsbach, *EU Private...*, pp. 16–17.

[284] According to the ECJ, the jurisdiction rules set out in the provisions of Regulation No. 44/2001 also apply in disputes about the validity of the agreement to exclude the jurisdiction – case on July 03, 1997 of Francesco Benincasa v. Dentalkit Srl, C-269/95, 1997 ECR I-37-67. See: M. Bogdan, U. Maunsbach, *EU Private...*, p. 156 et seq.

the court. Articles 23–24 set out in Section 7 of Chapter II of the Regulation apply as appropriate to labour disputes to the extent that they do not interfere with the above-mentioned provision of Article 21 of the Regulation.

Parties to social relations regulated by civil or commercial law, including employment law, may agree that the existing or future disputes arising from specific legal relationships will be subjected to a court or courts of a particular Member State. The conclusion of this agreement is subject to the jurisdiction of residence of one of the legal relationship of the parties in the territory of an EU Member State. Article 23, paragraph 1 of the Regulation provides that the scope of the agreement concerning the jurisdiction is decided upon by the parties, except that such an agreement according to Article 23, paragraph 1 is tantamount to granting a court or courts chosen by the parties exclusive jurisdiction in all matters covered by the agreement, unless the parties agree otherwise. The Community legislature grants the parties full autonomy in matters relating to the jurisdiction of the legal relations regulated by civil and commercial law. In matters relating to disputes arising out of individual employment contracts, the above freedom relating to the selection of competent authorities to resolve contentious issues regulated by individual employment law was previously limited to the provision of Article 21, Section 2 of the Regulation.

Freedom of choice of jurisdiction is not limited by the determinant of residence of at least one of the parties to the legal relationship. Despite the suggestive wording of the dependence of residence in the territory of a Member State for at least one of the parties and an indication of the court or the courts "of that State" which, under the agreement concluded by the parties are given jurisdiction in contentious matters arising from this legal relationship, Article 23, paragraph 1 does not establish any relationship between the place of residence of one of the parties and the jurisdictional system in force in any Member State or third country.[285] However, the scope of freedom of the parties is not unlimited, for in Article 23, paragraph 1 it is expressly agreed that the parties to an agreement conferring jurisdiction shall have the right to choose "a court or courts of a Member State." This right shall not use the disputes arising from contracts in which there are no foreign elements and therefore conflicts of norms of procedural law have no place.

The requirement of residence of one party is not a condition establishing the validity of the concluded agreement. Article 23, paragraph 3 of the Regulation accepts cases whereby none of the parties are domiciled in an EU Member State, however, it obligates to make use of the court specified in the agreements to

[285] See: judgements of the ECJ: January 17, 1980 in the case of Siegfried Zegler v. Sebsatiano Salinitri, C-56/79, 1980 ECR 1989; February 20, 1997 in the case of Mainschiffahrts-Genossenschaft eG (MSG) v. Les Gravières Rhénanes SARL, C-106/95, 1997 ECR I-911; March 16, 1999 in the case of Trasporti Castelletti Spedizioni Internazionali SpA v. Hugo Trumpy SpA, C-159/97, ECR I-1999 1597. See: M. Bogdan, U. Maunsbach, *EU Private...*, pp. 23–24, p. 149 et seq., p. 175 et seq.

hear the contested case decided upon by a court of a third country finding lack of jurisdiction in the matter at issue. Parties to legal relations, none of whom are domiciled in any Member State, may submit the disputed matter to a court of a Member State. The basis of jurisdiction of a Member State is specified by the determinants in the provisions of general application indicating the *forum loci domicili* of the defendant employer (Article 19, paragraph 1), or a place where the employee habitually carries out his work, *forum loci laboris* (Article 19, paragraph 2, point "a") or – if the employee usually does not perform work in one Member State – the jurisdiction district in which the employer has his branch hiring employees (Article 19, paragraph 2, point "b").

A necessary condition for the validity of the contract of jurisdiction is to complete the requirements for the form in which this arrangement should be concluded in accordance with the requirements laid down in the provisions of Article 23, paragraph 1, points "a"–"c") and Article 23, paragraph 2 of the Regulation. A necessary condition is for it to be in writing. The contract may be concluded orally, provided that it will be confirmed in writing (Article 23, paragraph 1, point "a"). The obligation of having the agreement in writing is considered to be fulfilled, if the contract is written or confirmed in writing at least by one of the parties to the agreement and if the other party bound by the terms of the contract did not raise objections to its content.[286]

Communications carried out electronically making a permanent record for the contract are treated as equivalent to writing, fulfilling the requirements (Article 23, paragraph 2). This provision of Regulation No. 44/2001 does not specify in what language the parties should conclude the said contract. The European Court of Justice in its ruling on June 24, 1981 issued in the case of *Elefanten Schuh GmbH v. Pierre Jacqmain* held that an agreement conferring jurisdiction shall be valid and effective regardless of the language it has been made in.[287] Due to the failure to determine the language of the contract by the rules of European law (the Brussels Convention and Regulation No. 44/2001), there is no legal basis for challenging the validity by one of the parties to that agreement.

An agreement conferring jurisdiction may also be included in a form which accords with practices adopted in the legal relations between the parties to that agreement (Article 23, paragraph 1, point "b"). In the literature on international procedural law as an example to meet the requirements set out in that provision shall be a case of renewal of an oral agreement concluded before the jurisdiction or the earlier conclusion of similar agreements in oral form and to abide by its provisions by the parties of the dispute.[288] According to the European Court

[286] Judgement of the ECJ July 11, 1985 in the case of F. Berghöfer GmbH & Co. KG v. ASA SA, C-221/84, 1985 ECR 2699. See: M. Bogdan, U. Maunsbach, *EU Private...*, pp. 62–63

[287] C-150/80 Act, 1981 ECR 1671. See: M. Bogdan, U. Maunsbach, *EU Private...*, p. 37 et seq.

[288] A. Briggs, *Agreement on Jurisdiction...*, p. 272.

of Justice, the responsible practice adopted between the parties, being a limited liability company and its shareholders to introduce to the contract or articles of association provisions of extractable disputes arising from legal and organisational relationship between the parties to the jurisdiction of that court.[289] In the thesis of the first set of rulings the Court held that a provision in the contract or articles of association of the company is considered as an agreement conferring jurisdiction, if the authorities of the company apply such a form to the legal and organisational relationship with the shareholders. Another exception to the requirement to complete the agreement in writing applies to international trade, in which the large role played by customs is applicable in relations between trading partners.

Conclusion of an agreement conferring jurisdiction prevents one party to that agreement to apply to the court having jurisdiction in civil proceedings or in separate proceedings in matters of employment law requesting a ruling prohibiting the other party to initiate proceedings before a court chosen by the parties under the contract in cases on dispute settlement, the contract or claims arising out of such a contract. European Court of Justice of April 27, 2004 in the case of *Gregory Paul Turner v. Felix Fareed Ismail Grovit, Harada Ltd.*, *Changepoint SA* [290] on the lack of legal basis in the provisions of the Brussels Convention and Regulation No. 44/2001 of appearing before the court of country X requesting a ruling stopping the proceedings initiated by the plaintiff before the court of country Y, if the latter was the court decided by the parties to an employment contract, which is the subject of the dispute designated as competent to hear the reported claim. In support of this case, the Court relied on the decision of June 27, 1991 issued in the case of *Overseas Union Insurance Lyd. and others v. New Hampshire Insurance Company*[291] about the lack of conflict in international law standards of procedural rulings by the judicial authorities in one Member State relating to the powers of justice in another Member State, where the latter were identified as appropriate by the parties concerning jurisdiction. In the literature on international procedural law in the case of *Turner v. Grovit* it was regarded as an important precedent for non-compliance with the provisions of the Brussels Convention and Regulation No. 44/2001 and the specific rules applicable in the Anglo-American legal system on the prohibition of taking certain steps to protect against imminent harm of the defendant (*injunction*), initiated in order to hinder or even prevent the use of powers under the contract to submit disputes arising from employment contracts under the jurisdiction of the courts of another Member State.[292]

The legal basis for the jurisdiction of judicial authorities in Member States are established by the provisions of Chapter II of the Regulation No. 44/2001.

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[289] ECJ judgement on March 10, 1992 in the case of Powell Duffryn plc v. Wolfgang Petereit, C-214/89, 1992 ECR I-1745. See: M. Bogdan, U. Maunsbach, *EU Private...*, p. 97 et seq.

[290] C-159/02, 2004 ECR I-3565. See: M. Bogdan, U. Maunsbach, *EU Private...*, p. 265 et seq.

[291] C-351/89, 1991 I-3317. See: M. Bogdan, U. Maunsbach, *EU Private...*, p. 88 et seq.

[292] A. Briggs, *Agreements on Jurisdiction...*, p. 279 et seq.

Competence to rule on controversial issues against the background of legal relationships involving foreign element in civil, commercial and labour courts in the Member States based on previous general rules of jurisdiction (Section 1), the special jurisdiction in separate proceedings listed in Section 2, *inter alia*, in matters relating to contracts of employment (Section 5), exclusive jurisdiction (Section 6) and on the basis of jurisdiction agreements (Section 7). Section 7 of Chapter II mentions the basis for the jurisdiction through the case of "provisional jurisdiction" (*tacita jurisdiction*), which is one of the legal forms of entering into an agreement concerning jurisdiction *per facta concludentia.* Appearing as a defendant before the court in a Member State which is not competent to hear the case on the basis of other provisions of Regulation No. 44/2001, is treated as granting a jurisdiction by the defendant, who was involved in a dispute as to the *meritum* without raising a plea of lack of jurisdiction, provided that the other court is not guaranteed in the main case of exclusive jurisdiction (Article 24, in conjunction with 22). The implicit nature of the contract submitting the disputed matter to the jurisdiction of the court where the matter was suspended, is based on the consistent actions of both sides of the legal relationship giving rise to a legal dispute: the plaintiff, who asks the court to issue a resolution, and a defendant who does not dispute the competence of the chosen court. The factual basis of this concept may be a failure to comply with the requirements of the formal agreement to submit the disputed issues with a particular legal relationship – relationship prescribed by Article 23 of the Regulation. There is no reason to adopt the concept of the presumption of an agreement on jurisdiction in those cases where the defendant appears before a court not having jurisdiction, only in order to contest the jurisdiction (Article 24 *in fine*).

§ 4. Recognition and enforcement of judgements

INTRODUCTION

Chapter III of Regulation No. 44/2001 consists of the provision containing the definition of the decision, subject to the recognition or enforcement in another Member State (Article 32) and the three sections: the first, which sets out the rules for the recognition of judgements in other Member States (Article 33––Article 37), the other governing the rules for the judgements (Article 38–Article 52) and the third section, in which the general rules are published, setting out the requirements that should be met by an applicant for recognition or enforcement in one Member State court ruling, which was issued in another Member State (Article 53–Article 56).

A characteristic feature of the regulatory provisions on the recognition and enforcement of judgements of courts of other Member States is to derogate from

the provisions adopted in earlier provisions of the Regulation issued in cases in which there are foreign elements. This provision applies to all decisions, both those that have been issued in disputes in which there are external factors and disputes arising from a legal relationship without the participation of such elements. A necessary condition for recognition and/or enforcement of a decision issued by a court of another Member State by the judicial authorities is that the judgements of the courts and bodies set up to enforce the decisions of another Member State are to belong to the category of civil and commercial judgements in the meaning of Article 1, paragraph 1 of Regulation No. 44/2001. The legal base of any other legal requirement is the concept of the "judgement" used in provision of Article 32 of the Regulation. A distinctive feature of judicial decisions, unlike other decisions, such as administrative decisions, is the assurance of equal rights in litigation for all parties to the proceeding by an independent judicial authority deciding on the contested case to be heard. The European Court of Justice has paid special attention to ensure that the judicial process to individuals or entities acting as defendants exercise their right to participate in the proceedings and to present their case and arguments, and to secure permission to present evidence to substantiate the claims presented.[293] The Court cited the above proposition *expressly* stating that "judicial decisions" are not be classified as judgements listed in the provision of Title III (Article 25) of the Brussels Convention, (Chapter III, Article 32 of Regulation No. 44/2001), if the rules of civil procedure allow a Member State authority deciding in a contested case to rule in the absence of the defendant, who has not been served with a date of the hearing. There is however, no difference whether a judicial decision issued in one Member State, which calls for recognition or enforcement of a party in another Member State has been issued in accordance with the procedure applicable in the Member State of which the judiciary exercised its jurisdiction over the case in which that decision was issued whether on the basis of national civil procedure in force in a third country which applies to those who are not resident in the territory of a Member State (Article 4). Subject to the wording in Article 72 of Regulation No. 44/2001, concerning the agreements concluded on the basis of Article 59 of the Convention, by the authorities of the Member States before the entry into force of this Regulation, the above statement does not apply to judgements of courts of the State that is party to that Convention issues against the defendant domiciled or normally resident within the territory of third countries, where a decision must be issued by a court of a Member State whose jurisdiction is determined in accordance with the rules of jurisdiction applicable to nationals and persons residing in Member States of the European Union. Article 72 protects the conflict rules provision applicable to the jurisdiction of the courts of the Member States. Despite

[293] ECJ Judgement of May 21, 1980 in the case of Bernard Denilauler v. S.N.C. Couchet Frères, C-125/79, 1980 ECR 1553. See: M. Bogdan, U. Maunsbach, *EU Private...*, p. 25 et seq.

the above claim the claim has an almost universal application of the provisions of Chapter III of Regulation No. 44/2001 on the recognition and enforcement of judgements in civil cases issued by courts in the Member States in third countries, in all civil and commercial matters, including labour law matters, falling within the scope of the Regulation, regardless of whether in the legal relations, which are subject to the jurisdiction of those courts, there are foreign elements.[294] The only criterion for applying the provisions of the Regulation is the recognition of decisions as "judicial decisions" within the meaning of Article 32 of Regulation No. 44/2001. For the purposes of this Regulation, the decision is "any decision given by a court of a Member State, irrespective of whether the decision will be defined as a judgement, order, payment order, or writ of execution, including the provision concerning the litigation costs issued by a judicial officer." Rulings are the substantive and procedural decisions of the court, the judge and judicial officer referred to in Article 32 of the Regulation, which take on the form of legal court or tribunal decisions in substantive matters of civil and commercial law, including matters of employment law, whatever the technical name of the ruling is. For example, Article 32 lists some common types of decisions: a decree, an order, a decision, a writ of execution and a decision issued by a judicial officer, specifying the allocation of costs or expenditure of the parties in litigation ("determination of costs or expenses"). From the above description of judgements in civil and commercial matters, issued by the courts, judges or judicial officers, which are recognised and enforced by the authorities of other Member States, it transpires that all decisions issued by the authorities entrusted with the administration of justice in the Member States shall be recognised in other Member States under Article 33, paragraph 1 of Regulation No. 44/2001. From the above principle the European Court of Justice has made an exception given to courts of Member States which have not ratified the Brussels Convention.[295] The Court reached this conclusion basing it on the literal interpretation of the provisions of the Convention, which in Article 26 and Article 31 obliges Member States authorities for the recognition and enforcement of judgements rendered by judicial bodies exercising jurisdiction in those countries which are parties to that Convention. The Court also stressed the need to respect "the legal principle certainty," which is a basis for this Convention,[296] according to which the States ratifying the present Convention shall ensure the application of similar procedures in proceedings taken for the recognition of judgements given in other countries. The Court has confirmed the belief that the object of the recognition and enforcement should be a decision

[294] M. Bogdan, *Concise Introduction to EU Private...*, p. 74.

[295] Judgement of the ECJ on January 20, 1994 in the case of Owens Bank Ltd. v. Fulvio Bracco and Bracco Industria Chimica SpA, C-129/92, 1994 ECR I-117. See: M. Bogdan. U. Maunsbach, *EU Private...*, p. 113 et seq.

[296] Judgement of the ECJ on March 4, 1982 in the case of Effer SpA v. Hans-Joachim Kanter, C-38/81, 1982 ECR 825. See: M. Bogdan, U. Maunsbach, *EU Private...*, pp. 39–40.

that directly resolves the issues of substance or procedural ruling and not rulings accepting such a ruling.

Refusing the admissibility of the recognition and enforcement of judgements given by courts of a Member State of the decision of a third country court that is not party to the Brussels Convention, the ECJ has taken steps to ensure legal certainty within the Community. It objected to the way legal issues were being resolved in the Community, which, as it was previously presented by the case of *Turner v. Grovit*, sought to challenge the conflict rules laid down by international law. In the ruling handed down in *Owens Bank v. Bracco* it was also questioned whether the sentence pronounced in a third country which has not ratified the Convention belonged to the category of civil or commercial matters. This question contrary to the cardinal principle expressed by the European Court of Justice in a decision issued on July 25, 1991, in the case of *Marc Rich & Co. AG v. Società Italiana Impianti PA* [297] opposed to recognise the judgements in matters not governed by the conflict rules of international law.

THE RECOGNITION OF JUDGEMENTS

The principle of territoriality is fundamental to the rules of civil procedure. Decisions of the civil courts and labour courts have legal force only in the State whose judicial authorities adjudicated in contested civil or labour matters. Final decisions of the courts of a specific country in a particular case, based on the same factual content, in which the decision has been delivered, relating to the same parties, prevent legal proceedings being reinstated in a different court because of the decision being handed down (*res judicata*). In the case of judgements rendered by courts of another state there is the same effect of recognition of a foreign court of the territory of another state. In accordance with Article 33, paragraph 1 of Regulation No. 44/2001, the ruling issued by the courts of one Member State must be recognised as binding in another Member State. I do not share the views presented in the literature on private international law of the automatic binding force of judgements issued by a court of a Member State or other countries[298] without any special procedure (*exequatur procedure*). If that claim were true, the interested party in recognition of foreign judgements would be exempt from the obligation to initiate a special procedure, which in the circumstances mentioned in Articles 34–35 must be completed by a ruling of refusal of the appeal, order, decree, decision, or order by a foreign court. A necessary condition for the use of this "automatic" obligation principle in judgements rendered by a court of a Member State within the European Union, is to provide a copy of the ruling

[297] [fuzzy] André Bamberg, C-7/98, 2000 ECR I-1935. See: M. Bogdan, U. Maunsbach, *EU Private...*, p. 91.

[298] M. Bogdan, *Concise Introduction to EU Private...*, p. 74.

of the court of country X, being sufficient enough to be used as proof according to the procedural rules in force in country Y, in which the party concerned seeks recognition of a specific decision (Article 53, paragraph 1). The provisions of Section 3 of Chapter III of Regulation No. 44/2001, the "common provisions," made several technical requirements relating to the procedures for recognition of a foreign court or a declaration of enforceability in the territory of another Member State. Among others, the party requesting the recognition or declaration of enforceability shall be required to submit a certificate on the legal status of the ruling issued by a foreign court (Article 53, paragraph 2). The procedure for the recognition or declaration of enforceability of foreign court is not charged to the formal requirements. Specifically, the documents certifying the status of a foreign court judgement to be recognised as binding or enforceable in another Member State are not subject to the verification procedure (Article 56). At the request of a court or other competent authority of the applicant for recognition or declaration of enforceability of a foreign court may be required by a competent court or authority competent to recognise and certify the enforceability of a foreign court to present a certified translation of the ruling (Article 55, paragraph 2).

In the event of a dispute between the parties, whether or not the decision was considered to be in another Member State, any interested parties have the right to request a finding that the disputed ruling as evidence in another case pending between the same parties in the court of a Member State be recognised in that country (Article 33, paragraph 2). The court hearing the dispute between the parties, of which at least one is called upon as proof of a decision issued by a court of another Member State, is competent to assess whether that decision is subject to the discretion of the State in which the dispute has been brought, whose decision is subject to the discretion of the applicable country of a foreign court judgement.

Proceedings of recognising a foreign court decision are formal in character. In this case the decision of a foreign court, which is the subject of this proceeding "in any case," is not subject to substantial control (Article 36). An application for recognition of foreign court judgements may still be open for appeal. This is justified by the wording of Article 37, paragraph 1 of the Regulation, a court of a Member State in which recognition is sought of a judgement given in another Member State may stay the proceedings if an ordinary appeal against the judgement has been lodged.[299] A court of a Member State in which recognition is sought of a judgement given in Ireland or the United Kingdom may stay the proceedings if enforcement is suspended in the state of origin, by reason of an appeal (Article 37, paragraph 2).

[299] The European Court of Justice defines a claim as an ordinary legal means, which is part of normal procedure, making it possible to amend or appeal the decision of the court of first instance. See: Judgement of the ECJ of November 22, 1977 in the case of Industrial Diamond Supplies v. Luigi Riva, C-43/77. ECR 1977 2175. See: M. Bogdan, U. Manunsbach, *EU Private...*, pp. 12–13.

In cases where the circumstances do not come under Article 34 and Article 35, paragraph 1 of the Regulation, the court case initiated in the recognition of a foreign court judgement has a duty to recognise the ruling. Pursuant to Article 33, paragraph 1, "judgements given in one Member State shall be recognised in other countries without any special procedure." *A contrario*, it can be considered that in the absence of "special procedure," a foreign court ruling should be recognised. "Special procedure" is therefore required before the judgement is handed down in country X in refusing the recognition of the court ruling issued in country Y. However, the Regulation does not impose the need to organise the foreign court ruling recognition process into two different procedures, "ordinary" and "special." There are reasonable grounds for believing that legal proceedings in order to be recognised by a foreign court may be terminated by a decision to grant or to refuse to recognise this decision. If the court adjudicating on the recognition of a foreign court determines that there is one of the reasons listed in Article 34 or Article 35, paragraph 1 preventing the recognition of a foreign court ruling, is required to issue a decision on refusing the recognition. Article 34 of the Regulation prohibits recognition of a decision, if such a recognition would be "manifestly contrary to public policy" in the Member State in which the recognition is sought (item 1). The public policy cited as a ground for refusing recognition of a decision cannot be identified with a wrong, even if the infringement is obvious and blatant, settlement of a court of another Member State[300] or from a ruling in violation of Regulation No. 44/2001 on jurisdiction in matters of insurance, consumers and exclusive jurisdictions. Non-compliance with the ruling of Section 5 of Chapter II of the Regulation, determining jurisdiction in matters relating to individual contracts of employment is not listed in Article 35, paragraph 1 as a reason to refuse to recognise. In the literature on private international law the above legal solution is considered as a sign of deliberate action by the legislature, of protecting the worker considered as "the weaker party" in the employment relationship and the parties in the investigation of claims arising from contracts of employment.[301] Arguments in order to clarify this regulation are not convincing. M. Bogdan believes that controversial issues relating to contracts and in cases of claims under those contracts litigation is usually initiated by the employee. For this reason, the refusal to recognise the labour court's ruling is inconsistent with the need to protect the employee. The arguments expressed by the author cited are based on false assumptions. Article 18 of Regulation No. 44/2001 the Community legislature identifying the issues in employment relationships with elements belonging to separate proceedings in connection with cases of civil and commercial law, uses

[300] Judgement of the ECJ of May 11, 2000 in the case of Régie Nationale de Usines Renault SA v. Maxicar SpA, Orazio Formento, C-38/98, 2000 ECR I-2937. See: M. Bogdan, U. Maunsbach, *EU Private...*, pp. 201–202.

[301] M. Bogdan, *Concise Introduction to EU Private...*, p. 78.

the terms "contract of employment" and "claims of the individual employment contract." This does not mean that an employer may not be a plaintiff in such matters. Statistics relating to the frequency of initiating judicial proceedings in cases involving labour law by employees or employers may not constitute a means bypassing the regulation of Article 35, paragraph 1 of Chapter II of Section 5 of the Regulation, which has determined "jurisdiction over individual contracts of employment." The most important argument put forward by M. Bogdan is based on the mistaken assumption that, in matters relating to individual contracts and claims arising from these contracts, workers appear more often as the plaintiffs in such cases than employers do, and usually are the beneficiaries of these rulings. For this reason, the criticised author believes that the obligation of non-recognition of foreign judgements of labour courts, issued as a result of proceedings initiated by employees and in most cases beneficial for them, is synonymous with the detriment of the "weaker party" in legal and procedural relationships. As mentioned above, the above reasoning is based on erroneous assumptions. For this reason, it cannot be accepted as an explanation for the motivation of the Community legislature, which in Article 35, paragraph 1 mentions the provisions of the third, fourth and sixth section of Chapter II, whilst ignoring the provisions of Section 5 of this Chapter.

The provisions on jurisdiction are not counted by the regulation to the legal standards that could be used to protect public order (Article 35, paragraph 3). The European Court of Justice ruled that the sentence issued by a court in one Member State must be considered by the courts of another Member State, even if issued with the clear violation of conflict of law rules contained in the Regulation to determine the jurisdiction of national courts.[302] In the ruling of *Krombach v. Bamberski*, the Court stated that the court of the Member State in which the application for recognition of a foreign court has been filed, has no right to take account of the better public policy than the court of another Member State which issued that decision. Violation of the court of a Member State of the conflict rules laid down in the Convention, in deciding the jurisdiction where the defendant is a person not resident in the territory of a Member State (Article 4),[303] cannot be treated by a court of another Member State on the recognition of a decision issued earlier by the court in another Member State as being contrary to public policy in the country in which that decision has to be considered. So there are no legal grounds to consider the decision as "manifestly contrary to public policy," in country A, that the court is called upon to recognise the decision of the court of state B, under the provisions in force in that country, and not the procedural rules

[302] Judgement of the ECJ on the March 28, 2000 in the case of Dieter Krombach v. André Bamberg, C-7/98, 2000 ECR I-1935. See: M. Bogdan, U. Maunsbach, *EU Private...*, p. 197 et seq.

[303] Article 4 of the Brussels Convention has been duplicated by Article 4 of Regulation No. 44/2001.

set out by the standards of conflict of international procedural law. Public policy has a national and international dimension. Article 1 of Regulation No. 44/2001, in which the said clause has been mentioned as a basis to refuse to recognise, is used by the European Court of Justice as a standard which allows to move to the more intricate differences in the rules of civil procedure in the Member States, and requiring the non-recognition of foreign judgements, which are in violation of fundamental rules of conduct laid down in international treaties – the European Convention on Human Rights and Fundamental Freedoms. In support of its ruling in *Krombach v. Bamberski*, the Court cited three European Court of Human Rights rulings,[304] which stipulated that part of fundamental procedural assurance was the right of the parties to benefit from legal assistance. Violation of this right, according to the Court, justifies the refusal of the court decision as "manifestly contrary to public policy," in a Member State in which recognition is sought due to a conflict with fundamental human rights protected by international law.

The clause is a separate legal reason to refuse to recognise a foreign court. It cannot be equated with the other grounds mentioned in Article 34, paragraph 2 and previously mentioned Article 35, paragraph 1 of the Regulation.[305] In point 21 of supporting the judgement in the case of *Hoffman v. Krieg*, the ECJ held that the public clause should be applied by the courts of the Member States only in special cases. As an example of misuse of public policy in proceedings for the recognition of a foreign judgement, the Court refused to recognise a foreign court decision issued in the same case, with different judicata between the same parties by the court in that Member State in which recognition is sought of a foreign judgement. A reason for justifying the refusal to recognise a foreign court order should not be based on the clause claiming the decision is "manifestly contrary to public policy" of a Member State whose recognition of foreign judgements was sought. Instead, refusal ought to be pronounced because two substantive decisions were handed in the same case between the same parties. This provides a reason to refuse to recognise based on the provisions of Article 34, paragraph 3 (against the decision given in the State in which recognition is sought)[306] or Article 34, paragraph 4 (a contradiction with an earlier decision given in another Member State

[304] Judgements: November 23,1993 in the case of Poitrimol v. France, Series A No. 277-A, September 22, 1994 in the case of Pelladoah v. Netherlands, Series A No. 297-B; January 12, 1999 in the case of Van Geyseghem v. Belgium (unpublished). See: point 39 of reasoning in the ECJ Judgement in Krombach v. Bamberski. Cf. M. Bogdan, U. Maunsbach, *EU Private...*, p. 200.

[305] See: Judgements of the ECJ: October 10, 1996 in the case of Bernardus Hendrkman and Maria Feyen v. Magenta Druck & Verlag GmbH, C-78/95, 1996 ECR I-4943; February 4, 1988 in the case of Horst Ludwig Martin Hoffmann v. [fuzzy] André Bamberg, C-7/98, 2000 ECR I-1935. See: M. Bogdan, U. Maunsbach, *EU Private...*, p. 74 et seq. (Hoffman), pp. 146–147 (Hendrikman).

[306] Italian Leather v. WECO, C-80/00, 2002 ECR-I4995. They cite M. Bogdan, *Concise Introduction to EU Private...*, p. 77, footnote 204.

or a third country). In the latter case, a necessary condition for refusing recognition is to establish that the earlier decision issued in another Member State meets the requirements for recognition in the country in which the proceedings have been initiated for the recognition of another, later issued in a ruling. A judicial decision, which cannot be reconciled with any other decision given in a dispute between the same parties in the Member State where recognition is sought, or an earlier decision given in another country does not necessarily refer to the same legal basis. In the literature on private international law, there was the conviction expressed that the decision for which recognition is sought before a court of a Member State may refer to the problem that is completely outside the scope of regulation of the conflict rules laid down in the Regulation No. 44/2001.[307] I share the sentiment in the matter relating to the dispute. In matters of labour law, a ruling by a foreign court in country A concerning the remuneration for the employee to remain in readiness for work, is in conflict with another ruling issued in country B in a dispute concerning the same employment relationship established between the same parties, in which claimant employee is demanding invalidity of the employer's claim to terminate an employment contract or employment relationship with the reactivation, was dismissed. If a worker who lost the case with the employer to establish that the legal relationship between the parties is still in existence, appeared before a court for recognition in country B, the decision of the court of the other country (country A), leading to a willingness to pay for the work, which clearly shows that the contract of employment between the same parties has not been terminated, although the court of country B dismissed the employee's claim, the decision issued by a court of country A could not be reconciled with the court's decision in country B.

I do not share the views expressed by M. Bogdan on the admissibility of the recognition of foreign judgements issued on in matters lying outside the scope of regulation of the conflict rules of Regulation No. 44/2001. As I tried to show earlier, the provision of Article 1, paragraph 1 excludes this possibility. The Regulation applies conflict norms in civil and commercial matters, including matters relating to individual contracts of employment. It cannot be used in other types of cases. This assertion applies to all of the proposed provisions, including those that apply to the recognition and enforcement of all foreign courts, and not just the judgements issued by courts in Member States.

According to the European Court of Justice, pursuant to Article 34, paragraph 3 or 4 of the Regulation, it is not a valid reason to refuse recognition of a settlement concluded before a foreign court, even if its provisions cannot be reconciled with the decision rendered between the parties themselves in a similar case.[308] The

[307] Ibid., p. 77.

[308] Judgement of the ECJ of June 2, 1994 in the case of Solo Kleinmotoren GnbH v. Emilio Boch, C-414/92, 1994 ECR I-2237. See: M. Bogdan, U. Maunsbach, *EU Private...*, pp. 118–119.

settlement, subject to execution, does not – according to the Court – establish a decision, even if it has been concluded before the court, within the meaning of the above Regulation.

The last claim for requiring the court to refuse to recognise a foreign court[309] mentioned in the provisions of Regulation No. 44/2001 refers to procedural errors committed by a court which issued the substantive decision in another Member State. If a debtor who did not appear before court, and who was served with the document instituting the proceedings, but had no opportunity to prepare his defence and the foreign court hands down a ruling in the matter, such a ruling against the debtor will not be recognised. Article 34 of Regulation lists "sufficient time" for preparing a defence. These obstacles can be removed by passive conduct of the debtor who has not brought the possibility of having a remedy against the decision in breach of conduct.

ENFORCEMENT OF JUDGEMENTS

Proceedings for a declaration of enforceability of a foreign court – procedure exequatur

Judgements given in a Member State shall be implemented in other Member States, provided that they shall be enforceable in the country in which they were issued. A necessary condition of enforceability of foreign courts is to ascertain the feasibility of these judgements in another Member State. A foreign court ruling stated in the application for a declaration of enforceability of a judgement in another Member State may not be enforceable.[310] In the ruling handed down in the case of *Coursier v. Fortis Bank SA*, the Court stressed the importance of the formal term *enforceability* of a foreign court. The Court did not address the circumstances in which, in fact, that decision is enforceable in the State in which it was issued. According to the ECJ, from the perspective of international procedural law it applies only to the importance of the legal effect of that ruling in the application for failure to comply in another country. A judgement, fulfilling the formal requirements that have been made in country A, are subject to the procedure preceding the declaration of enforceability of that decision in country B.

Proceedings on enforceability shall be initiated at the request of the person concerned in respect of the enforceability obtained in the Member State

[309] In Article 35, paragraph 1 of Regulation No. 44/2001 the reason to refuse to recognise a foreign court is given. I do not analyse the reason due to its limited application in matters of employment law.

[310] Judgement of the ECJ of April 29, 1999 in the case of Eric Coursier v. Fortis Bank SA, Martine Coursier, nee Bellami, C-267/97, 1999 ECR I-2543. See: M. Bogdan, U. Maunsbach, *EU Private...*, pp. 186–187.

on the basis of a decision given in another country (Article 38, paragraph 1).[311] Such proceedings governed by the second section of Chapter III of Regulation No. 44/2001, which sets out the technical requirements for jurisdiction and the local judicial authorities (courts or other authorities listed in Annex II to the Regulation) (Article 39), determine the rules governing the procedure for submitting an application for enforcement of foreign judgements (Article 40, Article 44), the powers of a court ruling on a declaration of enforceability (Article 45, Article 46), the possibility of applying safeguard measures to enforce the decision of the foreign court (Article 47), the permissibility of partial recognition of enforceability (Article 48) and the manner of implementation of decisions requiring the debtor to pay the person the entitled penalty (Article 49). The most important rule requiring equal treatment for foreign nationals applying for a declaration of enforceability of a foreign court is set out in Article 51 of the Regulation. It prohibits imposing on a foreigner, who does not have residence or stay in the country in which there is a declaration of enforceability of a foreign court, the obligation to deposit security, bond or a deposit however described. In proceedings for the declaration of a judicial decision issued in another state, there is a prohibition of collecting charges, duty or fees calculated by reference to the value of the matter. The applicant, recipient of the State in which the ruling was issued due to legal aid or exemption from costs and expenses using the procedure in proceedings for a declaration of enforceability of the most convenient treatment in legal aid or exemption from costs and expenses under the laws in force in the country in which a decision has to be made (Article 50).

Proceedings for a declaration of enforceability of foreign court is the only way to bring about enforcement in the country when a decision was handed down in another country.[312] The above procedure shall apply the procedural rules in force in the country in which a decision has to be made.[313] An applicant who, in country A was issued a ruling whose execution occurred in country B, takes advantage in country B of the most convenient treatment of legal aid and exemption from costs or expenses provided for by law in force in that country. A necessary condition for the use of these privileges is to demonstrate that in country A, in which the foreign decision was issued, the person applying for enforcement was granted complete or partial legal aid or exemption from costs or expenses (Article 50). An applicant applying for the declaration of enforceability of all or part of a foreign court judgement must provide an address for service or agent for service of

[311] In the UK, a precondition for the enforceability of the decision is the necessity to register a decision in that part of the United Kingdom (England, Wales, Scotland or Northern Ireland) in which the decision is to be enforced (Article 38, paragraph 2).

[312] Judgement of the ECJ of November 30, 1976 in the case of Joseph de Wolf v. Jarry Cox BV, C-42/76, 1976 ECR 1759. See: M. Bogdan, U. Maunsbach, *EU Private...*, pp. 6–7.

[313] Judgement of the ECJ of July 10, 1986 in the case of Fernand Carron v. Federal Republic of Germany, C-198/85, 1986 ECR 2437. See: M. Bogdan, U. Maunsbach, *EU Private...*, pp. 67–68.

subpoenas and legal documents and proceedings in the district court where the request is made (Article 40, paragraph 2). This provision simplifies the mode of operation of a competent court issuing a ruling on the enforcement of a foreign court judgement and the effect of reducing expenditure on the service of official letters. After finding by a court that the attached to the application for a declaration of enforceability of foreign court is an official document that is required by the provisions of Regulation No. 44/2001 having probative value, the court in proceedings for the enforcement of judgements attached must immediately determine the feasibility without examining whether there are legal obstacles mentioned in Article 34 and Article 35 of the Regulation. If a foreign court is ruling in several claims asserted by the plaintiff and the declaration of enforceability cannot be given for all claims, the court or other competent bodies assessing the application for a declaration of enforceability, shall order one or more of them in the application (Article 48, paragraph 1). A foreign ruling ordering the debtor a "periodic payment by way of a penalty" shall be enforceable in another Member State only if the amount of the payment has been completely determined (Article 49). During this stage of the proceedings the debtor does not take part. There is therefore no possibility to make any submissions (Article 41). The adoption of a decision on the declaration of enforceability shall forthwith notify the applicant of the court (Article 42, paragraph 1), and that decision shall be served to the debtor (Article 42, paragraph 2). Each of the parties has the right to lodge an appeal against the decision on the application for a declaration of enforceability, the applicant can appeal the decision to refuse a declaration of enforceability of the court, the debtor of the decision on the declaration of enforceability (Article 43, paragraph 1). The appeal, which must be filed within one month of service thereof (Article 43, paragraph 5) shall be heard by a court listed in Annex III of the Regulation, after hearing each party (Article 43, paragraph 3). If the debtor resides in another Member State than that in which the court issued a decision on the declaration of enforceability of a foreign court, the time for appealing shall be two months (Article 43, paragraph 5, second sentence). The court hearing the appeal may change the decision under appeal and refuse a declaration of enforceability or revoke the grounds mentioned in Article 34 and Article 35 of the Regulation (Article 45, paragraph 1). On appeal, the decision of a foreign court "cannot in any way be subject to review as to substance" (Article 45, paragraph 2). Article 45, paragraph 1 of the Regulation does not authorise the court of second instance to amend the substantive matter in a decision given in the proceedings by a court of first instance. The court of appeal, which considers that there are grounds to consider an application for a declaration of enforceability of a foreign court, repeals the contested decision and refers the matter back to the court of first instance. The decision given in the second instance, following the lodging of an ordinary appeal, may be filed by an extraordinary appeal (cassation appeal) listed in Annex IV to the Regulation (Article 44).

Proceedings for a declaration of enforceability of a foreign court shall be suspended if one party fails to appear before the court of appeal. The court hearing an appeal stays the proceedings after finding that the debtor is not domiciled in any Member State (Article 43, paragraph 4 in conjunction with Article 26, paragraphs 2–4). The court with which an appeal is lodged may, on the application of the party against whom enforcement is sought, stay the proceedings if an ordinary appeal has been lodged against the judgement in the Member State of origin or if the time for such an appeal has not yet expired (Article 46, paragraph 1). The court may also make enforcement conditional on the provision of such security as it shall determine (Article 46, paragraph 3). The declaration of enforceability shall carry with it the power to proceed to any protective measures (Article 47, paragraph 2).[314]

Proceedings for a declaration of enforceability of a foreign court shall be suspended if one party fails to appear before the court of appeal. The court hearing an appeal stays the proceedings after finding that the debtor is not domiciled in any Member State (Article 43, paragraph 4 in conjunction with Article 26, paragraphs 2–4).

Official documents, made before the public authorities in Member States (notaries, administrative authorities), which have probative value in the country in which they were drawn (Article 57, paragraphs 1, 3), or court settlements included in the proceedings are enforceable in the Member State (Article 58) and are the subject of proceedings for a declaration of enforceability under the conditions regulated by other provisions of Chapter III of the Regulation (Article 38 et seq.). A court of second instance determining the means to challenge the decision on the declaration of enforceability may refuse to determine the feasibility of the instrument or judicial settlement, or to revoke the decision given at first instance on a finding of the implementation of these documents only if the enforcement of the instrument or court settlement would be "manifestly contrary to public policy in the Member State" in which these documents would be made (Article 57, paragraph 1 *in fine*). The European Court of Justice does not specify limits for applying a general clause referring to public order, allowing but not requiring the second instance court to refuse to determine the enforceability of the instrument or the court settlement. The literature on public international law has denounced the view that the basis for refusal of a declaration of enforceability of official documents and court settlements cannot be inadmissible to use these remedies to regulate certain social relations.[315] This approach was not justified. However, one can assume, ac-

[314] In the second argument of the decision of October 3, 1985 in the case of P. Capelloni and F. Aquilini v. J.C.J. Pelkmans, C-119/84, 1985 ECR 3147 the European Court of Justice ruled that the applicant has the right to initiate proceedings preventing a claim after the decision by the court of first instance, until the deadline for lodging an appeal by the debtor. See: M. Bogdan, U. Maunsbach, *EU Private...*, p. 63 et seq.

[315] M. Bogdan, *Concise Introduction to EU Private...*, p. 80.

cording to labour laws in force in some Member States, a number of decisions on various types of disputes can only be in the form of a judicial decision. An employee seeking the payment of wages from the employer is not entitled under the applicable labour law in Poland to waive the right to due remuneration for work. A labour court ruling issued after evidence procedures establishing the merits of the claim have been completed, is the sole way in determining the monetary claims covered by legal proceedings. Entering into a settlement before the court concerning a wage agreement, under which the employee waives his share of wages in exchange for concessions from the employer, such as changing the mode of termination of employment is inconsistent with the mandatory provisions of the Polish labour law (Article 84 LC). Noncompliance with the procedure referred to by generally applicable rules of labour law, which are mandatory standards, should be regarded as contrary to public policy in the Member State concerned. It is in the interest of every country to accept judgements, official documents and court settlements issued entered into by the parties to relationships (personal relationships) abroad in other Member States which are not necessarily incompatible with the standards in force in the country where they are being carried out. Since the provisions of Article 34 and Article 35 of Regulation No. 44/2001 are not listed as the legal basis for preventing the recognition or enforcement of foreign judgements because it is inconsistent with the mandatory provisions of the country in which such a decision is made entering the legal sphere, therefore, should be considered that the clause relating to the absence of an obvious conflict with state public policy implementation is the only means of protection state law that prohibits making certain types of activities, such as a judicial conclusion of settlements, in which workers may waive in whole or in part, their due salary.

A necessary condition for determining the feasibility of official documents and court settlements that do not conflict with the state law, is to provide a court or competent authority an application for a declaration of enforceability and its annexes: an official document, or a court settlement, whose performance in another country is to be found together with a certificate of authenticity and enforceability issued by the authority that issued this document or before which the parties have made arrangements recorded in this document. This certificate should be issued according to the forms annexed to the Regulation No. 44/2001 (Article 57, paragraph 4; Article 58).

European Enforcement Order for uncontested claims

Regulation (EC) No. 805/2004 of the European Parliament and the Council of April 21, 2004 on creating a European Enforcement Order for uncontested claims[316] which came into force on January 21, 2005, is applicable in the Member

[316] Official Journal of the European Union L 143/15, April 30, 2004.

States since October 21, 2005.[317] This Regulation is the first EU legal act issued in the implementation of the Council on November 11, 2000 on the programme of legislative measures to implement the principle of mutual recognition by the European Union Member States of judgements in civil and commercial matters.[318] This programme includes the first stage of the adoption of a European Enforcement Order for uncontested claims. The European Council at its meeting on October 15–16, 1999 accepted the principle of mutual recognition of judicial decisions issued in the Member States as "the cornerstone for the creation of a genuine judicial area" in the European Union.[319] The conclusions of the European Council in Tampere considered that the possibility of making judgements in other Member States than that in which the decision has been issued should be accelerated and simplified by dispensing with the use of indirect measures taken prior to enforcement in the Member State where the enforcement is to be made. A decision made by a "court of origin"[320] giving it an EEO certificate, must be considered for enforcement purposes, as if it were issued in the Member State in which its execution was requested. In point 8 of the paragraph of the Preamble to Regulation No. 805/2004 of the above is an example of the operation of the automatic execution of judgements on uncontested claims within the European Union. It uses the practice applied in the UK. It was found that the registration of a foreign court order bearing the certificate issued under Regulation No. 805/2004 shall follow the same rules as the registration of judgements rendered in one part of the United Kingdom (England, Wales, Scotland or Northern Ireland), without the powers of the authority for a professional recording control of a foreign court. The conditions to enforce foreign judgements are governed by the legislation of the Member States. The advantage of this procedure compared with procedure *exequatur* governed by the provisions of Regulation No. 44/2001 is that there is no need for a declaration by a judicial authority of another Member State in its declared enforceability in the Member State in which the above decision has been issued ("the country of origin") (Article 4, point 4).

In the case of a court order made in the absence of the debtor, in an uncontested claim, waiving all control measures in the Member State, it is likely to require Member States to ensure the ruling sufficiently guarantees the right to a "fair trial" ("due process of law") and the right to represent the debtor and their rights. In view of these needs the Preamble to Regulation No. 805/2004

[317] With the exception of Article 30–Article 32 regarding information on review procedures, processes and bodies, amendments to the annexes and supporting committee of the commission obligated by Article 75 of Regulation No. 44/2001 to file within five years of the Regulation No. 44/2001 being in force, a report on its implementation by Member States authorities, which shall apply from the date of January 21, 2005 (Article 33).

[318] OJ C 12, p. 1, January 15, 2001.

[319] The third paragraph to the Preamble of Regulation No. 805/2004.

[320] The court or tribunal before which the ruling has been made (Article 4, item 6).

stressed the necessity of setting minimum standards for the proceedings leading to the decision being enforceable in all EU Member States to ensure that the debtor is informed about the proceedings initiated against him by the courts, the obligation to actively participate in the proceedings and the legal consequences of failure to comply with this obligation. Due to the differences in the rules of civil procedure in the Member States in matters relating to the service of notices, legal documents and pleadings of the parties to the proceedings, the Regulation No. 805/2004 regulates the minimum standards for service of documents during court proceedings. EU legislature concluded that the method of service of these documents is based on a legal fiction which derives from the theory of proper notice in all cases in which an opportunity to review the documents was created and cannot be considered sufficient to give a ruling with a certificate EEO. Regulated by Regulation No. 805/2004 the service of judicial documents techniques are characterised by either absolute certainty (Article 13) or very high degree of probability (Article 14) that the document has reached the addressee. In this last case, the Regulation allows the issue of an EEO when the procedural system of a given Member State has in its use an appropriate legal mechanism allowing the debtor seeking full review of a decision in accordance with the conditions stipulated under Article 19 in situations when (despite compliance with Article 14) the documents did not reach the addressee.

Courts competent to examine compliance with the minimum standards of conduct stipulated in the rules of civil procedure were required to adopt – after determining that procedural requirements have been met – a standard certificate EEO. Mutual trust in the justice of the Member States justifies the assignment of regular monitoring of the proceedings in other Member States by a Member State's court to issue such a ruling without having to conduct additional screenings by the court of the Member State in which such a decision has to be done.

Regulation No. 805/2004 does not require Member States to adapt their national rules of civil procedure to the minimum European standards. By offering the possibility of effective and immediate execution of foreign judgements in other Member States if they meet the minimum procedural standards, it inspires the authorities of the Member States to implement European standards into their domestic law.

Regulation No. 805/2004 does not require a foreign court ruling to be granted an EEO certificate. Creditors who intend to carry out enforcement in a Member State pursuant to a decision issued by a court of another Member State have the right to choose the system of recognition and enforcement regulated by EC Regulation No. 44/2001 (Article 27).

Regulation No. 805/2004 is applicable in all Member States of the European Union, with the exception of Denmark.

The scope of that Regulation is essentially identical to the scope of Regulation No. 44/2001. I am writing in general, as in Article 2, paragraph 1 of Regulation No.

805/2004 in the calculation of sample cases in which the Regulation does not apply outside the listed tax matters, including customs and administrative matters relating to State obligations for acts or omissions of public authorities and administrations exercise of public authority (*acta jure imperii*). These matters do not fall within the scope of labour law regulation. In assessing the scope of Regulation No. 805/2004 from the perspective of labour law it must be stated that it did not apply in matters relating to the determination of legal capacity of individuals in labour relations (Article 2, paragraph 2, point "a") and social insurance (Article 2, paragraph 2, point "c"). Comparing the ranges of validity of Regulation No. 44/2001 and Regulation No. 805/2004 one should conclude that Regulation No. 805/2004 cannot be applied to matters arising from contracts of employment. It applies only to claims arising from such agreements. However, the above interpretation of the scope of the regulation based on a comparison of both the scope of the regulations was incorrect because it would be based on the generally accepted legal meaning of the term "claim." For purposes of Regulation No. 805/2005 the meaning of that term was limited to claims for payment specified, unlimited, the required sum of money or a sum of money which the due date is specified in the decision, judicial settlement or other official document (Article 4, paragraph 2). Thus, in matters of employment law, the Regulation No. 805/2004 is applicable only to all, well-defined monetary claims arising from contracts of employment. Strict interpretation of this provision may limit the scope of the proposed regulation only to property claims arising directly from contracts of employment, it is only to salary and other benefits to property controlled by such an agreement. This interpretation of the provisions of Regulation No. 805/2004, based on an interpretation of a provision of Article 18, paragraph 1 of Regulation No. 44/2001, the differentiation would lead to unjustified property claims that could be enforced by workers. The employment contracts are not generally known to provide wealth enjoyed by workers in the event of dismissal for reasons not related to employees during redundancies. In addition to remuneration for work, the employment contracts are not governed by any other provision of property granted to workers by virtue of employment under the employment relationship. Compensation for employees to refrain from competitive employment with another employer after employment contract termination, who is mentioned in the anti-competition clause, could be enforced in a proceeding governed by the provisions of Regulation No. 805/2004, depending on whether the clause would be introduced to competitive employment contract or having assumed the legal form of a separate agreement on the prohibition of competition. For these reasons, I believe that in matters of labour law, provisions of Regulation No. 805/2004 apply to all monetary claims arising from individual labour relations established on the basis of individual employment contracts. It should be noted that the above interpretation of the scope of the proposed regulation creates opportunities for redress of specific sums of money, also pursuing actions for compensation of workers from employers in proceedings conducted before separate labour courts or other authorities in the Member States exercising justice in matters of employment law.

The EEO established by the Regulation Order for uncontested claims is intended to allow – with the introduction of uniform minimum procedural guarantees to debtors – the free movement of judgements, court settlements and official documents within the European Union, without the need to initiate any proceedings to enforce the intermediate amounts recoverable by law enforcement authorities in other Member States than the one in which execution is to be carried out (Article 1). The key legal concept used in Regulation No. 805/2005 is the term "uncontested claim." It has been defined in Article 3, paragraph 1 of this Regulation. The meaning of this provision, the claim is considered to be "uncontested" in the event of one of the four alternatives set out in Article 3, paragraph 1, point "a" of the Regulation, characterising the behaviour of the defendant in proceedings by one party to the individual relationship to assert property arising from a contract of employment which:

- was considered an action or entered into before a court for settlement, under which the debtor agreed to pay the plaintiff the claimed amount of money;
- did not object to an order to pay the amount covered by the request of the petition;
- denied the allegations which the plaintiff relied on the claim, but did not enter an appearance and did not attend the hearing and did not send a legal representative. If – according to the court ruling – this behaviour can be considered as a "tacit admission" of the claim, there are grounds for considering a claim as being uncontested;
- considering the claim in an official document.[321]

Decisions, judicial settlements, official documents for uncontested claims are issued by a court or tribunal of a Member State irrespective of the name, whether an order, decision, ruling, decree, writ of execution, as well as irrespective of the procedure and court instance in which these decisions have been issued, a certificate of execution of the European Court is issued on the application at any time by the court of origin. The requirements for issuing this certificate are described by Article 6 of the Regulation. A prerequisite for issuing an European Enforcement Order is an enforceable decision in a Member State, not having been in conflict with the rules on jurisdiction laid down in the third and sixth sections of Chapter II of Regulation No. 44/2001. Remaining decisions in conflict with the provisions concerning jurisdiction in matters of employment law (Section 5 of Chapter II of Regulation No. 44/2001) do not prevent the decision to give an EEO certificate. This is due to the way rules of jurisdiction in matters relating to "the indi-

[321] An official document within the meaning of Article 4, point 3 of Regulation No. 805/2004 is a document which is formally drawn up or registered as an official document, issued by the competent public authority or other authority empowered by a Member State which confirms the authenticity of the signature and its content. In family matters, the nature of the instrument has an arrangement relating to maintenance obligations concluded with administrative authorities or authenticated by them.

vidual employment contract" are structured. Article 18, paragraph 1 of Regulation No. 44/2001 establishing the specific rules of jurisdiction in these matters does not preclude the application of Article 4 and Article 5, paragraph 5 of the universal jurisdiction in cases brought against the debtors not resident in a Member State and special jurisdiction in matters relating to disputes arising from the operations of a branch, agency or other entity (company) located within the European Union. Moreover, in matters of labour law, a breach of jurisdiction shall not be considered by the legislature of the EU as an obstacle that prevented the granting of the certificate allowing a decision in another Member State in order to protect the rights and interests of employees. It should however be noted that the European Enforcement Order certificate may also be granted through a ruling, a court settlement or an official document, whose beneficiary is the employer.

A ruling issued in the Member State in which the debtor was domiciled within the meaning of Article 59 of Regulation No. 44/2001, was awarded an EEO, where the claim was considered to be common ground due to "a tacit recognition" (Article 3, paragraph 1, points "b" and "c") of the debtor, refers to an agreement concluded by the person for a purpose which can be regarded as outside his trade or profession (Article 6, paragraph 1, point "d"). The employee is such a person. However, the literal interpretation of this provision, in particular the phrase "(...) agreement signed by the person, the consumer, in order, which can be regarded as being outside his trade or profession (...) indicates a contract governed by civil law, concluded with consumers."

Assigning EEOs is issued to the entire decision, including litigation costs if they are feasible and not disputed by the debtor (Article 7) or the part thereof that meets the requirements of the provisions of the Regulation (Article 8). If the legal status of the decision is changed, to which an EEO has been granted (deprivation, suspension or limitation of enforceability), at the request of the interested party, a certificate indicating the lack or limitation of enforceability is issued (Article 6, paragraph 2). In contrast with the procedure *exequatur*, governed by the provisions of the Regulation allowing the court to consider whether the proceedings terminated a decision given in another Member State meet the formal requirements of Regulation No. 44/2001 and requiring a court in the State of enforcement to refuse a declaration of enforceability of the reasons clearly set out in Regulation No. 44/2001, Regulation No. 805/2004 authorises a court of origin to rule in an EEO only if the proceedings in the issuing State meet the procedural requirements of Chapter III entitled "Minimum standards of the procedures for uncontested claim" (Article 12–Article 19) of Regulation No. 805/2004 (Article 12, paragraphs 1 and 2).

The minimum standards relate to civil procedure, how documents are served, notices, legal documents and pleadings, the scope of information about court proceedings provided to the debtor, their procedural obligations and legal consequences of their failure. Documents instituting the proceedings, which may cul-

minate in an enforceable decision, are to be delivered to the debtor by one of the four methods listed in Article 13, paragraph 1, points "a" to "d" of the Regulation No. 805/2004, classified as "service with proof of receipt by the debtor":

a) personal service attested by an acknowledgement of receipt containing a reference to the date of receipt and signed by the debtor;
b) personal service attested by a document signed by the person who effected the service stating that the debtor received the document or refused to receive it, mentioning the date of service;
c) postal service with acknowledgement of receipt containing the date receipt, signed by the debtor;
d) service by electronic means (fax or email) with an acknowledgement of receipt, including the date of receipt and the signature of the debtor.

Summons to a court hearing may also be communicated to the debtor orally at the previous hearing, or during the same hearing. This method of notification should be recorded in the minutes of the hearing (Article 13, paragraph 2).

Regulation No. 805/2004 allows the debtor to receive court documents and proceedings documents without personal confirmation of receipt by the party to the proceedings. Such notification is effective when it has been made by one of the six ways listed in Article 14, paragraph 1, points "a" to "f":

a) by personal delivery to the address of residence of the debtor in the hands of people who live with him in the same household, or those employed therein;
b) in the case of a debtor doing business or in the case of a legal person, by personal service at the debtor's business premises, into the hands of one of the employees;
c) submission of the document in the debtor's mailbox;
d) depositing an instrument in the right post office or public authority upon written notification of the debtor, left in his mailbox. Written notification of the deposit of the document should clearly identify the nature of the document as a court document and contain information about the legal implications of this act, causing the effects causing the start of service and time periods regulated by law;
e) postal service without confirmation, after certification by the deliverer if the debtor has his address in the country where the decision was made;
f) electronically, with an automatic confirmation of receipt, provided that the debtor has expressly accepted this method of service.

Article 15 of the Regulation instructs to make delivery in accordance with the provisions of the regulation for persons representing the debtor, for example, his legal representation.

The provisions of Article 16 and Article 17 of the Regulation specify the requirements to be met by the documents instituting the proceedings, that they have properly informed the debtor of the asserted cash claims. The document instituting the proceedings or an equivalent document must include information

about: the parties (the names and addresses of the parties), the amount claimed, the amount of interest, the interest rate and the period for which the interest is claimed[322] and the legal basis of the claim (Article 16). In addition, the document instituting the proceedings or any defendant called before the trial court should be clearly indicated by the necessary procedural measures, such as the period within which the defendant is entitled to contest the claim in writing, name and address of a judicial or other body to which the answer to the claim must be brought or before which to appear for trial, time of the trial and the instruction on the necessity or otherwise of the use of expert legal representation (Article 17, point "a"). The document instituting the proceedings or other official document sent to the debtor by a judicial authority, in which the pending court case should contain information about the legal consequences of failure to comply with the procedural steps – does not make a response to the lawsuit, failure to appear at the hearing and the possibility of a court decision or its implementation in relation to the debtor and an order for the debtor to pay plaintiff's court costs and legal representation (Article 17, point "b"). Failure to comply with these requirements does not prevent a court adjudicating in the Member States issuing a certificate stating the decision to give an EEO, because tainted by a procedural decision may be cured, if it was served on the debtor in accordance with the procedural requirements stipulated in Article 13 or Article 14 of the Regulation, and the debtor had the opportunity to challenge this decision through the use of full control in the decision, in due time before bringing forth an appeal and had been duly notified of the decision issued, its contents and the procedural requirements that must be satisfied in order to effectively challenge this ruling. In particular, the debtor should be made aware of the name and address of the institution to which an appeal must be lodged and the deadline for submission of the measure. The final condition of validating the decision handed down in breach of procedural requirements is to refrain from an appeal by the debtor (Article 18, paragraph 1, points "a" to "c").

Proceedings in the Member State ruling inconsistent with the procedural requirements stipulated in Article 13 or Article 14 of Regulation could be cured if the conduct of the debtor in the court proceedings expressed that he had personally received the document to be served in sufficient time to prepare a defecse (Article 18, paragraph 2). In exceptional cases, such as *force majeure*, other out of the ordinary circumstances not at fault of the debtor, preventing the preparation of the defence because of the service of official documents without confirmation of receipt by the debtor, the minimum control standards issued in the ruling require the debtor to allow him to exercise the right to bring an appeal (Article 19).

[322] Exempt from this obligation are the claims coming together with statutory interest at the legal systems of Member States where statutory interest is added to the principal amount claimed (Article 16, point "c" *in fine*).

Only after the completion of the minimum standards of procedural ruling is it possible to give an EEO certificate.

A judicial decision which was awarded this certificate by a court ruling in a Member State of that ruling, is automatically (*ex lege*) recognized and enforced in the other Member States without a declaration of enforceability and without any possibility of opposing its recognition (Article 5). The judgement which has been certified as an EEO shall be enforceable under the same conditions as other judgements issued in the State in accordance with the procedure of enforcement in that State (Article 20, paragraph 1). Enforcement proceedings are initiated at the request of the creditor. To the enforcement request, a plaintiff is obliged to provide the competent enforcement authorities of the Member State with the enforcement document (a copy of the decision of a foreign court which meets the conditions necessary to establish its authenticity), the executive title (a copy of an EEO certificate to satisfy the conditions to establish its authenticity) if necessary, a transcription of an EEO certificate or a certified translation into the official language of the Member State of enforcement. The party seeking enforcement in any Member State which has been certified as an EEO is not obligated to make any security or caution in this respect, proving they are a foreigner or not having residence or establishment in the State of issue (Article 20, paragraphs 1–3).

At the request of the debtor the competent court in the Member State refuses to execute a foreign decision which has been certified as an EEO, if that decision is *irreconcilable* with a previously issued ruling in any country (State or third country) in a dispute between the parties in an identical case, if the previously issued ruling has been issued in a Member State of enforcement or fulfils the necessary conditions for recognition in that state, or if the party could not raise a plea of irreconcilability in the judicial decisions of a Member State of origin (Article 21, paragraph 1). Under no circumstances may the judgement or its certification as a European Enforcement Order be reviewed as to their substance in the Member State of enforcement (Article 21, paragraph 2).

The provisions of Chapter V and VI (Article 24–Article 25) reiterated the regulations pertaining to a declaration of enforceability of judgements in respect of court settlements and official documents.

Chapter 3

Judicial co-operation of Member States in matters of employment law

Creating in the European Union the area "of freedom, security and justice"[323] in labour issues, requires the cooperation of the courts and other institutions in the exercise of justice in these matters in Member States on matters relating to the service of judicial and extra-judicial documents, taking of evidence and the establishment of minimum common rules for the use of legal assistance by the workers. Minimum standards for judicial cooperation, creating a system of judicial assistance and legal aid, are treated as part of the EU system of cooperation and legal assistance in civil and commercial matters are ensured by the three instruments of the Council of the European Union: Regulation No. 1348/2000 of May 29, 2000 on the service in the Member States of judicial and extra-judicial documents in civil and commercial matters,[324] Regulation No. 1206/2001 of May 28, 2001 on the cooperation between the courts of the Member States in the conduct of evidence in civil and commercial matters,[325] and the Directive 2003/8/EC of January 27, 2003 on improving access to justice in cross border disputes by establishing minimum common rules relating to legal aid in such disputes.[326]

§ 1. Judicial assistance

With the term "legal assistance" I present the basic principles of cooperation of judicial authorities of the Member States deciding in matters of employment law, the limits of the procedural rules of international labour law in two ways: the first relating to the proper service to the interested parties of the judicial and extra-judicial documents and the second consisting of enabling the taking of evidence in these matters.

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[323] The concept adopted in the so-called "Vienna Action Plan," OJ, C 19, January 01, 1999, p. 1.
[324] OJ, L 160/37, June 30, 2000, p. 37.
[325] OJ, L 174/1, June 27, 2001, p. 1.
[326] OJ, L 26/41, January 31, 2003.

SERVICE OF DOCUMENTS

The proper functioning of the common market within the European Union needs to improve and expedite the flow of judicial documents in civil and commercial matters, including labour matters, serving such documents to judicial authorities in the Member States. The efficiency of serving documents depends on the efficiency and speed in judicial procedures in these matters. The realisation of these objectives justifies the use of all available means of transmission of judicial and extra-judicial documents between Member States of the European Union. Regulation No. 1348/2000 requires Member State authorities to participate in the central system of official service of documents in civil or commercial matters. As part of the obligation of all Member States, authorities are organising "transmitting agencies" and "receiving agencies," whose responsibilities include the transmission and reception of judicial or extra-judicial documents to be served in another Member State (Article 2, paragraphs 1–2). In addition, each Member State shall designate a "central body," responsible for exercising supervision over the transmitting and receiving agencies, responsible for providing information to the transmitting agencies, solving problems that may occur in the process of transmission, and in exceptional cases, targeting at the request of the transferring agency of another Member State requests for service to the competent agencies in the host Member State (Article 3).

The procedure for the provision of official documents has been organised on the principle of direct and rapid transfer of documents between designated agencies. Court documents must be sent through these agencies. Extra-judicial documents may be transmitted for service in other Member States in the same manner as the court documents (Article 16). Regulation No. 1348/200 authorises agencies to transfer the documents that may be carried out by any appropriate means, provided that the content of the document received is true and faithful to that of the document forwarded and that all information in it is easily legible (Article 4, paragraphs 1–2). The documents are exempt from the requirement of legalisation (Article 4, paragraph 4). For each transmitted document accompanied by a request made by a single form, the model is set to be presented in the Annex to the Regulation. The application must be filled in the official language of the Member State to which the documents are forwarded (Article 4, paragraph 3).

Official documents need not be translated into the official language of the Member State to which they are to be served. However, the person making the request for documents should be advised by the agency providing the recipient the right to refuse to accept the document if it is not written in the official language or if in a particular Member State there are two official languages, it is not written in one of these languages (Article 5) or in a language which the addressee understands in the Member State of origin of the document (Article 8). Refusal to accept a document is not treated by the judicature as the lack of an effective serv-

ice, provided that the translation service was to be sent to the addressee as soon as possible.[327] In the judgement issued in *Leffler v. Berlin*, the Court introduced the concept of validity in serving the court documents in the provision of the Regulation No. 1348/200, claiming there is no obligation for the official documents to be translated into the language understood by the debtor. Only the content of the application form to reflect the additional attached document should be written in the official language of the country to which the documents are addressed. The Court concluded that the provisions should be construed to be presumed that the official documents were served on the party in such a way that the party was able to become familiar with them. This implies the need to translate the documents drawn up if they are in an incomprehensible language for the defendant. Official documents are to be served as soon as possible. If the receiving agency cannot provide the document within one month, it must notify the transmitting agency (Article 7). The deadline for receipt of the document by the receiving agency is treated as a term of service in accordance with the rules of a Member State to which the document was forwarded (Article 9, paragraph 1). After receiving notification of the document the receiving agency issues a certificate of the completion of service transactions and forwards them to the transmitting agency (Article 10). Serving court documents from another Member State does not give rise to any cost of service. The transferor of such documents is required to pay the costs associated with the public officer to provide the documents and the costs caused by a particular method of service of documents (Article 11, paragraphs 1 to 2).

The serving of official documents does not preclude the possibility of service of judicial and extra-judicial documents by consular and diplomatic representatives[328] by mail (Article 14) or directly by the court officials, other officials or other competent persons of the Member State to which the documents have been submitted (Article 15). The Regulation does not establish any relationship between specific means of service or set of official documents.[329] It introduces only to the service of judicial documents the agency of sending and receiving. The exercise by the judicial authorities of the two different methods of service of judicial documents, through one agency by another, which is to use one of the three options set out in the provisions of Section 2 of Chapter III as "other means of service of judicial documents," is only relevant in determining the date of service of the sent document.[330]

[327] ECJ Judgement on November 8, 2005 in the case of Götz Leffler v. Berlin Chemie AG, C-443/03, 2005 ECR I-9611. See: M. Bogdan, U. Maunsbach, *EU Private...*, p. 299 et seq.

[328] Article 12 of Regulation No. 1348/2000 allows for this possibility, in exceptional circumstances.

[329] The argument of the first ECJ Judgement on February 9, 2006, in the case of Plumex v. Young Sports NV, C-473/04, 2006 ECR I 1417. See: M. Bogdan, U. Maunsbach, *EU Private...*, p. 310 et seq.

[330] The second argument in the ECJ Judgement in Plumex v. Young Sports NV. See: M. Bogdan, U. Maunsbach, *EU Private...*, p. 310 et seq.

Article 19, paragraph 1 of the Regulation prohibits the court adjudicating in the Member State in proceedings where the debtor lives or stays in another Member State, a ruling in spite of the transfer application or an equivalent document initiating a civil proceeding where the debtor failed to appear for trial. Adjournment of the judgement or other relevant decision may occur only after finding the official document had been served as specified in accordance with the provisions of the procedures in force in the Member State to which the document was sent or where it is noted that the document was served on the debtor or to place of residence, in a manner otherwise provided for in Regulation No. 1348/2000. From the above restrictions on the freedom to rule in the absence of the debtor, the authorities of the Member States may depart from notifying the Commission of the European Union, that notwithstanding the prohibition laid down in Article 19, paragraph 1 of the Regulation, the court may make a decision, even if they received a certificate of service or have supplied an official document satisfying the three conditions laid down in Article 19, paragraph 2, points "a"–"c." The first requirement is that the transfer of the document was done by one of the ways of transmission of official documents provided for in this Regulation. The second condition is the expiry of the period set by the court, not less than six months, which begins on the date of dispatch of the document. The last condition concerns the absence of any statement of service of the document, despite all the reasonable steps taken to obtain such certification from the appropriate agencies or authorities of a Member State to which it is addressed.

The debtor who did become familiar with the official document through no fault of his own, yet received the document in sufficient time to prepare a defence or an appeal against the decision at first instance, the court may restore the time limit for carrying out the necessary procedural steps. The same order may be issued after the disclosure by a debtor who had not appeared at the hearing, of allegations *prima facie* of the deficiencies contained within the issued ruling (Article 19, paragraph 4, points "a"–"b").

TAKING OF EVIDENCE

It is essential to the decisions in the matters of employment law relating to contracts of employment, in which there are foreign elements, and claims arising from such agreements, to collect evidence in other Member States. In view of this, the seventh thesis of the preamble to the Regulation No. 1206/2001 has expressed the conviction that the Community may not be limited to the transmission of judicial and extra-judicial documents in civil or commercial matters. It was found that there is an urgent need to further improve cooperation between the courts of the Member States in the collection of evidence. Regulation No. 1206/2001 lays down rules for judicial assistance in matters of evidence in labour, civil and commercial matters involving a foreign element. Pursuant to the provisions of this Regula-

tion, a court of one Member State has the right to request the competent court of another Member State to obtain evidence or to allow it to carry out a direct collection of evidence in another Member State (Article 1, paragraph 1, points "a"–"b"). Requests for evidence are to be directly transferred between the courts involved. Each Member State shall draw up a list of the courts competent for the performance of taking of evidence according to this Regulation (Article 2). Each Member State shall designate a central body responsible for the coordination of the listed courts (Article 3). A request for evidence should be made in accordance with the requirements of the form, which was annexed to the Regulation No. 1206/2001. A list of data that should be included in the proposal was made in Article 4, paragraph 1 of this Regulation. Among other things, the court requesting the taking of evidence is required to describe the evidence to be carried out. In the case of a request for hearing people (witnesses, experts or parties), the application should contain personal details and addresses of such persons, the questions to be asked, a description of the facts on which the designated persons are to be heard and any other requirements referring to testimony (after giving oath and being notified of the criminal liability for giving false evidence). Request for evidence and any other information regarding the desired evidence of conduct should be drawn in the official language of the Member State which the competent court has been asked to undertake the evidence (Article 5). Requests and communications pursuant to this Regulation shall be transmitted by the swiftest possible means, which the requested Member State has indicated it can accept (Article 6). The competent court summoned in another Member State to carry out the taking of evidence, sends it within 7 days of being serviced requesting confirmation of receipt. Where the request does not comply with the conditions laid down in Articles 5 and 6, the requested court shall enter a note to that effect in the acknowledgement of receipt (Article 7). In the event that an incomplete application has been filed, the court serviced, which can not, therefore, follow the steps listed in the application process immediately, no later than within 30 days of receipt of the application asks the court which made the request to provide missing information or deposit or advance payment towards the expenditure on the remuneration of experts, translators, the costs resulting from the use of special procedures, communications technology (video conferencing, teleconferencing). With the exception of expenses to cover the activities listed in Article 18, paragraph 2 of the Regulation, the request does not give rise to a claim for refund of any fees or costs (Article 18, paragraph 1). A request for evidence means the requested court shall execute promptly, at the latest within days of its receipt (Article 10, paragraph 1). The time limit shall begin to run when the requested court received the request duly completed (Article 9, paragraph 1).

The court of inquiry summoned, executes the request in accordance with the procedure applicable in the Member State (Article 9, paragraph 2). However, at the request of the requesting court for execution of the request in accordance with

the special procedure laid down by the law of the Member State requested the court to comply with the procedural requirements in force in another Member State, provided that they are not inconsistent with the law of the Member State of the requested court. The requested court shall comply with such a requirement unless this procedure is incompatible with the law of the Member State of the requested court or by reason of major practical difficulties (Article 10, paragraph 3). The requesting court may ask the requested court to take evidence through communications technology, in particular, video conferencing and teleconferencing. The requested court shall comply with such a requirement unless this is incompatible with the law of the Member State of the requested court or by reason of major practical difficulties (Article 10, paragraph 4). If the law of the Member State requesting the court allows the participation of the parties and their representatives in the process of the operation, these people have the right to be present at the taking of evidence requested by the court (Article 11, paragraph 1). If the participation of the parties and, if any, their representatives, is requested at the performance of the taking of evidence, the requested court shall determine the conditions under which they may participate (Article 11, paragraph 3). The information concerning the place and date of taking of evidence is notified by the requested court, notifying the parties and their representatives (Article 11, paragraph 4) and the requesting court (Article 11, paragraph 5). The requested court shall apply the appropriate coercive measures in the instances and to the extent as are provided for by the law of the Member State of the requested court for the execution of a request made for the same purpose by its national authorities or one of the parties concerned (Article 13).

Request for proof of the witness or the parties will not be executed if the person acting as one of the two roles in the process of a witness or the parties will exercise its right to refuse to testify or not testify in accordance with the law of the requested court or the requesting court (Article 14, paragraph 1, points "a"–"b").

The court asked to comply with a request may refuse to perform the operations specified in the application process in four cases listed in Article 14, paragraph 2, points "a"–"d" of the Regulation, in the case of not completing the application by calling for the taking of evidence, do not pay an advance on the intended action. Reasons for refusal to carry out the evidence may also be requested in matters not regulated by Regulation No. 1206/2001 or not under the judicial power in the requested State.

After the evidence cited in the application, the requested court shall immediately transmit to the court requesting the documents certifying the execution of the request (Article 16).

The court hearing the civil cases in one Member State has the right to request the central body of another Member State to take evidence directly in that other State (Article 17, paragraph 1). Within 30 days of receipt of the central body or the competent authorities of a Member State shall notify the court which made

such a request as to whether the proposal was adopted. The central body or the competent authority may assign a court of its Member State to take part in the performance of the taking of evidence in order to ensure the proper application of this Article and the conditions that have been set out in Regulations 1206/2001 as well as under what conditions according to the law of its Member State such performance is to be carried out (Article 17, paragraph 4). Direct taking of evidence may only take place if it can be performed on a voluntary basis without the need for coercive measures (Article 17, paragraph 2). The application for the direct taking of evidence by the requesting court may be not covered in the three cases referred to in Article 17, paragraph 5, points "a"–"c" of the Regulation, so if the application relates to matters not covered by that Regulation or the Regulation does not contain the necessary information required by Article 4 of this Regulation, the direct taking of evidence requested is contrary to fundamental principles of the Member State in which the evidence sought to be carried out.

§ 2. Legal assistance

The minimum, uniform standards relating to legal aid in EU Member States are formulated by Directive 2003/8/EC. The purpose of this Directive is to encourage to apply for legal aid in cross-border disputes by persons without sufficient assets. The European Council considers that the lack of material resources, or the difficulties resulting from the transboundary nature of the conduct at issue, should not hinder the effective access to justice for all citizens and other persons permanently resident in the Member States of the European Union. Legal aid should cover pre-trial advice to resolve the dispute before bringing the matter to the courts, legal aid in court proceedings and help in paying court costs or exemption from costs.

Directive 2003/8/EC applies to cross border disputes, which are defined as disputes involving the applicant for legal aid or permanent residents in other Member States than the one in which the court is located, before which the dispute is pending or a court whose decision will be handed down (Article 2(1)).

THE RIGHT TO LEGAL AID

All individuals involved in legal disputes falling within the scope of the Directive are entitled to receive appropriate legal aid in order to allow their effective access to justice in the Member States in accordance with conditions laid down in this Directive (Article 3, paragraph 1). Legal aid is considered to be appropriate when it guarantees "pre-litigation advice" with a view to reaching a settlement prior to bringing legal proceedings, and legal assistance and representation in court, and exemption from, or assistance with, the cost of proceedings of the recipient,

including the costs and the fees to persons mandated by the court to perform acts during the proceedings (Article 3, paragraph 2, points "a"–"b"). Decisions related to the provision to persons entitled to legal counsel are the sole responsibility of the competent authorities of the Member States. Directive 2003/8/EC requires the authorities of these countries not to discriminate when deciding on matters concerning the granting of legal assistance of European Union citizens and persons from third countries, legally residing in the territory of a Member State (Article 4).

THE CONDITIONS FOR GRANTING AND THE SCOPE OF LEGAL AID

Member States shall grant legal aid to persons entitled thereto, wholly or partially unable to bear the costs of civil cases because of their economic situation. Legal aid granted to these persons is to ensure their effective access to justice (Article 5, paragraph 1). The economic situation of those persons is assessed by the competent authority of the Member State in which the court is located. Directive 2003/8/EC leaves to the authorities of the Member States to determine the threshold above which may be accepted assumption that the person involved in a legal dispute may, partly or wholly cover the costs of the proceedings (Article 5, paragraph 3). The poverty threshold should be defined using a set of objective factors such as income, capital, family circumstances of the applicant, to obtain assistance and financial resources held by persons financially dependent on the applicant (Article 5, paragraph 2). In deciding to grant or refuse legal assistance by the competent authority may be empowered to reject a request for legal assistance if the applicant intends to take actions that appear to be manifestly unfounded (Article 6, paragraph 1).

Legal aid granted in the Member State in which the court shall allow costs directly related to the cross-border nature of the dispute, such as costs related to translation of documents into the language of force in the Member State in which the court is located, travel expenses at the hearing and the attorney (Article 7). Legal aid also includes extra-judicial proceedings, if the provisions in force in the State of location of the court require the parties to submit the dispute to an assessment of a conciliator, a mediator, or arbitrator that is not authorised to issue decisions binding the parties or where the parties have the right to decide the dispute prior to submission to the mediating authority that is not bound by the decision of the authority designated for an amicable settlement (Article 10). Legal assistance includes totally or partially the cover of costs of enforcement in the Member State in which the court is located (Article 9, paragraph 1).

Legal aid shall be granted or refused by the competent authority of the Member State in which the court is sitting, without prejudice to the party seeking legal aid, residing permanently in a different Member State (Article 12). Member State of domicile or residence of the person requiring assistance provides temporary le-

gal assistance, including costs associated with using the advice of a local lawyer or other person authorised by the court to give legal advice, incurred in that country pending a request for legal assistance by the State in which the court is responsible for hearing the case at issue and the costs of translation of the application and the documents accompanying the application for legal assistance by the competent authority of the Member State in which the court is located (Article 8).

Requests for legal assistance may be submitted to the competent Member State in which the applicant is domiciled or habitually resident (transmitting authority) or the competent authority of the Member State in which the head of the court hearing the case at issue (receiving authority) is located. The transmitting authority has the right to refuse the receiving authority the application if the application is obviously unfounded or is outside the scope of Directive 2003/8/EC. The transmitting authority is obliged to provide free assistance to the applicant in completing assembly of the application and its attachments. The documents attached to the application are not subject to verification (Article 13, paragraphs 1 to 6).

Member State authorities administering the legal aid cases are obliged to inform the claimant of proceedings in matters relating to the application. In the event of total or partial rejection the deciding bodies have a duty to give reasons for refusing the application. The refusal may be appealed, except for those cases in which decisions were taken by the courts or tribunals, whose decisions cannot be appealed (Article 15, paragraphs 1 to 3).

Directive 2003/8/EC does not prohibit Member States from adopting more favourable legal solutions for people seeking legal assistance (Article 20).

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