

5-2007

Social Security for Migrant Workers: The EU, ILO & Treaty Based Regimes

Barbara Fick

Notre Dame Law School, barbara.j.fick.1@nd.edu

Alma Clara Garcia Flechas

Pontificia Universidad Javeriana

Follow this and additional works at: https://scholarship.law.nd.edu/law_books



Part of the [International Humanitarian Law Commons](#)

Recommended Citation

Fick, Barbara and Garcia Flechas, Alma Clara, "Social Security for Migrant Workers: The EU, ILO & Treaty Based Regimes" (2007).
Books. 251.

https://scholarship.law.nd.edu/law_books/251

This Book is brought to you for free and open access by the Publications at NDLScholarship. It has been accepted for inclusion in Books by an authorized administrator of NDLScholarship. For more information, please contact lawdr@nd.edu.

SOCIAL SECURITY FOR MIGRANT WORKERS: THE EU, ILO AND TREATY-BASED REGIMES

BARBARA J. FICK*

University of Notre Dame Law School**

ALMA CLARA GARCÍA FLECHAS***

Pontificia Universidad Javeriana****

ABSTRACT

Migrant workers face special problems in terms of qualifying for, and receiving payment under, national social security

*Fecha de recepción: 20 de noviembre de 2006
Fecha de aceptación: 29 de marzo de 2007*

* Joined the Notre Dame Law School faculty in 1983 as a visiting associate professor of law, and became a permanent member of the faculty one year later. She earned her B.A. from Creighton University in 1972 and her J.D. from the University of Pennsylvania in 1976. A member of the Wisconsin Bar since 1976, Professor Fick has worked as an associate at the Milwaukee firm of Foley & Lardner (1976-78) and as a field attorney for the National Labor Relations Board in Philadelphia (1978-83). While at the NLRB, she also lectured in law at St. Joseph's University in Philadelphia (1981-1982).

** 209 Law School, P.O. Box 780 Notre Dame, IN 46556.

*** Abogada especializada en derecho laboral. Profesora investigadora de la Facultad de Ciencias Jurídicas de la Pontificia Universidad Javeriana. Asesora y consultora. Miembro de García & García Abogados.

**** Calle 40 # 6 -23 piso 5°, Bogotá, D.C., Colombia.

systems. In an effort to mitigate these problems, many states coordinate their social security systems. This paper explores how coordination schemes work in regional mechanisms such as the European Union, in international conventions adopted by the International Labour Organisation, and in multi-lateral treaties such as the Andean Social Security Instrument.

Key words: Migrant workers, Social security, European Union, International Labour, Organisation, EU Regulation 1408/71, ILO Convention N° 118, ILO Convention N° 157, Social Security Treaties.

*SEGURIDAD SOCIAL PARA TRABAJADORES
MIGRANTES: SU TRATAMIENTO EN LA UNIÓN
EUROPEA, EN LA ORGANIZACIÓN INTERNACIONAL
DEL TRABAJO Y EN EL DERECHO DE TRATADOS*

RESUMEN

Los trabajadores migrantes enfrentan problemas muy específicos en relación con su calificación dentro de los sistemas de seguridad social de los países receptores y respecto del pago de las prestaciones económicas que reconocen los diferentes sistemas. En un esfuerzo por mitigar esos problemas, muchos estados han venido coordinando sus sistemas de seguridad social. Este artículo explora cómo opera el mecanismo de la coordinación, tanto en procesos de integración regional como la Unión Europea, como en los convenios internacionales adoptados por la Organización Internacional del Trabajo y hace referencia también, a tratados multilaterales tales como el Instrumento Socio Laboral sobre Seguridad Social, de la Comunidad Andina de Naciones.

Palabras clave: trabajadores migrantes, seguridad social, Unión Europea, Organización Internacional del Trabajo, Regulación 1408/71 de la Unión Europea, Convenio 118 de la Organización Internacional del Trabajo, Convenio 157 de la Organización Internacional del Trabajo, tratados sobre seguridad social.

SUMMARY

Presentación

Introduction

The EU System

1. Scope of Coverage
 - a. Personal Coverage
 - b. Substantive Coverage
2. Conflict of Laws
3. Equal Treatment
4. Aggregation of Qualification Criteria
5. Exporting Benefit Payments
6. Overlapping Benefits

ILO Conventions

Convention 118

1. Scope of Coverage
 - a. Personal Coverage
 - b. Substantive Coverage
2. Equal Treatment
3. Exporting Benefit Payments
4. Aggregation of Qualification Criteria

Convention 157

1. Scope of Coverage
2. Conflict of Laws

3. Equal Treatment
4. Aggregation of Qualifying Criteria
5. Exporting Benefit Payments
6. Overlapping Benefits

Result of Ratifying C. 157

Treaties

Andean Social Security Instrument

1. Scope of Coverage
2. Conflict of Laws
3. Equal Treatment
4. Aggregation of Qualification Criteria
5. Exporting Benefit Payments
6. Overlapping Benefits

Conclusion

Bibliography

PRESENTACIÓN

La profesora BÁRBARA FICK se aproxima a los temas con tal profundidad jurídica y con tan notable seriedad investigativa, que su análisis constituye innegablemente, una fuente de conocimiento y de consulta obligada.

El tema de la seguridad social aplicable a los trabajadores migrantes dentro de la Unión Europea y su tratamiento por parte del derecho internacional laboral a través de los convenios y recomendaciones de la Organización Internacional del Trabajo entre otros, ha sido abordado por la profesora sobre la base de seis grandes ejes dentro de los cuales, la igualdad de tratamiento entre nacionales

y migrantes, así como el cumplimiento de requisitos para el pago de beneficios, bien pueden ser una guía para nuestro propio análisis dentro de la Comunidad Andina de Naciones y del Mercado Común del Sur. Digo guía, pues el esquema de coordinación de legislaciones sobre seguridad social que se practica en la Unión Europea cuyo funcionamiento se explica en este artículo, es de sustancial importancia para nosotros, en la medida en que nuestro proyecto se orienta fundamentalmente a dilucidar, la viabilidad o no de una legislación laboral armónica o coordinada entre los países integrantes de la CAN y de MERCOSUR.

En efecto, la regulación migratoria de cara a la seguridad social existente en la Unión Europea y en los convenios de la OIT, son un instrumento de obligada consulta, máxime cuando en nuestro continente, la CAN se ha caracterizado por estructurar bastas posibilidades de integración humana a nivel comunitario, que desafortunadamente se han quedado casi que en el papel, por falta de voluntad política de los países que la integran y por cuanto la juventud de MERCOSUR, no le ha permitido desarrollar plenamente sus herramientas migratorias.

INTRODUCTION

Traditionally, national social security legislation has been premised on a territoriality principle. Territoriality defined the scope of social security systems: coverage was based on working or residing within the national territory, and territorial elements determined whether individuals met qualifying conditions and conditions for payment.

This territoriality principle can detrimentally impact workers who reside in one nation but work in another, or who work in several different countries over the course of their working lives. For example, a worker *resides* in State A, whose social security laws provide coverage to workers employed within the territory of State A. This worker, however, *works* in State B, whose laws provide for coverage for workers who reside within the territory of State B.

Thus, this worker would consequently be ineligible for coverage in either State. Or, consider the worker who has been employed full-time for 30 years; he has worked ten years in each of three different countries. Each country's social security law provides for old-age pension benefits to workers who have completed at least 15 years of work within their respective territory. This worker would not be able to meet this qualifying condition for receiving a pension from any of the countries where he has worked. Other problems involve "double" coverage (where the worker is required to pay social security taxes to two countries for the same period of work) or refusal to pay earned benefits to non-resident workers.

These types of problems faced by migrant workers were recognized during the early years of industrialization. As early as 1919, France and Italy were signatories to a bilateral social security agreement addressing the problem of fragmented or lost social security benefits for migrant workers¹. Over the years other countries have followed suit, entering into bilateral and multi-lateral agreements on this issue. The International Labour Organisation (ILO) first addressed the issue of the acquisition and maintenance of pension rights for migrant workers with the adoption in 1935 of Convention 48, and the subsequent adoption of two other conventions (Nos. 118 and 157) dealing with this issue². Since 1958, the EEC/EU has adopted and implemented a series of regulations dealing with social security for migrant workers, culminating in the current Regulation 1408/71³.

-
- 1 Labour Treaty, Fr.-Italy, Sept. 30, 1919, 5 L.N.T.S. 279.
 - 2 International Labour Organisation Convention (n° 48) Concerning the Establishment of an International Scheme for the Maintenance of Rights under Invalidity, Old-Age and Widows' and Orphans' Insurance, June 22, 1935, 40 U.N.T.S. 73 (hereinafter Convention 48); International Labour Organisation Convention (n° 118) Concerning Equality of Treatment of Nationals and Non-Nationals in Social Security, June 28, 1962, 494 U.N.T.S. 271 (hereinafter Convention 118); International Labour Organisation Convention (n° 157) Concerning the Establishment of an International System for the Maintenance of Rights in Social Security, June 21, 1982, 1932 U.N.T.S. 29 (hereinafter Convention 157).
 - 3 Council Regulation 1408/71, 1971 O.J. (L 149) 2 (hereinafter Regulation 1408/71).

Each of these regimes (treaties, ILO and EU) addresses the social security problems of migrant workers by means of coordination rather than harmonization. In other words, these mechanisms are aimed at regulating the acquisition and retention of social security benefits (as defined by domestic legislation) through the coordination of existing domestic legislation, rather than attempting to amend domestic legislation to conform to a uniform transnational standard. Thus, domestic laws continue to differ, *inter alia*, as to the types of social security benefits offered, how benefits are financed, and the amount of benefits provided. Coordination requires changes to domestic legislation only as to those rules which disadvantage migrant workers with respect to the acquisition and retention of domestically defined benefits.

In order to successfully manage the problems created by the territoriality principle, a coordination scheme must address six issues:

1. defining the scope of the coverage of the coordination scheme;
2. establishing a standard to prevent conflicts of laws;
3. prohibiting unequal treatment based on nationality;
4. providing for aggregation of qualifying criteria;
5. alleviating territorial requirements for the payment of benefits;
and
6. preventing “double-dipping” or the overlapping of benefits.

The remainder of this paper will examine how each of the different regimes –EU, ILO and treaties– handles these issues.

THE EU SYSTEM⁴

The most fully developed coordination scheme for migrant worker social security benefits is the EU system. Article 39 of the EC Treaty⁵ guarantees the freedom of movement for workers within the EU and ensures the right to equal treatment with respect to access to employment and working conditions. Article 40 provides that the Council of the European Union (hereinafter Council) shall issue directives and regulations designed to promote freedom of movement, and, in particular, Article 42 requires the Council to

“adopt such measures in the field of social security as are necessary to provide freedom of movement for workers; to this end, it shall make arrangements to secure for migrant workers and their dependants:

- (a) aggregation, for the purpose of acquiring and retaining the right to benefit and of calculating the amount of benefit, of all periods taken into account under the laws of the several countries;
- (b) payment of benefits to persons resident in the territories of Member States⁶.

Consequently, the Council adopted Regulation n°1408/71, on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the European Community, and Regulation N° 574/72⁷, laying down the procedures for implementing Regulation N° 1408/71. In

4 The purpose of this section is to provide an overview on how the EU coordination scheme addresses the six problems created by the territoriality principle. It is not meant to be a comprehensive discussion of EU social security law. For a more detailed analysis, see FRANS PENNING, *Introduction to European Social Security Law* (4th ed. 2003).

5 Consolidated Version of the Treaty Establishing the European Community, Dec. 24, 2002, O.J. (C 325) 33,2002 (hereinafter EC Treaty).

6 *Id.*

7 Council Regulation 574/72, 1972 O.J. (L 74), 1.

effect, the former Regulation establishes the substantive rules for coordination and the latter contains the procedural and administrative rules for implementing the substantive rights.

1. SCOPE OF COVERAGE

A. PERSONAL COVERAGE

Regulation 1408/71 applies to three categories of persons:

“1. employed persons, self-employed persons and students who are nationals of an EU member state⁸;

2. family members and survivors of persons in category one; and

3. survivors, who are themselves nationals of an EU member state, of employed persons, self-employed persons or students who were covered under the social security legislation of an EU member state, regardless of the nationality of such employed or self-employed person or student”⁹.

For purposes of coverage under category one, an individual is considered to be “employed” or “self-employed” if the individual is insured for one or more contingencies covered under a social security scheme for employed or self-employed persons¹⁰. Thus the key to whether one is considered “employed” or “self-employed” for purposes of Regulation 1408/71 is based not on how domestic legislation defines an employed person, but rather on how domestic legislation defines who is covered by their own respective social security scheme. Therefore it is possible that an individual would not be considered “employed” for purposes of domestic labor legislation but would be covered by domestic social security

8 Refugees and stateless persons are also covered if they reside within the EU.

9 Regulation 1408/71, *supra* note 3 art. 2.

10 *Id.* at art. 1(a).

legislation and therefore would be considered “employed” for purposes of Regulation 1408/71.

“Under German law, for instance, a person who brings up a child under the age of three is compulsorily insured under the Old Age and Invalidity Pension Act, a form of employees’ insurance. If a person falls under this insurance on the grounds of raising a child, he is an employed person for the purpose of the Regulation, even if he does not work and has never worked”¹¹.

Moreover, so long as the individual is insured under any branch of the social security scheme, he is considered an “employed” or “self-employed” person for the purposes of the Regulation; one need not be covered by every provision of the social security scheme¹².

In terms of category two coverage, family members and survivors are covered regardless of their nationality, so long as the employed or self-employed individual to whom they are related meets the requirements for category one coverage.

Under category three, even if the employed or self-employed person who was covered by a social security scheme was not an EU national, his or her survivors are covered by the Regulation if the survivors are EU nationals.

B. SUBSTANTIVE COVERAGE

Initially, it should be noted that the Regulation applies only to legislation, defined as statutes and regulations, and does not include provisions contained in collective bargaining agreements, even if those agreements are made generally applicable by virtue of domestic legislation or authorization¹³.

11 Pennings, *supra* note 4 at 36.

12 Case 71/93, *Van Poucke v. Rijksinstituut voor de Sociale Verzekeringen*, 1994 E.C.R. 1101.

13 Regulation 1408/71, *supra* note 3 at art. 1(j).

Article 4 specifically lists the branches of social security to which the Regulation applies:

- a) sickness and maternity benefits;
- b) invalidity benefits, including those intended for the maintenance or improvement of earning capacity;
- c) old-age benefits;
- d) survivors' benefits;
- e) benefits in respect of accidents at work and occupational diseases;
- f) death grants;
- g) unemployment benefits;
- h) family benefits.

The Article expressly excludes social and medical assistance¹⁴. It is sometimes difficult, however, to determine whether a particular benefit constitutes social or medical assistance so as not to be governed by the coordination requirements of the Regulation. Over the years, the European Court of Justice has issued a series of decisions defining the distinction between social security *benefits* and social and medical *assistance*. In particular, at least two criteria have emerged as indicators of benefits vs. assistance:

- 1) if payment is discretionary it is assistance, whereas if an individual has an enforceable right to payment then it is a benefit¹⁵; and

14 *Id.* at art. 4(4).

15 Case 1/72, *Frilli v Belgian State*, 1972 E.C.R. 457.

- 2) if the purpose of the payment is related to one of the contingencies listed under the social security branches in Article 4 (a)-(h) it is a benefit, but if the purpose is for some other reason then it is assistance¹⁶.

2. CONFLICT OF LAWS

Article 13 of Regulation 1408/71 provides that for any given period of time, an employed or self-employed person can be subject to the social security legislation of only one state. Which state's law applies is determined by the rule of *lex loci laboris*, i.e. the law of the place where the person works, regardless of the place of residence, and regardless of the state of incorporation of the employing entity¹⁷. There are, however, several exceptions¹⁸ to the *lex loci laboris* principle:

- 1) workers employed on sea-going vessels are subject to the legislation of the state under whose flag the vessel sails (Article 13(2)(c));
- 2) civil servants are subject to the legislation of their employing state (Article 13 (2)(d));
- 3) posted workers (i.e. workers temporarily sent to work in another country for 12 months or less) are subject to the legislation of the country of employment prior to the posting (Article 14(1));

16 Case 249/83, *Hoeckx v Openbaar Centrum voor Maatschappelijk Welzijn*, 1985 E.C.R. 973.

17 Regulation 1408/71 *supra* note 3 art. 13(2)(a).

18 The most common exceptions will be noted; the Regulation provides for other special circumstances, e.g. persons in the military or consular service or persons in interstate transport, which will not be discussed in this paper.

- 4) persons who regularly work in more than one state are subject to the legislation of the state of residence if the state of residence is one of the sites where the individual works; if the individual does not work in the state of residence, then he is subject to the legislation of the state where the employing entity is registered (Article 14(2)(b));
- 5) persons who regularly work in more than one state, and are employed by more than one employing entity which have their registered offices in different states, are subject to the legislation of the state of residence (Article 14(2)(b));
- 6) persons to whom the legislation of a state ceases to apply, without the legislation of another state becoming applicable, are covered by the legislation of the state of residence (Article 13(2)(f)). This last exception applies to persons who permanently retire from the workforce, and in some circumstances it also applies to persons who temporarily cease employment¹⁹.

19 For persons who temporarily cease employment, there are currently no definitive guidelines for determining whether the law of the state of last employment applies (under Article 13(2)(a)) or the law of the state of residence (under Article 13(2)(f)). At least one factor which the European Court of Justice (ECJ) appeared to rely on was whether there was a close link between the state of previous employment and the individual at the time the individual applies for benefits or coverage. For example, in the *Kuusijärvi* case (Case 275/96, 1998 E.C.R. 3419), the individual became unemployed and eleven months later gave birth. She subsequently established residence in a state different from the state of her prior employment. When she applied for benefits from the state of her previous employment, the ECJ held that Article 13(2)(f) applied and the applicable law was that of the place of residence. On the other hand, in the *Elsen* case (Case 135/99, 2000 E.C.R. 10409) the individual resided in State A and was employed in State B. While employed she gave birth, and after exhausting her maternity leave she ceased working to raise her child. The ECJ held that she was still covered by the legislation of the state of employment and not her state of residence, pursuant to Article 13(2)(a).

Once it is determined which country's law applies to the person, one looks to that law for determining whether the individual has to make contributions into the system, what conditions must be satisfied to acquire benefits under the system and the amount of benefits owed to the individual. It should be noted that deciding which state's legislation currently applies to an employed person is different from deciding which state must pay benefits to an individual. A migrant worker may have acquired an enforceable right to the payment of a benefit from a state in which he previously worked, while accruing rights to social security benefits under the legislation of the state where he currently works. Issues regarding payment and the overlapping of benefits will be discussed in a subsequent section of this paper.

3. EQUAL TREATMENT

Both the EC Treaty and Regulation 1408/71 prohibit discrimination based on nationality. The EC Treaty applies this principle to all aspects of employment²⁰, whereas the Regulation, focused as it is solely on social security, applies the principle specifically to social security schemes²¹. Accordingly, all workers covered by the Regulation must receive the same treatment under a state's social security legislation as the nationals of that state. Moreover, not only is direct discrimination prohibited, but also indirect discrimination.

Direct discrimination occurs when legislation establishes different rules for national vs. non-national workers, *e.g.* a law which provides benefits to national workers after ten years of employment but only

20 EC Treaty Art. 49 (2): "Such freedom of movement [for workers] shall entail the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment."

21 Regulation 1408/71, art. 3(1): "...persons resident in the territory of one of the Member States to whom this Regulation applies shall be subject to the same obligations and enjoy the same benefits under the legislation of any Member State as the nationals of the State."

pays benefits to non-national workers after fifteen years²². Indirect discrimination occurs when a rule or regulation is uniformly imposed on both national and non-national workers, but the effect of the rule is more disadvantageous for non-nationals than nationals²³. For example, a law which requires a minimum residency period as a criteria for coverage or payment of benefit will always disadvantage non-national workers more than national workers. Indeed, most residence requirements imposed under social security laws have been invalidated as a form of indirect discrimination.

Not all indirect discrimination is invalid, however. Indirect discrimination can be justified if

“the measure which applies equally to nationals and non-nationals alike ...meet[s] the twin requirements of necessity and proportionality... Necessity refers to the aims of the measure; it must serve a legitimate aim. Proportionality refers to the means used to achieve the end; the means must constitute the least interference with the freedom to achieve the legitimate aim it pursues”²⁴.

It should be noted that neither cost nor inconvenience are justified grounds for indirect discrimination. Any such justification must be related to public policy, public security or public health²⁵.

4. AGGREGATION OF QUALIFICATION CRITERIA

Many social security schemes impose preconditions for determining eligibility for, or the amount of, benefits. Legislation may impose

22 This type of discrimination is known as disparate treatment theory under U.S. employment discrimination law.

23 This type of discrimination is known as adverse impact theory under U.S. employment discrimination law.

24 ROBIN C.A. White, *Workers, Establishment, and Services in the European Union* 58 (2004).

25 Case 10/90, *Masgio v Bundesknappschaft*, 1991 E.C.R. 1119.

waiting periods before eligibility accrues or may require minimum periods of employment or residency before benefits are paid. Regulation 1408/71 ensures that workers moving within the EU can fulfill such prerequisites to eligibility and acquisition of benefits based not only on their employment history within the current *loci laboris*, but also including the relevant employment history in other EU member states. With the exception of benefits for accidents at work or occupational disease (workers' compensation), the Regulation provides for the aggregation of qualification criteria for the other six branches of social security. For example, Article 18, dealing with sickness and maternity benefits provides that:

“[t]he competent institution of a member State whose legislation makes the acquisition, retention or recovery of the right to benefits conditional upon the completion of periods of insurance, employment or residence shall, to the extent necessary, take account of periods of insurance, employment or residence completed under the legislation of any other Member State as if they were periods completed under the legislation which it administers”.

Other articles of the Regulation similarly provide for aggregation for other types of benefits: art. 38 (invalidity), art. 45 (pensions and survivors' benefits), art. 64 (death grants), art. 67 (unemployment benefits) and art. 72 (family benefits).

With respect to workers' compensation, there is no specific allowance for aggregation for eligibility purposes similar to that provided for the other six branches²⁶. However, in terms of calculating benefits, the Regulation does require that occupational activity in other member states be taken into account. For example, Article 57 provides:

“[i]f, under the legislation of a Member State, the granting of benefits in respect of an occupational disease is subject to the condition that an activity

26 It is possible that this is not an omission but rather the need for aggregation is not necessary. European law in this regard appears to be similar to workers' compensation in the United States in which workers are automatically covered by workers' compensation insurance upon hire – there are no preconditions to eligibility.

likely to cause the disease in question was pursued for a certain length of time, the ... State shall take into account, to the extent necessary, periods during which such activity was pursued under the legislation of any other Member State...”.

Similarly, Article 61(5) provides:

“[w]here the legislation of a Member State provides expressly or by implication that accidents at work or occupational diseases which have occurred or have been confirmed previously shall be taken into consideration in order to assess the degree of incapacity, to establish a right to any benefit, or to determine the amount of benefit, the competent institution of that member State shall also take into consideration accidents at work or occupational diseases which have occurred or have been confirmed previously under the legislation of another Member State...”.

On the other hand, where the calculation of benefits is based on average earnings, the Regulation provides that such calculation shall be based solely on the earnings paid under the legislation of the state of employment at the time of injury²⁷. This latter limitation on the aggregation principle would seem to make sense given that the purpose of workers’ compensation with regard to earnings replacement is to replace the earnings lost from not being able to work on the job at which one was injured. Thus, limiting the calculation for earnings to that particular job is appropriate.

5. EXPORTING BENEFIT PAYMENTS

Residency requirements as a condition for payment of benefits already acquired are dealt with in several different provision of Regulation 1408/71. As previously mentioned, Article 3 requires equality of treatment for non-nationals, prohibiting both direct and indirect discrimination. Thus, in the absence of a compelling public

27 Regulation 1408/71, *supra* note 3 at art. 58.

policy justification, refusal to pay earned benefits to persons based on their failure to reside within the territory of the responsible state would constitute indirect discrimination.

Secondly, Article 10 expressly addresses residency requirements for payment under certain branches of a social security system:

“...invalidity, old-age or survivors’ cash benefits, pension for accidents at work or occupational diseases and death grants acquired under the legislation of one or more Member States shall not be subject to any reduction, modification, suspension, withdrawal or confiscation by reason of the fact that the recipient resides in the territory of a Member State other than that in which the institute responsible for payment is situated”.

The European Court of Justice has held that this language not only prohibits reduction or suspension of accrued benefits when the claimant resides in another state (as is apparent from the express language of the article) but also prohibits residency requirements imposed for purposes of acquiring a right to a benefit²⁸. For example, the Dutch invalidity benefits law requires that the individual be incapable of work for 52 weeks while residing in the Netherlands in order to be eligible for benefits. The Court held that the residency requirement was contrary to the purpose of Article 10²⁹.

“At first sight [these Court judgements] appear[] to deviate significantly from the text of Article 10. It fits, however, well within the system of the Regulation, as migrant workers cannot be, at the moment of the materialisation of the risk... in all the Member States where they have earlier worked”³⁰.

28 Case 92/81, *Camara v. Institut national d’assurance maladie-invalidité*, 1982 E.C.R. 2213. This case was decided under the predecessor regulation to the current Regulation 1408/71; however, the wording of the relevant article was *in haec verba* to that contained in Article 10.

29 Case 300/84, *van Roosmalen v Bestuur van de Bedrijfsvereniging voor de Gezondheid*, 1986 E.C.R. 3097. This case was decided, in part, in reliance on Article 10 of Regulation 1408/71.

30 Pennings, *supra* note 4 at 143.

Of course, residency requirements which affect the acquisition of benefits are also subject to the aggregation principle discussed earlier.

With respect to sickness and maternity benefits, and benefits for work accidents or occupational disease which do not constitute pensions³¹, special provision is made due to the fact that these benefits include not only cash payments but also medical treatment (benefits in kind). Article 19 (dealing with sickness and maternity benefits) provides that a worker who has satisfied the conditions for entitlement to benefits under the laws of one state, but who resides in a different state, is entitled to receive the cash payments from the insuring state. As regards benefits in kind, the worker is not required to travel to the insuring state to seek treatment; rather benefits in kind are provided by the institutions in the place of residence, *as if he were insured under its law*, in accordance with the law of the place of residence³². Thus, the worker is considered to be covered by the law of the place of residence by virtue of his entitlement to benefits under the law of the insuring state; he need not meet the resident state's eligibility requirements. However, the substantive law of the state of residence will determine what types of benefits in kind the worker is entitled to which may be different, either better or worse benefits, than those available in the insuring state³³. Article 36 provides that the insuring state must reimburse the resident state for the cost of any benefits in kind provided.

31 These types of benefits are not within the scope of Article 10.

32 Regulation 1408/71, *supra* note 3 at art. 19(b).

33 For example, a worker employed in State A, who has fulfilled the eligibility requirements for sickness benefits in State A, becomes ill. He decides to return to his native country, State B. State A must send cash payments under its sickness benefits law to the worker while he resides in State B. For purposes of medicine and hospital care, however, the law of State B applies. State B may require cost-sharing which the worker will have to pay even though, if he had stayed in State A, its law would not require cost-sharing.

Of course, if the worker stays in the insuring state, then both cash benefits and benefits in kind are governed by the legislation of that state³⁴.

The same system is established for cash benefits and benefits in kind for work accidents or occupational disease. Article 52 provides for cash payment by the insuring state, and benefits in kind by the resident state according to the latter's own laws. Article 54 provides for both types of benefits to be provided by the insuring state where the worker remains in that state. Lastly, Article 63 requires reimbursement to the resident state for benefits in kind provided.

For purposes of family benefits, the European Court of Justice has interpreted Article 73 of Regulation 1408/71 to require the export of family benefits. By its terms Article 73 states:

“An employed... person subject to the legislation of a Member State shall be entitled, in respect of the members of his family who are residing in another Member State, to the family benefits provided for by the legislation of the former State, as if they were residing in that State...”.

This article appears to address which State's law applies for the provision of family benefits, i.e. *lex loci laboris* rather than the law of the place of the family members' residence; it does not directly relate to the exportability of the payment. In the *Hoever and Zachow* case, however, the Court relied on Article 73 as the basis for requiring the export of family benefits when the worker resides in a state different than the one under which he is insured³⁵. In this case two families resided in the Netherlands but the husbands worked in Germany. When the wives applied for a child-rearing allowance under German law, the Court held them entitled to the benefit under Article 73, even though neither they, nor their spouses, were resident in Germany.

34 Regulation 1408/71, *supra* note 3 at art. 21.

35 Case 245/94, *Hoever and Zachow v. Land Nordrhein-Westfalen*, 1996 E.C.R. 4895.

Although covered by different articles, the exportation of benefits is required for all of the above-mentioned branches of social security. The one anomaly is unemployment benefits. The rationale for the difference in treatment is based on the fact that claimants are obliged to actively seek work, and the insuring state has an interest in supervising the claimant to ensure he is doing so; moreover varying levels of unemployment in different states can affect the likelihood of finding employment. Thus Article 69 allows for states to impose restrictions on the exportation of unemployment benefits.

First, the claimant must remain within the insuring state and register with its employment service for at least four weeks after becoming unemployed. Thereafter, a person may leave the insuring state and continue to receive benefits if he registers with the employment service of the state to which he moves. Lastly, unemployment benefits can be exported for a maximum of three months; if, before the expiration of three months the worker returns to the insuring state he will continue to receive benefits. If, however, the worker fails to return within the allotted time, he loses all entitlement to further benefits, even if he subsequently returns to the insuring state³⁶.

6. OVERLAPPING BENEFITS

Given both the aggregation and equality of treatment principles, a migrant worker can acquire benefit rights from two different states with respect to the same contingency. As a general rule, Regulation 1408/71 provides that, with respect to short-term benefits, claimants are not entitled to collect from more than one state. On the other hand, with regard to long-term benefits, overlapping is allowed.

Specifically Article 12(1) provides:

36 Regulation 1408/71, *supra* note 3 at art. 69 (1)(a)-(c) and (2).

“This Regulation can neither confer nor maintain the right to several benefits of the same kind for one and the same period of compulsory insurance. However, this provision shall not apply to benefits in respect of invalidity, old age, death (pensions) or occupational disease which are awarded by the institutions of two or more Member States...”.

Thus for purposes of short-term benefits, the conflict of laws principle applies for determining which state is responsible for the payment of benefits. For long-term benefits, workers are entitled to payment from each state where they have acquired entitlement to benefits.

The Regulation also addresses another form of overlapping of short-term benefits. Whereas Article 12(1) addresses the overlap of benefits for the same contingency, Article 12(2) addresses the overlap between benefits for different contingencies:

“Save as otherwise provided in this Regulation, the provisions of the legislations of a Member State governing the reduction, suspension or withdrawal of benefits in cases of overlapping with other social security benefits or any other form of income may be invoked even where such benefits were acquired under the legislation of another member State...”.

Whereas Article 12(1) prevents an individual from claiming maternity benefits from two different states, Article 12(2) prevents an individual from receiving sickness benefits from State A while simultaneously receiving unemployment benefits from State B. In order for Article 12(2) to apply, however, there must be a specific provision in domestic legislation regulating this type of overlap.

“For example, if a German rule prevents overlapping of sickness and disability benefits, this is relevant to a person claiming German sickness benefit; the Regulation extends the German rule to, for instance, Belgian disability benefit. This is also the case if the national rules against overlapping are exclusively focused on benefits and income in its own territory. This extension applies unless the Regulation provides otherwise, such as in the case of long-term benefits”³⁷.

37 Pennings, *supra* note 4 at 148.

As noted above, overlapping is allowed for long-term benefits. The question then becomes how to calculate the benefit payment for each responsible state. As a general rule, Regulation 1408/71 uses a proportional method for determining each state's liability. This general rule, however, is complicated by variations in the eligibility conditions imposed by domestic legislation.

Basically, there are two methods for determining entitlement to long-term benefits: entitlement based on duration of insurance coverage or work period (durational coverage); or entitlement based on the materialization of the risk (risk coverage). Under durational coverage, an individual who has fulfilled the eligibility and durational requirements receives benefits even if the event (invalidity or old age) occurs when he is no longer covered under the social security scheme. Under risk coverage, so long as the individual falls within the scope of the social security scheme, he is entitled to benefits at the moment the risk materializes regardless of the duration of his coverage; conversely, if the individual is not with the scope of coverage of the scheme at the time the risk materializes (because, for example, he is now working and residing in another state) he is not entitled to benefits even if he had been covered under the previous legislation for twenty years.

If, through his worklife, the worker was employed in states all of which use risk coverage, Regulation 1408/71 provides that the worker collects benefits solely from the state where he was insured when the risk materialized³⁸. If the worker was employed in states all of which use durational coverage, then each state pays its proportional share of the benefit³⁹. For every country where the worker was insured, the state makes two calculations. First, it determines the entire amount of pension owed *as if* the worker had spent his entire working life in that country. Second, it determines what percentage of the worker's entire working life he *actually* spent in that country. The worker is then paid that percent of the entire

38 Regulation 1408/71, *supra* note 3 at art. 39(1) and (2).

39 *Id.* at art. 46.

amount. For example, a worker worked 4 years in Italy, 7 years in Belgium and 19 years in France. Each country would determine a pension payment based on 30 years of work. Then Italy would pay 4/30 (i.e. 2/15) of a 30 year Italian pension; Belgium would pay 7/30 of a 30 year Belgian pension and France would pay 20/30 (i.e. 2/3) of a 30 year French pension.

If a worker is first insured under a duration scheme and subsequently is insured under a risk scheme, he will receive two pension payments – a proportional share from the first state (based on the percentage calculation described in the previous paragraph) and a full pension from the second state. Article 46a, however, allows the second state to credit the amount received from the first state and deduct it from its payment to the claimant⁴⁰.

If a worker is first insured under risk coverage and subsequently insured under durational coverage, he is entitled to a proportional payment from each state, calculated as a percentage of actual working life in each country (as explained in the above paragraph).

ILO CONVENTIONS

There are three ILO Conventions specifically focused on social security: Convention N° 48 Concerning the Establishment of an International Scheme for the Maintenance of Rights under Invalidity, Old-Age and Widows' and Orphans' Insurance (hereinafter C.48), Convention N° 118 (hereinafter C.118) Concerning Equality of

40 While at first glance this appears to violate the rule concerning entitlement to overlapping benefits for long-term benefits, in effect the worker *is* receiving payments from more than one state for the same contingency. The purpose of Regulation 1408/71 is to ensure the freedom of movement of workers so that migrant workers are not disadvantaged as compared to workers who remain within a single state. The point is to allow a migrant worker to get credit for the entire value of his working life; if he receives both a partial payment from the durational coverage state and a full payment from the risk coverage state he is receiving credit for more than the entire value of his working life.

Treatment of Nationals and Non-Nationals in Social Security, and Convention N° 157 Concerning the Establishment of an International System for the Maintenance of Rights in Social Security (hereinafter C.157). C.157 constituted a revision of C.48; thus upon the adoption of C.157, C.48 was withdrawn and shelved⁴¹. This discussion, therefore, will focus solely on C. 118 and C.157.

Of the two conventions, C.118 is the most widely adopted, having been ratified by 38 countries, including five South American countries: Brazil, Ecuador, Bolivia, Uruguay and Venezuela. C.157 has only been ratified by three countries: Spain, Sweden and the Philippines. Together, these two conventions address most of the issues raised by the territoriality principle. C.118 addresses the equality of treatment issues and exporting of benefits, whereas C.157 addresses conflict of laws, aggregation and overlapping of benefits.

CONVENTION 118

1. SCOPE OF COVERAGE

A. PERSONAL COVERAGE

Nationals of a ratifying state are entitled to the protection of the convention so long as they are within the territory of another ratifying state⁴². For purposes of survivors' benefits, all survivors of a national of a ratifying state are covered, even if the survivor is not a national of a ratifying state⁴³. For purposes of family benefits, the children of a national of a ratifying state must reside within the territory of a ratifying state in order to be covered⁴⁴. Similar to the EU system,

41 Convention 48 is still applicable to the parties which ratified it, but it is no longer available for ratification by additional states. At the time of its withdrawal, eleven countries had ratified Convention 48, none of them South American countries.

42 Convention 118, *supra* note 2 at art. 3(1).

43 *Id.* at art. 3(2).

44 *Id.* at art. 6.

C.118 applies to stateless persons and refugees⁴⁵, and excepts from coverage civil servants and diplomatic personnel⁴⁶.

B. SUBSTANTIVE COVERAGE

The substantive branches of social security covered under the convention are the same as those listed by the EU: medical and sickness; maternity; invalidity; old age; employment injury; unemployment; and family benefits⁴⁷. Like the EU system, the convention does not apply to public assistance programs⁴⁸.

A major difference to the EU system is that countries ratifying C.118 are able to designate to which branch(es) of their social security system the convention will apply⁴⁹. Thus a state may elect coverage for old-age benefits but not for maternity or sickness benefits.

2. EQUAL TREATMENT

Article 3 sets forth the principle of equality of treatment:

“Each Member for which this Convention is in force shall grant within its territory to the nationals of any other Member for which the Convention is in force equality of treatment under its legislation with its own nationals, both as regards coverage and as regards the right to benefits, in respect of every branch of social security for which it has accepted the obligations of the Convention”.

45 *Id.* at art. 10(1).

46 *Id.* at art. 10(2) and (3).

47 *Id.* at art. 2(1).

48 *Id.* at art. 10(2).

49 *Id.* at art. 2(3).

The basic premise is that ratifying states must apply the same rules for coverage and grant of benefits to non-nationals as they apply to nationals. It is clear that the convention prohibits direct discrimination; for example, where coverage of nationals under a country's social security scheme is compulsory but coverage of non-nationals is only voluntary, the equality of treatment principle has been violated⁵⁰.

It does not appear, however, that the convention prohibits indirect discrimination. In reference to Article 4 of the convention ("Equality of treatment as regards the grant of benefits shall be accorded without any condition of residence"), the International Labour Office noted that

"the preparatory work preceding the adoption of the Convention brings out that article 4 is intended to ensure... that any residence condition which may govern the grant of benefit shall apply without distinction to a ratifying State's own nationals and to nationals of any other State to whom, under Article 3, equality of treatment is due"⁵¹.

Thus, the ILO Committee of Experts has determined that

"conditions of residence imposed by ...legislation... for the grant of certain benefits do not appear to constitute an obstacle to ratification of the Convention in so far as those conditions are identical for national and non-nationals"⁵².

-
- 50 Int'l Labour Office, Report of the Committee of Experts on the Application of Conventions and Recommendations, *General Report and Observations Concerning Particular Countries*, 79th Sess., Rpt. 3, pt. 4A, at 429 (Libyan Arab Jamahiriya)(1992).
- 51 Memorandum by the Int'l Labour Office, OFFICIAL BULLETIN, vol. XLIX, n° 3, at 398 (July 1966).
- 52 Int'l Labour Office, Report of the Committee of Experts on the Application of Conventions and Recommendations, *General Survey of the Reports Relating to the Equality of Treatment (Social Security) Convention, 1962 (n° 118)*, 63rd Sess, Rpt. 3, pt. 4B at 42 (1977) (hereinafter General Survey).

This result is contrary to the EU system which has determined that most residency requirements violate the equality of treatment principle based on a theory of indirect discrimination.

The equality of treatment provision does, however, require a ratifying state to treat non-nationals equally as to all branches of social security for which that state has accepted the convention, even if the non-nationals' state has not accepted the same branches⁵³. For example, both State A and B have ratified C.118, with State A indicating its application for sickness, maternity and old age benefits and State B indicating its application for old age benefits only. A national of State B, working in State A, must be treated the same as nationals of State A as regards sickness and maternity benefits as well as old-age benefits.

The rationale behind this asymmetrical reciprocity was

“to avoid placing at a disadvantage the nationals of states where social security was as yet little developed”⁵⁴.

A state can only accept the obligations of the convention for those branches of social security for which it has operative legislation⁵⁵. Thus State B, if it did not have sickness and maternity benefits legislation, could not accept the application of the convention for those benefits. In light of the rationale behind asymmetrical reciprocity, the convention also contains a retorsion clause to cover those states which do have effective legislation yet choose not to subject it to the coverage of the convention.

“Nothing... shall require a Member to apply the provisions of these paragraphs [art. 3(1) and (2) regarding equality of treatment], in respect of the benefits of a specified branch of social security, to the nationals of another Member which has legislation relating to that branch but does not

53 Convention 118, *supra* note 2 at art. 3(1).

54 General Survey, *supra* note 53 at 20.

55 Convention 118, *supra* note 2 at art. 2(1).

grant equality of treatment in respect thereof to the nationals of the first Member”⁵⁶.

Although, as previously noted, Article 4 prohibits imposing residency requirements on non-nationals for the grant of benefits which requirements are not imposed on nationals, the convention allows for two exceptions:

1. involving non-contributory schemes; and
2. when benefits are not conditioned on fulfilling a qualifying period of occupational activity⁵⁷.

Maternity, unemployment, invalidity, survivors’ and old-age benefits which meet one of the two above exceptions may be subject to a limited residency requirement. In the case of maternity and unemployment benefits, residency requirements cannot exceed six months; for invalidity or survivors’ benefits, residency cannot exceed five years; and for old age benefits, residency cannot exceed ten years.

3. EXPORTING BENEFIT PAYMENTS

Article 5 requires that a ratifying state allow for the exportation of benefits for both its own nationals as well as nationals of other ratifying states. The article does not, however, provide for complete portability of all branches of social security benefits; it only covers invalidity, old-age and survivors’ benefits, death grants and employment injury pensions. Medical care, sickness, maternity and family benefits, and unemployment benefits are not exportable under *Article 5*. If, however, a ratifying country allows its own

56 *Id.* at art. 3(3).

57 *Id.* at art. 4(2).

nationals to export these latter types of benefits then, pursuant to *Article 4* (requiring equality of treatment in regards to residency requirements), it must allow for exportation for the nationals of other ratifying countries.

Lastly, the obligations of *Article 5* are based on a branch-by-branch reciprocity principle rather than the asymmetrical reciprocity required under the equality of treatment provisions. In other words, if State A has accepted the obligations of the convention for purposes of both invalidity and old age pension, but State B has accepted the convention only as to old age pensions, then State A is not required to allow for the exportation of invalidity benefits to nationals of State B.

Article 6 provides for the payment of family allowances⁵⁸ to nationals of ratifying countries in respect of children who reside in any other ratifying country. This is a bit more limited than the exportation required under *Article 5*, in that children must reside within the territory of a ratifying state, whereas for purposes of *Article 5* exportation is required regardless of the place of residence. Moreover, *Article 6* creates an indirect obligation only. The payment of family allowance is required

“under conditions and within limits to be agreed upon by the members concerned”⁵⁹.

The convention, therefore, requires ratifying states to enter into agreements concerning the payment of these allowances, rather than directly requiring their payment.

58 Family allowances are a subset of the family benefits mentioned in *Article 2(i)*. A family allowance is defined as “periodical payments granted as compensation for expenditure for the maintenance of children, exclusive of certain special allowances, especially those granted to mothers remaining at home.” Int’l Labour Conference, *Report of Proceedings of the Conference*, 46th Sess., Appendix VII at 758 para. 37(1962).

59 Convention 118, *supra* note 2 at art. 6.

4. AGGREGATION OF QUALIFICATION CRITERIA

C.118 does not totally ignore the problem created by the territoriality principle for purposes of acquiring, maintaining and calculating benefits. Article 7 obliges the ratifying countries to

“endeavor to participate in schemes for the maintenance of the acquired rights and rights in course of acquisition...”.

This article is hortatory only; the failure to reach such an agreement does not constitute a breach of the convention⁶⁰.

CONVENTION 157

While the title of this convention⁶¹ leads one to think that it constitutes an international coordination scheme for social security benefits, this is a mistaken impression. It creates only an indirect obligation with regard to a coordination scheme⁶². Articles 4 and 6 anticipate that ratifying states will negotiate bilateral and multilateral agreements which will establish binding coordination schemes. The convention does, however, require that these agreements address certain issues, although the details for how to deal with the issues are left to the discretion of the negotiating parties.

60 General Survey, *supra* note 52 at 59.

61 Convention concerning the Establishment of an International System for the Maintenance of Rights in Social Security.

62 There are a few provisions of the convention which are directly applicable. Most of them refer to either aggregation of qualifying periods pursuant to obligations which ratifying states have already accepted under other bilateral or multilateral social security agreements, or administrative coordination between the signatories. See Art. 4(2).

1. SCOPE OF COVERAGE

Specifically, the convention requires that substantive coverage of any coordination scheme must include, at a minimum, the following branches of social security: invalidity benefits, old-age benefits, survivors benefits, death grants and pensions in respect of employment injuries, and medical care, sickness benefits, maternity benefits, benefits in respect of employment injuries, unemployment benefits and family benefits⁶³. In addition, the personal coverage of such agreements must include at least the following three categories: 1) employees who are nationals of a ratifying state; 2) members and survivors of employees who are nationals of a ratifying state; and 3) refugees and stateless persons.

2. CONFLICT OF LAWS

The convention suggests as the basic principle for conflict of law the *lex loci laboris*⁶⁴, but allows for ratifying states to mutually agree to exceptions to the rule⁶⁵. In particular the convention notes exception to the *lex loci laboris* principle for mariners (law of the country whose flag the ship flies)⁶⁶ and economically inactive persons (law of the place of residence)⁶⁷.

3. EQUAL TREATMENT

Since this concept is directly addressed by C. 118, C. 157 does not address this issue.

63 Convention 157, *supra* note 2 at art. 4(3)(a) and art. 10(3).

64 *Id.* at art. 5(1)(a).

65 *Id.* at art. 5(3).

66 *Id.* at art. 5(1)(c).

67 *Id.* at art. 5(1)(d).

4. AGGREGATION OF QUALIFYING CRITERIA

Under Article 7:

“The schemes for the maintenance of rights in the course of acquisition... shall provide for the adding together, to the extent necessary, of periods of insurance, employment, occupational activity or residence, as the case may be, completed under the legislation of the Members concerned for the purposes of:

- a) participation in voluntary insurance or optional continued insurance, where appropriate;
- b) acquisition, maintenance or recovery of rights and, as the case may be, calculation of benefits”.

5. EXPORTING BENEFIT PAYMENTS

Article 9 requires that the coordination schemes negotiated shall guarantee the payment of invalidity, old-age and survivors’ cash benefits, pensions in respect of employment injuries and death grants to nationals of signatory countries regardless of their place of residence.

6. OVERLAPPING BENEFITS

Article 15 provides that

“[e]xcept for invalidity, old-age and survivors’ benefits and benefits in respect of occupational disease, the cost of which are apportioned among two or more members, this Convention shall not confer or maintain a right to several benefits of the same nature based on the same period of compulsory insurance, employment, occupational activity or residence.”

The convention also allows for adjusting payment pursuant to domestic legislation in the case of overlap of benefits not of the same nature⁶⁸.

RESULT OF RATIFYING C. 157

Countries which ratify this convention are, therefore, obliged to negotiate agreements with other ratifying nations to cover the contingencies raised in the convention, but the terms of such agreements may vary depending on the interests and needs of the negotiating parties. In order to assist in the negotiation process, the International Labour Conference adopted Recommendation 167 Maintenance of Social Security Rights (1983)⁶⁹. This document contains model language for bilateral and multilateral social security coordination agreements in addressing the issues of conflict of laws, aggregation, exporting, and overlapping of benefits⁷⁰.

TREATIES

The negotiation of bilateral and multilateral agreements to address the issue of social security for migrant workers is a relatively prevalent phenomenon at the international level. In essence these are contracts negotiated between the signatory parties, and as such their terms vary according to the need and interests of the parties. Some agreements attempt to deal with many, if not most, of the problems raised by the territoriality principle, while others address only a few.

68 *Id.* at art. 11.

69 Recommendations are not ratified by ILO Member States nor are they binding. They are advisory only, providing guidelines for implementing the objectives of ratified conventions.

70 The text of Recommendation 167 is available at www.ilo.org/ilolex/english/recdisp1.htm.

Exemplars of the latter category would be the 1968 U.S.- Mexico Social Security Agreement⁷¹ and the 1972 U.S.-Argentina Social Security Agreement⁷². These documents provide solely for the payment of accrued social security benefits to nationals of the signatory countries resident outside the territory of the payee country (*i.e.* the exportation of benefit payments)⁷³.

At the other end of the spectrum is the 2003 Andean Social Security Instrument⁷⁴ (hereinafter Instrument) which addresses all six of the issues created by the territoriality principle. As with the EU system, this document is aimed at coordinating existing domestic social security legislation, not displacing it.

ANDEAN SOCIAL SECURITY INSTRUMENT

1. SCOPE OF COVERAGE

For purposes of personal coverage, the Instrument applies to all migrant workers and their beneficiaries⁷⁵. Migrant workers are defined as

71 24 U.S.T. 1045.

72 23 U.S.T. 2660.

73 The U.S. has also entered into a social security agreement with Chile which provides for the totalization of periods of employment for purposes of eligibility for, and payment under, the two countries' social security legislation dealing with old-age, survivors' and disability insurance. Agreement on Social Security, U.S.-Chile, Feb. 16, 2000, H.R. Doc. 106-244. A similar totalization agreement with Mexico is currently stalled in the U.S. House of Representatives.

74 Available on-line at www.comunidadandina.org/ingles/treaties.htm, Decision 546 (hereinafter Decision 546). The signatories to this document are Bolivia, Columbia, Ecuador, Peru and Venezuela.

75 *Id.* at art. 3.

“anyone who moves from the territory of one Member Country to that of another irrespective of his or her nationality and status of wage-earner or independent worker”⁷⁶.

For purposes of substantive coverage, the Instrument applies to

“general and special social security legislation referring to health and economic benefits”⁷⁷.

Health benefits include all medical services

“in the cases of common or occupational illnesses, childbirth or accident”⁷⁸.

Economic benefits include cash payments for

“maternity, temporary disability, breastfeeding, retirement, employment injuries, occupational diseases, invalidity or death”⁷⁹.

2. CONFLICT OF LAWS

The general principle adopted by the Instrument to deal with the conflict of laws problem is *lex loci laboris*⁸⁰. The document recognizes the standard exceptions to that principle for air carrier personnel, seafarers, civil servants and diplomatic and consular workers⁸¹.

76 *Id.* at art. 2(l).

77 *Id.* at art. 4.

78 *Id.* at art. 2(a).

79 *Id.* at art. 2(k).

80 *Id.* at art. 5.

81 *Id.* at art. 6.

3. EQUAL TREATMENT

The Instrument provides that member countries must ensure that migrant workers and their beneficiaries receive “treatment equal to that of [their] own nationals in regard to social security benefits”⁸².

4. AGGREGATION OF QUALIFICATION CRITERIA

Article 8 of the Instrument provides that the insurance periods fulfilled by migrant workers in any member country will be added for purposes of qualifying for access to health or economic benefits.

5. EXPORTING BENEFIT PAYMENTS

Article 12 prohibits the diminution or withdrawal of accrued economic benefits solely because the claimant lives in a member country other than the paying country. As regards health benefits, the Instrument creates a regime similar to the manner in which the EU handles benefits in kind⁸³. If a worker accrues health benefits under the social security system of State A and subsequently moves to State B, he receives the health benefits based on the provisions of State B’s legislation. State B may then seek reimbursement from state A for the cost of health benefits provided⁸⁴.

6. OVERLAPPING BENEFITS

Article 16 regulates overlapping benefits:

82 *Id.* at art. 3.

83 See discussion *supra* at p. 8.

84 Decision 546, *supra* note 74 at art. 7.

“The provisions of this Decision do not confer the right to profit, by virtue of the same insurance period, from several benefits of the same nature, notwithstanding the stipulations of national legislation on the subject”.

The broad outlines of this Instrument are supplemented by a Regulation which provides more detailed guidance for implementation.

There are at least two other multilateral agreements on social security involving South American countries which should be noted: the 1968 *Convenio Iberoamericano de Seguridad Social*⁸⁵, signed by Ecuador, Spain, Panama, Chile, Honduras, Nicaragua, Costa Rica, Venezuela, Uruguay, Guatamala, El Salvador, Dominican Republic, Bolivia and Argentina; and the 2005 *Acuerdo Multilateral de Seguridad Social del Mercado Común del Sur*⁸⁶, signed by Argentina, Brazil, Paraguay and Uruguay.

CONCLUSION

In order to establish a comprehensive system for coordinating national social security systems to effectively deal with the problems faced by migrant workers, six issues need to be addressed:

1. defining the scope of the coverage of the coordination scheme;
2. establishing a standard to prevent conflicts of laws;
3. prohibiting unequal treatment based on nationality;
4. providing for aggregation of qualifying criteria;

85 Available on-line at www.oit.org.pe/segsoc/marcojur/convsegsoc.html.

86 Available on-line at www.ental.org/segsocial/2.htm.

5. alleviating territorial requirements for the payment of benefits;
and
6. preventing “double-dipping” or the overlapping of benefits.

As this article has shown, there is a fairly well-developed body of law at both the regional and international levels which provide guidance for dealing with these issues. The specifics of any coordination scheme, however, will require taking into account any unique aspects of the relevant national legislation which is to be coordinated.

BIBLIOGRAPHY

I. BOOKS

- BERGHMAN, J.; NAGELKERK, A.; BOOS, K.; DOESCHOT, R. and VONK, G. (eds.), *Social Security in Transition*, Kluwer Law Int’l, The Hague, 2002.
- BLANPAIN, ROGER and FRANK HENDRICKX, (eds.), *European Labor law and Social Security Law Codex*, Kluwer Law Int’l, London, 2002.
- BLANPAIN, ROGER, (ed.), *Collective Bargaining, Discrimination, Social Security and European Integration: Papers & Proceedings of the VIIth European Regional Congress of the International Society for Labour Law and Social Security Law*, Kluwer Law Int’l, The Hague, 2003.
- BLANPAIN, ROGER, *European Labour Law*, 9th ed., Kluwer Law Int’l, The Hague, 2003).
- CARLIER, JEAN-YVES and MICHEL VERWILGHEN, *Thirty Years of Free Movement of Workers in Europe: Proceedings of the Conference*, European Communities, Luxembourg, 2000.
- European Commission, *Employment & Social Affairs, The Community Provisions on Social Security*, European Communities, Luxembourg, 2005.

- European Commission, *Free Movement of Workers: Achieving the Full Benefits and Potential*, available on line at eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52002DC0694:EN:HTML
- JORENS, YVES (ed.), *The Influence of International Organization on National Social Security Law in the European Union*, Nomos Verlagsgesellschaft, Baden-Baden, 2002.
- MEI, A. PIETER VAN DER, *Free Movement of Persons within the European Community*, Hart Publ., Oxford, 2003.
- PENNINGS, FRANS, *Introduction to European Social Security Law*, 4th ed., Intersentia, Antwerp, 2004)
- PIETERS, DANNY, *The Social Security Systems of the member States of the European Union*, Intersentia, Antwerp, 2002.
- WHITE, ROBIN C.A., *Workers, Establishment, and Services in the European Union*, Oxford Univ. Press, Oxford, 2004.

II. EU DOCUMENTS

- Case 1/72, *Frilli v. Belgian State*, 1972 E.C.R. 457, available online at europa.eu.int/eur-lex/en/search/search_case.html
- Case 10/90, *Masgio v Bundesknappschaft*, 1991 E.C.R. 1119, available online at europa.eu.int/eur-lex/en/search/search_case.html
- Case 135/99, *Elsen v Bundesversicherungsanstalt für Angestellte*, 2000 E.C.R. 10409, available online at europa.eu.int/eur-lex/en/search/search_case.html
- Case 249/83 *Hoeckx v. Openbaar Centrum voor Maatschappelijk Welzijn*, 1985 E.C.R. 973, available online at europa.eu.int/eur-lex/en/search/search_case.html
- Case 254/94, *Hoever and Zachow v Land Nordrhein-Westfalen*, 1996 E.C.R. 4895, available online at europa.eu.int/eur-lex/en/search/search_case.html
- Case 275/96, *Kuusijärvi v Riksförsäkringsverket*, 1998 E.C.R. 3419, available online at europa.eu.int/eur-lex/en/search/search_case.html

- Case 300/84, *van Roosmalen v Bestuur van de Bedrijfsvereniging voor de Gezondheid*, 1986 E.C.R. 3097, available online at europa.eu.int/eur-lex/en/search/search_case.html
- Case 71/93, *Van Poucke v. Rijksinstituut voor de Sociale Verzekeringen*, 1994 E.C.R. 1101, available online at europa.eu.int/eur-lex/en/search/search_case.html
- Case 92/81, *Camera v Institut national d'assurance maladie-invalidité*, 1982 E.C.R. 2213, available online at europa.eu.int/eur-lex/en/search/search_case.html
- Consolidated Version of the Treaty Establishing the European Community, 2002 O.J. (C 325) 33,2002
- EU Council Regulation 1408/71, 1971 O.J. (L149) 2, available online at europa.eu.int/eur-lex/en/consleg/main/1971_en_1971R1408_index.html
- EU Council Regulation 574/72, 1972 O.J. (L 74) 1, available online at eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31972R0574:EN:HTML

III. ILO DOCUMENTS

- ILO Convention (n° 118) Concerning Equality of Treatment of Nationals and Non-Nationals in Social Security, 494 U.N.T.S. 271.
- ILO Convention (n° 157) Concerning the Establishment of an International System for the Maintenance of Rights in Social Security, 1932 U.N.T.S. 29.
- ILO Convention (n° 48) Concerning the Establishment of an International Scheme for the Maintenance of Rights under Invalidity, Old-Age and Widows' and Orphans' Insurance, 40 U.N.T.S. 73.
- ILO Recommendation n° 167, Maintenance of Social Security Rights, available on-line at www.ilo.org/ilolex/english/recdisp1.htm
- International Labour Office, Report of the Committee of Experts on the Application of Conventions and Recommendations, *General Report and Observations Concerning Particular Countries*, 59th Sess - 93rd Sess, Rpt. 3, pt. 4A, (1974-2005).
- International Labour Office, Report of the Committee of Experts on the Application of Conventions and Recommendations, *General Survey*

of the Reports Relating to the Equality of Treatment (Social Security Convention, 1962 (n° 118), 63rd Sess, Rpt. 3, pt. 4B (1977).

IV. INTERNATIONAL TREATIES

Agreement on Social Security, U.S.-Chile, Feb. 16, 2000, H.R. Doc. 106-244, available online at www.ssa.gov/international/Agreement_Texts/chile.html

Andean Social Security Instrument (2003), available online at www.comunidadandina.org/ingles/treaties.htm, (Decision 546).

Labour Treaty, Fr.-Italy (1919), 5 L.N.T.S. 279.

Social Security Agreement, U.S.-Argentina (1972), 23 U.S.T. 2660.

Social Security Agreement, U.S.-Mexico (1968), 24 U.S.T. 1045.