

RECENT DEVELOPMENTS IN THE EUROPEAN PRIVATE INTERNATIONAL LAW OF EMPLOYMENT

Abstract: This article outlines the main recent developments in the field of European private international law of employment. The developments include judgments of the Court of Justice of the European Union on the concept of 'individual employment contract', jurisdiction over individual employment contracts and choice of law for individual employment contracts, changes to the posted workers regime through the adoption and transposition of the Posting of Workers Enforcement Directive and the revision of the Posted Workers Directive, and the forthcoming withdrawal of the United Kingdom from the EU. The article demonstrates that the European private international law of employment is fit for purpose, although there is scope for improvement.

Keywords: private international law; conflict of laws; choice of law; jurisdiction; EU law; individual employment contracts; posted workers

1. Introduction

The European private international law of employment is the part of European Union law that regulates transnational employment relationships. The rules of the European private international law of employment are contained in the Brussels I Regulation,¹ Lugano Convention,² Rome I Regulation,³ Rome II Regulation⁴ and the Posted Workers Directive.⁵ The Brussels I Regulation deals with the jurisdiction of the courts of Member States over

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¹ Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) [2012] OJ L351/1. This Regulation superseded Regulation No 44/2001 [2001] OJ L12/1, which, in turn, superseded the 1968 Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters [1972] OJ L299/32. See also the Agreement between the European Community and the Kingdom of Denmark on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2005] OJ L299/62, [2013] OJ L79/4.

² 2007 Lugano Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2007] OJ L339/3, replacing the 1988 Lugano Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [1988] OJ L319/9.

³ Regulation (EC) 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I) [2008] OJ L177/6, superseding the 1980 Rome Convention on the law applicable to contractual obligations [1980] OJ L266/1.

⁴ Regulation (EC) 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II) [2007] OJ L199/40.

⁵ Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services [1997] OJ L18/1.

individual employment contracts and the recognition and enforcement of judgments of Member State courts given in employment matters. The Lugano Convention extends the regime of jurisdiction and recognition and enforcement of judgments established by the Brussels I Regulation to Norway, Switzerland and Iceland. The Rome I and Rome II Regulations set out the rules for determining the law applicable to contractual and non-contractual obligations arising out of or in relation to individual employment contracts. The Posted Workers Directive guarantees workers posted by their employer from one Member State to another Member State to perform a service contract that the employer has won in the host Member State the application of certain employment standards that are in force in the host Member State. The Directive also provides for some mechanisms for the enforcement of those standards.

In this article I will outline the main developments in this fast-moving field since 1 January 2015. I have chosen this as the cut-off date because my book *The European Private International Law of Employment*⁶ covers developments in this field before this date. More specifically, I will focus on the recent case law of the Court of Justice of the EU, changes to the posted workers regime and the challenges posed by the forthcoming withdrawal of the United Kingdom from the EU ('Brexit').

2. Recent Court of Justice Case Law

The Court of Justice has given several judgments concerning the interpretation of the rules of the European private international law of employment since 1 January 2015. The subject-matters of these judgments fall into three categories: the concept of 'individual employment contract' in European private international law; jurisdiction of the courts of Member States over individual employment contracts; and the law applicable to individual employment contracts.

2.1. The Concept of 'Individual Employment Contract'

The concept of 'individual employment contract' is crucial in the European private international law of employment. This is because the Brussels I Regulation, Lugano Convention and the Rome I Regulation contain special rules, whose main objective is the protection of employees as weaker contractual parties,⁷ that apply to 'individual employment

⁶ (Cambridge University Press 2015).

⁷ Brussels I Regulation, recital 18; Rome I Regulation, recital 23.

contracts’.⁸ Two recent judgments of the Court of Justice clarify this concept: *Holterman*⁹ and *Bosworth*.¹⁰

The facts of the two cases were similar. In *Holterman*, four companies belonging to the same group brought proceedings in the Netherlands, where the holding company of the group was established, against Mr Spies von Büllenheim, a German-domiciled director and manager of the four companies. The claim was for damages for misconduct in the performance of the defendant’s duties as director and manager. Mr Spies von Büllenheim had contracts with the four companies setting out his rights and obligations as director and manager. He was also a minority shareholder in the group’s holding company. In *Bosworth*, four companies belonging to the same group brought proceedings in England, where the holding company of the group was established, against Mr Bosworth and Mr Hurley, Swiss-domiciled senior officers of the group and directors of the three subsidiaries, and some other non-EU-domiciled defendants. The claims were for damages for fraud. Mr Bosworth and Mr Hurley each had an employment contract with one of the three subsidiaries. These contracts were drafted by Mr Bosworth and Mr Hurley or at their discretion. They held no shares in the group. In both cases, the EU-domiciled defendants contested the jurisdiction of the court on the basis that they fell within the scope of the protective jurisdictional rules of the Brussels I Regulation and the Lugano Convention, respectively, and that they could only be sued in the courts of their domicile.

The Court of Justice confirmed the following principles in the two judgments. First, the concept of ‘individual employment contract’ is autonomous.¹¹ Second, the concept of ‘individual employment contract’ is the same across all legal instruments that comprise the European private international law of employment.¹² Third, the concept of ‘individual employment contract’ in the European private international law of employment corresponds to the concept of ‘worker’ used more generally in substantive EU employment law.¹³ Fourth, the concept of ‘individual employment contract’ should be interpreted in light of the

⁸ Brussels I Regulation, arts 20-23, 45(1)(e)(i); Lugano Convention, arts 18-21; Rome I Regulation, art 8.

⁹ Case C-47/14 *Holterman Ferho Exploitatie BV v Spies von Büllenheim* ECLI:EU:C:2015:574.

¹⁰ Case C-603/17 *Bosworth v Arcadia Petroleum Ltd* ECLI:EU:C:2019:310.

¹¹ *Holterman* [36]-[37]; *Bosworth* [24].

¹² *Holterman* [38]; *Bosworth* [22].

¹³ *Holterman* [36] (referring to Case C-116/06 *Kiiski v Tampereen kaupunki* [2007] ECR I-7643, concerning equal treatment of men and women and protection of pregnant employees), [41] (referring to the concept of ‘worker’ in primary EU law and the directive on the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding), [46] (referring to Case C-229/14 *Balkaya v Kiesel Abbruch- und Recycling Technik GmbH* ECLI:EU:C:2015:455, concerning collective redundancies); *Bosworth* [25] (referring to *Kiiski*), [26] (referring to Case C-147/17 *Sindicatul Familia Constanța and Others v Direcția Generală de Asistență Socială și Protecția Copilului Constanța* ECLI:EU:C:2018:926, concerning safety and health of workers and working time).

objective of protection of employees.¹⁴ Fifth, in order to determine whether or not a contract is an individual employment contract, national courts should take into account the fact that individual employment contracts typically exhibit the following characteristics:

‘they create a lasting bond which brings the worker to some extent within the organisational framework of the business of the undertaking or employer, and they are linked to the place where the activities are pursued, which determines the application of mandatory rules and collective agreements’;¹⁵

‘the independent concept of a “contract of employment”... presupposes a relationship of subordination of the employee to the employer’;¹⁶

‘the essential feature of an employment relationship is that for a certain period of time one person performs services for and under the direction of another in return for which he receives remuneration’;¹⁷

‘the concept of “employee”... must be defined in accordance with objective criteria which distinguish the employment relationship by reference to the rights and duties of the persons concerned. The essential feature of an employment relationship is that, for a certain period of time, a person performs services for and under the direction of another person, in return for which he receives remuneration’;¹⁸

‘an employment relationship implies the existence of a hierarchical relationship between the worker and his employer, and that the issue whether such a relationship exists must, in each particular case, be assessed on the basis of all the factors and circumstances characterising the relationship between the parties’.¹⁹

Finally, the form of the relationship between the parties is not determinative for the purposes of its autonomous classification. For example, the fact that the contracts between the parties in *Bosworth* were called employment contracts was not determinative. As will be seen, the Court of Justice did not regard the contracts in *Bosworth* as individual employment contracts for the purposes of European private international law. Similarly, the conclusion of a contract is not a condition for the application of the protective rules of the European private international law of employment – ‘the absence of any formal contract does not preclude the

¹⁴ *Holterman* [42].

¹⁵ *Ibid* [39].

¹⁶ *Ibid* [40]; see also *Bosworth* [28].

¹⁷ *Holterman* [41].

¹⁸ *Bosworth* [25].

¹⁹ *Ibid* [26]; *Holterman* [46].

existence of an employment relationship that falls within the concept of “individual contract of employment”²⁰.

In *Holterman*, the court indicated that two deciding factors were 1) whether Mr Spies von Büllenheim, in his capacity as shareholder in the group’s holding company, was able to influence the will of the company’s administrative body of which he was the manager, and 2) who had the authority to give Mr Spies von Büllenheim, in his capacity as manager, instructions and to monitor their implementation.²¹ If Mr Spies von Büllenheim had a ‘not negligible’ ability to influence the holding company’s administrative body, the necessary relationship of subordination would not exist and he could not be regarded as an employee.²² In *Bosworth*, the court indicated that the deciding factors were that Mr Bosworth and Mr Hurley were senior officers of the group, directors of the three subsidiaries, had each a contract of employment with one of the subsidiaries ‘drafted by themselves or at their discretion’²³ and ‘exercised control over by whom, where and on what terms they were employed’.²⁴ This indicated that the two defendants had an ability to influence the group that was not negligible and could, therefore, not be classified as employees even if they were not shareholders in the group and answered to the group’s shareholder.²⁵

Holterman and *Bosworth* provide welcome clarification of the nature of the relationship between a company and its shareholder/director/manager. Unfortunately, the fact that the Court of Justice found in *Bosworth* that the defendants were not employees meant that the court did not deal with other questions posed by the referring court. The most important of these questions was whether a claim not arising directly out of an employment contract or the applicable employment legislation, but in relation to the employment contract, triggered the application of the protective rules of the European private international law of employment. In *Bosworth*, the claims were brought on multiple bases: in contract, unlawful means conspiracy and breach of fiduciary duty. The claims in contract were eventually withdrawn. The High Court²⁶ held that it had jurisdiction over the remaining claims, with the exception of the claims for breach of fiduciary duty alleged to have occurred during the defendants’ employment with the companies belonging to the group. The Court of Appeal²⁷

²⁰ *Bosworth* [27].

²¹ *Holterman* [47].

²² *Ibid*.

²³ *Bosworth* [29].

²⁴ *Ibid* [30].

²⁵ *Ibid* [31]-[33].

²⁶ [2015] EWHC 1030 (Comm).

²⁷ [2016] EWCA Civ 818, [2016] 2 CLC 387.

dismissed the appeal and the UK Supreme Court asked the Court of Justice to clarify whether the claims framed in conspiracy and breach of fiduciary duty were covered by the protective rules of the European private international law of employment. Since the Court of Justice did not deal with this question, we will have to wait for another opportunity for the clarification of the controversial case law on the jurisdictional treatment of concurrent causes of action²⁸ in the context of international employment litigation.

2.2. Jurisdiction over Individual Employment Contracts²⁹

The Brussels I Regulation³⁰ contains one set of jurisdictional rules applicable when employees act as claimants. In general terms, an employee may commence proceedings in the EU in any of the following courts:

- in the courts of the Member State in which the employer is domiciled;³¹
- in the courts for the habitual place of work;³²
- absent a habitual place of work, in the courts for the engaging place of business;³³
- as regards a dispute arising out of the operations of the employer's branch, agency or other establishment, in the courts for the place of that establishment;³⁴
- on a counter-claim, in the court in which the original claim is pending;³⁵
- where there is more than one defendant employer, in the courts of the Member State in which any one of them is domiciled.³⁶

There is another set of jurisdictional rules applicable when employees domiciled in a Member State act as defendants. An employer may commence proceedings:

- in the courts of the Member State in which the employee is domiciled;³⁷
- on a counter-claim, in the court in which the original claim is pending.³⁸

A jurisdiction agreement entered before the dispute has arisen is not given effect if it reduces the number of forums available to the employee or increases the number of forums available

²⁸ Case 189/87 *Kalfelis v Bankhaus Schröder, Münchmeyer, Hengst and Co* [1988] ECR 5565; Case C-548/12 *Brogstetter v Fabrication de Montres Normandes EURL and Karsten Fräßdorf* ECLI:EU:C:2014:148.

²⁹ The outline of the Brussels I Regulation is based on Grušić (n 6), ch 4.

³⁰ The corresponding rules of the Lugano Convention are set out in arts 18-21.

³¹ Brussels I Regulation, art 21(1)(a).

³² *Ibid* art 21(1)(b)(i).

³³ *Ibid* art 19(1)(b)(ii).

³⁴ *Ibid* arts 20(1) and 7(5).

³⁵ *Ibid* art 22(2).

³⁶ *Ibid* arts 20(1) and 8(1).

³⁷ *Ibid* art 22(1).

³⁸ *Ibid* art 22(2).

to the employer.³⁹ Otherwise, jurisdiction agreements are, in principle, effective. Submission to the court's jurisdiction by entering an appearance is also allowed.⁴⁰

There are two⁴¹ recent judgments of the Court of Justice that deal with the jurisdictional rules of the Brussels I Regulation: *Ryanair*⁴² and *Guida*.⁴³

Ryanair is a very important case that concerns employment practices in the aviation industry. Ryanair is an Irish low-cost airline. It directly employs some aircrew members, but it also uses labour supplied by affiliated employment agencies. One such affiliate is Crewlink, also registered in Ireland. In *Ryanair*, several former aircrew members, some of whom were employed directly by Ryanair and some of whom were employed by Crewlink but hired out to Ryanair, commenced employment litigation in Charleroi, Belgium. Charleroi is an important operating base for Ryanair. All the aircrew members in *Ryanair* started their working days at Charleroi airport and systematically ended them there. They also had to stay there on standby in order to potentially replace an absent member of staff. In order to reduce its administrative costs, Ryanair and its affiliates that supplied it with labour drafted employment contracts with aircrew members in a way that was intended to lead to the jurisdiction of Irish courts and the application of Irish law. The facts of *Ryanair* show that: all the claimants in this case had employment contracts which were drafted in English; all the employment contracts contained an exclusive Irish jurisdiction clause, an Irish choice-of-law clause, a clause that the salary would be paid into an Irish bank account and a clause that the claimants' work, as aircrew members flying on Irish-registered aircraft belonging to an Irish airline, was regarded as being carried out in Ireland; the claimants were subject to Irish law in the field of tax and social security; the employment contracts were concluded only after the

³⁹ Ibid art 23.

⁴⁰ Ibid art 26.

⁴¹ See also Case C-579/17 *BUAK Bauarbeiter-Urlaubs- u Abfertigungskasse v Gradbeništvo Korana doo* ECLI:EU:C:2019:162, which deals with the subject-matter scope of the Brussels I Regulation. The Court of Justice held that an action for payment of wage supplements in respect of annual leave pay brought by a body governed by public law against an employer, in connection with the posting of workers to a Member State where they do not have their habitual place of work, or in the context of the provision of labour in that Member State, or against an employer established outside of the territory of that Member State in connection with the employment of workers who have their habitual place of work in that Member State, falls within the scope of application of the Brussels I Regulation, in so far as the modalities for bringing such an action do not infringe the rules of general law and, in particular, do not exclude the possibility for the court ruling on the case to verify the merits of the information on which the establishment of that claim is based. The court also confirmed that if the court that gave the judgment to be enforced in another Member State did not rule, at the time of giving the judgment, on whether the claim fell within the subject-matter scope of the Regulation, that court is obliged, at the time of the issue of the certificate certifying that the judgment is enforceable under art 53 of the Regulation, to determine whether the dispute comes within the subject-matter scope of the Regulation.

⁴² Joined Cases C-168/16 and C-169/16 *Nogueira v Crewlink Ireland Ltd and Moreno Osacar v Ryanair Designated Activity Company* ECLI:EU:C:2017:688.

⁴³ Case C-1/17 *Petronas Lubricants Italy SpA v Guida* ECLI:EU:C:2018:478.

employers had signed the contracts in Ireland. The referring court asked the Court of Justice to clarify how the jurisdictional rules of the Brussels I Regulation applied to claims brought by aircrew members. The referring court also asked whether the connecting factor of the habitual place of work, which is used in the European private international law of employment as the primary factor determining jurisdiction and the applicable law, was to be interpreted in line with the concept of ‘home base’ used in EU aviation and social security law.⁴⁴

Ryanair is the third major case in the field of the European private international law of employment that concerned the transport sector. The previous two cases were *Koelzsch*,⁴⁵ which concerned the law applicable to employment contracts in the road transport industry, and *Voogsgeerd*,⁴⁶ which concerned the law applicable to employment contracts in the maritime industry. The jurisdiction of courts of Member States over claims relating to individual employment contracts brought by employees and the law applicable to individual employment contracts essentially depends on the interpretation of, and the relationship between, two connecting factors: the connecting factors of the habitual place of work and the engaging place of business. The importance of *Koelzsch* and *Voogsgeerd* lies in the fact that they clarify that the connecting factor of the habitual place of work is to be interpreted very broadly and that, therefore, the connecting factor of the engaging place of business is to be interpreted very narrowly. I have previously argued that this is a welcome development because the connecting factor of the engaging place of business leads to excessive legal uncertainty, unforeseeability of the outcome of litigation, and does not support the objectives of employee protection and proximity.⁴⁷ The Court of Justice in *Ryanair* continued down this path. After holding that the jurisdiction agreements were ineffective,⁴⁸ the court confirmed the wide interpretation of the connecting factor of the habitual place of work:

As regards an employment contract performed in the territory of several Contracting States and where there is no effective centre of professional activities from which an

⁴⁴ Council Regulation (EEC) No 3922/91 of 16 December 1991 on the harmonisation of technical requirements and administrative procedures in the field of civil aviation [1991] OJ L373/4, annex III, subpart Q, OPS 1.1090, pt 3.1, OPS 1.1095, pt 1.7 and OPS 1.1110 (this Regulation has been repealed by Regulation (EC) No 216/2008 of the European Parliament and of the Council of 20 February 2008 on common rules in the field of civil aviation and establishing a European Aviation Safety Agency, and repealing Council Directive 91/670/EEC, Regulation (EC) No 1592/2002 and Directive 2004/36/EC [2008] OJ L79/1); Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems [2004] OJ L166/1, recital 18b and art 11.

⁴⁵ Case C-29/10 *Koelzsch v Luxemburg* [2011] ECR I-1595.

⁴⁶ Case C-384/10 *Voogsgeerd v Navimer SA* [2011] ECR I-13275.

⁴⁷ U Grušić, ‘Should the Connecting Factor of the “Engaging Place of Business” Be Abolished in European Private International Law?’ (2013) 62 *International and Comparative Law Quarterly* 173.

⁴⁸ *Ryanair* [54].

employee performs the essential part of his duties vis-à-vis his employer, the Court has held that Article 5(1) of the Brussels Convention [the predecessor of article 21(1)(b)(i) of the Brussels I Regulation] must — in view of the need to establish the place with which the dispute has the most significant link, so that it is possible to identify the courts best placed to decide the case in order to afford proper protection to the employee as the weaker party to the contract and to avoid multiplication of the courts having jurisdiction — be interpreted as referring to the place where, or from which, the employee actually performs the essential part of his duties vis-à-vis his employer. That is the place where it is least expensive for the employee to commence proceedings against his employer or to defend such proceedings and where the courts best suited to resolving disputes relating to the contract of employment are situated.⁴⁹

In order to determine the place from which an employee principally discharges his obligations towards his employer, the court should take into account the following factors: (i) the place from which the employee carries out his transport-related tasks, (ii) the place where he returns after his tasks, receives instructions concerning his tasks and organises his work, and (iii) the place where his work tools are to be found.⁵⁰ This method enables the court not only to take into account the true nature of legal relationships, in that the court must take account of all the factors which characterise the activity of the employee, but also to prevent a concept such as ‘the place where, or from which, the employee habitually performs his work’ from being exploited or contributing to the achievement of circumvention strategies.⁵¹ In the specific case of the aviation industry, significant factors include the place where the aircraft aboard which the work is habitually performed are stationed⁵² and ‘home base’ of the employee within the meaning of EU aviation and social security law.⁵³ By contrast, the nationality of the aircraft is irrelevant.⁵⁴

In *Guida*, an Italian company employed Mr Guida and after 6 years posted him to Poland to work for a Polish subsidiary of the Italian employer. He entered a parallel employment contract with the Polish subsidiary, which was subject to Polish law. Mr Guida was accused of making false claims for expenses and other claims and both the Italian and Polish employers terminated his employment. Mr Guida then brought a claim for unjustified and unlawful dismissal in Italy against the Italian employer. The employer defended the

⁴⁹ Ibid [58].

⁵⁰ Ibid [63].

⁵¹ Ibid [62].

⁵² Ibid [64].

⁵³ Ibid [65]-[74].

⁵⁴ Ibid [75]-[76].

claim and brought a counter-claim for repayment of sums that Mr Guida had wrongfully received from the Polish employer. The basis for the counter-claim was the assignment of the Polish employer's claims to the Italian employer. The Brussels I Regulation allows the employer to sue the employee, on a counter-claim, in the court in which the original claim is pending.⁵⁵ The question before the Court of Justice was whether the employer had the right to bring, before the court properly seised of the original proceedings brought by the employee, a counter-claim based on an assignment agreement concluded after the commencement of the original proceedings between the employer and the original holder of the assigned claim. The court stated that the jurisdictional rules of the Regulation had to be interpreted in light of the objective of protection of employees.⁵⁶ But the court held that the objective of employee protection should not affect the right to bring a counter-claim in the court in which the original claim is pending.⁵⁷ Once the employee commences the original proceedings, the objective of employee protection is achieved and there is no reason to limit the possibility of examining the claim together with a counter-claim.⁵⁸ The only condition is that the claim and counter-claim have 'a common origin',⁵⁹ which may be found in a contract or in a factual situation.⁶⁰ Since the claim and counter-claim in *Guida* had, as a matter of fact, a common origin, the Italian court had jurisdiction over the counter-claim.

2.3. Choice of Law for Individual Employment Contracts⁶¹

The law applicable to individual employment contracts is determined by the Rome I Regulation. In a nutshell, the parties to an employment contract are allowed to choose the applicable law.⁶² But the choice cannot deprive the employee of the protection afforded to him by the mandatory provisions of the law applicable in the absence of choice (objectively applicable law).⁶³ In the absence of choice, the contract is governed by the law of the country of the habitual place of work⁶⁴ or, if none, by the law of the country of the engaging place of business.⁶⁵ However, where it appears from the circumstances as a whole that the contract is

⁵⁵ Brussels I Regulation, art 22(2).

⁵⁶ *Guida* [23].

⁵⁷ *Ibid* [27].

⁵⁸ *Ibid* [28].

⁵⁹ *Ibid* [29].

⁶⁰ *Ibid* [30].

⁶¹ The outline of the Rome I Regulation is based on Grušić (n 6), ch 5.

⁶² Rome I, art 8(1).

⁶³ *Ibid*.

⁶⁴ *Ibid* art 8(2).

⁶⁵ *Ibid* art 8(3).

more closely connected with another country, that country's law applies.⁶⁶ There are also special choice-of-law rules for formal and material validity of contracts,⁶⁷ whereas the law applicable to legal capacity is determined pursuant to domestic choice-of-law rules.⁶⁸ Furthermore, the courts are allowed to apply the overriding mandatory provisions of the forum and, under certain conditions, even the overriding mandatory provisions of the country of performance.⁶⁹

There is only one recent judgment of the Court of Justice that deals with the rules of the Rome I Regulation: *Nikiforidis*.⁷⁰ In order to escape the economic crisis, Greece took certain measures in 2010, in agreement with the EU, the European Central Bank and the International Monetary Fund, for the reduction of its public debt. One measure was a reform of employment in the public sector. Law No 3833/2010 and Law No 3845/2010 imposed a total reduction of 15% in the remuneration of public sector workers. The two statutes applied to public sector workers who worked both in Greece and abroad. The two statutes affected the employment of Mr Nikiforidis, a Greek national employed as a teacher at the Greek primary school in Nuremberg, Germany under an employment contract governed by German law. Mr Nikiforidis commenced proceedings in Germany for unpaid wages. After it had found that Greece did not enjoy immunity, the German Federal Labour Court thought it necessary to ask the Court of Justice whether it could apply the two Greek statutes pursuant to article 9(3) of the Rome I Regulation, which allows the court to give effect to overriding mandatory provisions of the place of performance of the contract.⁷¹

After stating that article 9(3), as a derogation from the choice-of-law rules of the Rome I Regulation, should be interpreted strictly⁷² and that the principles of legal certainty, foreseeability and employee protection militate in favour of the conclusion that the

⁶⁶ Ibid art 8(4).

⁶⁷ Ibid arts 10 and 11.

⁶⁸ Ibid art 1(2)(a); see also art 13.

⁶⁹ Ibid art 9.

⁷⁰ Case C-135/15 *Greece v Nikiforidis* ECLI:EU:C:2016:774.

⁷¹ Since the employment contract between Mr Nikiforidis and Greece was entered in 1996 and subsequently in 2010 terminated with reengagement on amended terms (*Änderungskündigung*), the German Federal Labour Court also asked the Court of Justice whether the Rome I Regulation applied *ratione temporis* to employment contracts concluded before 17 December 2008, but varied after this date. Article 28 provides that the Regulation is applicable *ratione temporis* to contracts concluded as from 17 December 2008, but says nothing about contract variation. The Court of Justice held that an individual employment contract that came into being before 17 December 2009 fell within the scope of the Regulation only in so far as that contract had undergone, as a result of mutual agreement of the contracting parties which had manifested itself on or after that date, a variation of such magnitude that a new employment contract had to be regarded as having been concluded on or after that date. The Court of Justice here departed from the opinion of Advocate General Spuznar, who advocated the application of the putative applicable law determined pursuant to art 10(1) to the issue of when a contract was concluded for the purposes of art 28.

⁷² *Nikiforidis* [44]-[45].

circumstances in which overriding mandatory provisions of third countries could be given effect were exclusively listed in article 9,⁷³ the Grand Chamber of the Court of Justice held:

Article 9 of the Rome I Regulation must therefore be interpreted as precluding the court of the forum from applying, as legal rules, overriding mandatory provisions other than those of the State of the forum or of the State where the obligations arising out of the contract have to be or have been performed. Consequently, since, according to the referring court, Mr Nikiforidis's employment contract has been performed in Germany, and the referring court is German, the latter cannot in this instance apply, directly or indirectly, the Greek overriding mandatory provisions which it sets out in the request for a preliminary ruling.⁷⁴

Nevertheless, the court confirmed that if the applicable German substantive employment law allowed the courts to take into account rules belonging to another legal system, article 9 of the Rome I Regulation should not be interpreted as standing in the way of this:

Article 9 of the Rome I Regulation does not preclude overriding mandatory provisions of a State other than the State of the forum or the State where the obligations arising out of the contract have to be or have been performed from being taken into account as a matter of fact, in so far as this is provided for by a substantive rule of the law that is applicable to the contract pursuant to the regulation.⁷⁵

Examples of this method could be the application of vague provisions regarding good faith, morality, legitimate interests of a party and good behaviour or change of circumstances defences which give relevance to the fact that a foreign state party to an employment contract, which is in a public debt crisis, has passed legislation to deal with that crisis.⁷⁶ Eventually, the German Federal Labour Court refused to give effect to the Greek statutes and ruled that the salary of Mr Nikiforidis remained unaffected by such laws under German law.⁷⁷ The rules of the Rome I Regulation, therefore, enabled Mr Nikiforidis to recover unpaid wages. But the rules of the Rome I Regulation also precluded the effectiveness of the Greek legislation aimed at reducing its public debt pursuant to an agreement with the EU, the European Central Bank and the International Monetary Fund.

⁷³ Ibid [46]-[49].

⁷⁴ Ibid [50].

⁷⁵ Ibid [51]. Similarly, [52].

⁷⁶ F Esposito and P Hacker, 'Exclusiveness of the overriding power of the *lex obligationis* and relevance of other foreign laws as matters of fact: Judgment in Case C-135/15 *Nikiforidis*' (2017) 13 *European Review of Contract Law* 119, 120; S Rameloo, "'From Rome to Rome'" – Cross-border Employment Contract. *European Private International Law: Intertemporal Law and Foreign Overriding Mandatory Laws*' (2017) 24 *Maastricht Journal of European and Comparative Law* 298, 316.

⁷⁷ *Bundesarbeitsgericht*, 26 April 2017, 5 AZR 962/13.

3. Changes to the Posted Workers Regime⁷⁸

The Posted Workers Directive seeks to coordinate the laws of Member States with regard to the employment standards that are applicable to service providers from a Member State that post workers within the EU.⁷⁹ It pursues multiple objectives. On the one hand, it protects the interests of host Member States to safeguard their labour law systems by imposing certain local employment standards on foreign service providers.⁸⁰ It also aims to protect posted workers by entitling them to certain host Member State employment standards when those standards are more favourable for them than the otherwise applicable equivalent standards.⁸¹

The Posted Workers Directive applies to service providers established in a Member State which, in the framework of transnational provision of services, post workers to the territory of another Member State.⁸² The Directive does not apply to all postings of workers, but only in the following three situations: 1) the service provider posts workers on its account and under its direction, under a contract concluded with the service receiver operating in the host country; 2) the service provider, a member of a corporate group, posts workers to an establishment or to an undertaking owned by the group in the host country; 3) the service provider, an employment agency, hires out a worker to an end-user established or operating in the host country.⁸³ In all three situations, there has to be an employment relationship between the service provider and the posted workers during the period of posting.⁸⁴ Non-EU service providers must not be given more favourable treatment than service providers from the EU.⁸⁵ For the purposes of the Directive, ‘posted worker’ is a worker who, for a limited period, carries out his work in the territory of a Member State other than the Member State in which he normally works.⁸⁶ The scope of the Directive is further limited to ‘workers’, as defined in the law of the host Member State.⁸⁷ The Directive also contains a number of derogations.⁸⁸

With regard to the range of the host Member State employment standards, the Posted Workers Directive distinguishes those that *must* and those that *may* be imposed on out-of-

⁷⁸ The outline of the Posted Workers Directive is based on Grušić (n 6), ch 8.

⁷⁹ Posted Workers Directive, recital 13.

⁸⁰ Ibid recitals 5, 12-14.

⁸¹ Ibid recitals 5, 13, 14 and 17.

⁸² Ibid art 1(1).

⁸³ Ibid art 1(3).

⁸⁴ Ibid art 1(3).

⁸⁵ Ibid art 1(4).

⁸⁶ Ibid art 2(1).

⁸⁷ Ibid art 2(2).

⁸⁸ Ibid arts 1(2) and 3(2)-(6).

state service providers. According to article 3(1), local standards that must be afforded posted workers, regardless of the law applicable to the employment contract (so-called ‘nucleus’ of mandatory rules for minimum protection or ‘hard core’ of protective rules),⁸⁹ concern the following seven matters:

- maximum work periods and minimum rest periods;
- minimum paid annual holidays;
- the minimum rates of pay, including overtime rates;⁹⁰
- the conditions of hiring-out of workers, in particular the supply of workers by employment agencies;
- health, safety and hygiene at work;
- protection of pregnant women, women who have recently given birth, children and young people;
- non-discrimination.

Pursuant to the first indent of article 3(10), host Member States may also impose, in compliance with the Treaty and on a basis of equality of treatment between the host Member State and out-of-state service providers, employment standards concerning non-listed matters ‘in the case of public policy provisions’.

Regarding the sources of the relevant host Member State employment standards, the Posted Workers Directive distinguishes those set legislatively and those set collectively. With regard to the former category, the Directive mandates the application of standards set ‘by law, regulation or administrative provision’.⁹¹ With regard to the latter category, the key questions are which types of collectively set standards can be imposed on out-of-state service providers and in which sectors of the economy. The Directive attempts to accommodate various traditions of collective standard setting that exist within the EU. On the one hand, it mandates the application of standards set by ‘collective agreements or arbitration awards which have been declared universally applicable’,⁹² i.e. ‘collective agreements or arbitration awards which must be observed by all undertakings in the geographical area and in the profession or industry concerned’.⁹³ On the other hand, Member States that do not have a system for declaring collective agreements or arbitration awards to be of universal application may, ‘if they so decide’, impose, on a basis of equality of treatment, employment standards set by

⁸⁹ Ibid recitals 13 and 14.

⁹⁰ See also *ibid* art 3(9).

⁹¹ *Ibid* art 3(1).

⁹² *Ibid*.

⁹³ *Ibid* art 3(8), first subparagraph.

‘collective agreements or arbitration awards which are generally applicable to all similar undertakings in the geographical area and in the profession or industry concerned’ and/or ‘collective agreements which have been concluded by the most representative employers’ and labour organisations at national level and which are applied throughout national territory’.⁹⁴ The provisions concerning the imposition of collectively set standards apply by default and mandatorily in the building sector.⁹⁵ The Directive provides that collectively set standards in other sectors may also be imposed in compliance with the Treaty and on a basis of equality of treatment.⁹⁶

The Posted Workers Directive also provides for cooperation between Member States on information.⁹⁷ The Directive further provides that Member States shall take appropriate measures in the event of failure to comply with the Directive.⁹⁸ Member States shall in particular ensure that adequate procedures are available to workers and/or their representatives for the enforcement of obligations under this Directive.⁹⁹ The posted worker can sue the employer, pursuant to the Brussels I Regulation, in the courts of the employer’s domicile and in the courts for the habitual place of work. The Posted Workers Directive makes one more forum available to posted workers. In order to enforce the right to the terms and conditions of employment guaranteed in article 3, judicial proceedings may be instituted in the Member State in whose territory the worker is or was posted.¹⁰⁰

The Posted Workers Directive is a very controversial instrument. Many shortcomings of the Directive have been revealed since its entry into force.¹⁰¹ The two most important shortcomings were the defective enforcement of the Directive and the fact that the Directive allowed host Member States to impose on out-of-state service providers local employment standards concerning minimum wage only. This was thought to have considerably contributed to social dumping in affluent Member States. The EU reacted by adopting two measures: the Posting of Workers Enforcement Directive¹⁰² and a directive revising the Posted Workers Directive.¹⁰³ These two developments will be addressed in turn.

⁹⁴ Ibid art 3(8), second subparagraph.

⁹⁵ Ibid art 3(1) and the Annex.

⁹⁶ Ibid art 3(10), second indent.

⁹⁷ Ibid art 4.

⁹⁸ Ibid art 5(1).

⁹⁹ Ibid art 5(2).

¹⁰⁰ Ibid art 6.

¹⁰¹ For an account of the shortcomings with further references, see Grušić (n 6), ch 8.

¹⁰² Directive 2014/67/EU of the European Parliament and of the Council of 15 May 2014 on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services and amending Regulation (EU) No 1024/2012 on administrative cooperation through the Internal Market Information System (‘the IMI Regulation’) [2014] OJ L159/11. This article deals with the main developments in

3.1. Posting of Workers Enforcement Directive

The meaning of the terms ‘posting’ and ‘posted worker’ under the Posted Workers Directive was not entirely clear. The Posting of Workers Enforcement Directive aims to introduce legal certainty by providing, in article 4, a non-exhaustive list of indicative factual elements characterising both the temporary nature inherent in the notion of posting and the existence of a genuine link between the employer and the Member State from which the posting takes place. The purpose of this provision is to help Member State authorities to identify genuine postings and to prevent the abuse of the posted workers regime and the circumvention of the applicable rules, in particular through incorporating ‘letter-box’ companies solely for the purpose of posting workers, through consecutive ‘postings’ of a single worker to a single Member State by different ‘employers’ from different Member States and through rotational postings of different workers to a single Member State who effectively share a single job.

The Posting of Workers Enforcement Directive primarily concerns the public enforcement of the Posted Workers Directive. Public enforcement refers to the monitoring and enforcement by public authorities, primarily labour inspectorates and immigration authorities of host Member States. The Posting of Workers Enforcement Directive addresses four issues concerning the public enforcement of the Posted Workers Directive: administrative cooperation among Member States’ public authorities with respect to the monitoring and enforcement of the Posted Workers Directive;¹⁰⁴ the monitoring of compliance with the Posted Workers Directive by the host Member State public authorities;¹⁰⁵ subcontracting liability in some cases concerning public enforcement;¹⁰⁶ and the cross-border enforcement of administrative fines and penalties imposed by the host Member State public authorities for the violation of the applicable host Member State employment standards.¹⁰⁷ The Posting of Workers Enforcement Directive also deals with the private enforcement of the Posted Workers Directive by posted workers themselves. It

the European private international law of employment since 1 January 2015. The Posting of Workers Enforcement Directive is included in this review because, although it entered into force on 17 June 2014, the deadline for its transposition was 18 June 2016.

¹⁰³ Directive (EU) 2018/957 of the European Parliament and of the Council of 28 June 2018 amending Directive 96/71/EC concerning the posting of workers in the framework of the provision of services [2018] OJ L 173/16. The deadline for the transposition of this Directive is 30 July 2020. The provisions of the original Posted Workers Directive remain applicable until this date.

¹⁰⁴ Posting of Workers Enforcement Directive, arts 6-8.

¹⁰⁵ Ibid arts 9 and 10. If the monitoring of compliance with the Posted Workers Directive is left to trade unions or workers’ representatives, an adequate level of protection of service providers to that established by the Posted Workers Directive and the Posting of Workers Enforcement Directive must be guaranteed: art 10(4).

¹⁰⁶ Ibid art 12(6).

¹⁰⁷ Ibid arts 13-19.

provides that Member States shall ensure that there are effective mechanisms for posted workers to lodge complaints against their employers directly and to commence judicial or administrative proceedings in the host Member State.¹⁰⁸ It also provides for subcontracting liability, which gives posted workers an alternative or additional debtor for the obligations imposed on the service provider by the Posted Workers Directive.¹⁰⁹ The Posting of Workers Enforcement Directive does not deal in any great detail with the collective enforcement of the Posted Workers Directive by trade unions, work councils and other workers' representatives. The Posting of Workers Enforcement Directive also aims to improve access to information.¹¹⁰ In this way, this Directive indirectly assists the public, collective and private enforcement of the Posted Workers directive.

The provisions of the Posting of Workers Enforcement Directive are very detailed, spanning 21 pages of the Official Report of the EU. It is not necessary to set out those provision in this article. Suffice it to note that the Posting of Workers Enforcement Directive represents a major step towards remedying the shortcomings of the Posted Workers Directive and that its effects will become clearer in the future. Article 24 of the Posting of Workers Enforcement Directive provides that the Commission should present a review no later than 18 June 2019 on the application and implementation of this Directive to the European Parliament, the Council and the European Economic and Social Committee and propose, where appropriate, necessary amendments and modifications. This report has not been published yet.

3.2.Revision of the Posted Workers Directive

The Posted Workers Directive, in its original version, enabled host Member States to impose on service providers from other Member States the minimum rates of pay. In other words, an out-of-state service provider could not be forced to comply with the running wage in the host Member State. This had two consequences. On the one hand, the fact that only the minimum, and not the running, wage could be imposed meant that the Directive enabled Europe-wide competition of service providers in labour-intensive industries such as construction, transport and agency work not on the basis of productivity, efficiency and the quality of the services provided, but on the basis of low labour costs. This benefitted service providers from Member States with relatively low employment standards, in particular from southern and

¹⁰⁸ Ibid art 11.

¹⁰⁹ Ibid art 12.

¹¹⁰ Ibid art 5.

former communist European countries. Low cost per unit of labour is a comparative advantage that such service providers enjoy over service providers from Member States with relatively high employment standards. Workers from Member States with relatively low employment standards also indirectly benefitted from the increased ability of their employers to win services contracts abroad. The interests of those countries were also advanced because the increased competitiveness of their service providers led to more employment and revenue. On the other hand, this was perceived as ‘unfair competition’ and ‘social dumping’ by workers, trade unions and service providers from Member States with relatively high employment standards. More importantly, the Posted Workers Directive seriously disturbed labour market practices in countries like Sweden that have neither legislatively set standards concerning minimum wage, nor a system for extending the application of collectively set standards. Sweden is a country that traditionally relies on trade unions for the setting, monitoring and enforcing the level of wages.¹¹¹ The level of wages is generally left to be negotiated on a case-by-case basis at the level of each workplace. If an employer refuses to negotiate the level of wages, unions will force it to do so by means of primary and secondary industrial action. The Posted Workers Directive meant that the traditional way of setting, monitoring and enforcing the level of wages of posted workers was illegal under EU law.¹¹²

In order to combat this kind of social dumping, the European Parliament and the Council adopted a directive revising the Posted Workers Directive. The main change introduced by the revised Directive is the application to posted workers of all the mandatory elements of remuneration, including overtime rates.¹¹³ For the purposes of the revised Directive, the concept of remuneration is determined by the national law and/or practice of the host Member State and means all the constituent elements of remuneration rendered mandatory by national law, regulation or administrative provision, or by collective agreements or arbitration awards that are applicable in accordance with the Directive.¹¹⁴ Furthermore, the revised Directive provides for the application to posted workers of the rules of the host Member State on workers’ accommodation and allowances or reimbursement of expenses during the posting assignment.¹¹⁵ Finally, the revised Directive provides for the

¹¹¹ M Rönmar, ‘Free Movement of Services versus National Labour Law and Industrial Relations Systems: Understanding the *Laval* Case from a Swedish and Nordic Perspective’ (2007–2008) 10 *Cambridge Yearbook of European Legal Studies* 493.

¹¹² Case C-341/05 *Laval un Partneri Ltd v. Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avdelning 1, Byggettan and Svenska Elektrikerförbundet* [2007] ECR I-11767.

¹¹³ Revised Posted Workers Directive, art 3(1)(c).

¹¹⁴ *Ibid* 3(1).

¹¹⁵ *Ibid* art 3(1)(h) and (i).

application of an extended set of terms and conditions of employment of the host Member State for long-term postings (longer than 12 or 18 months).¹¹⁶

The revised Posted Workers Directive will go a long way towards combating unfair competition and social dumping in the transnational EU labour market. It should be mentioned that, because of the highly mobile nature of work in international road transport, the implementation of the revised Directive in that sector is said to raise particular legal questions and difficulties. The rules of the revised Directive will apply to this sector only from the date of application of the sector-specific rules proposed by the Commission and under discussion between the European Parliament and the Council.

But the revised Posted Workers Directive is not a development that has been universally welcomed. Some central and eastern European Member States opposed the revision of the Directive¹¹⁷ because this eliminates one of the main comparative advantages of service providers from these countries. Hungary and Poland have commenced proceedings before the Court of Justice seeking the annulment of the revision of the Posted Workers Directive.¹¹⁸ These cases have the potential to be the next big development in the field of European private international law of employment.

4. Brexit¹¹⁹

The UK is set to withdraw from the EU on 31 October 2019.¹²⁰ At the moment, it is impossible to predict the exact shape that Brexit will take. This section, therefore, describes the likely effect that a withdrawal of the UK from the EU without a withdrawal agreement, so called ‘hard Brexit’ or ‘no-deal Brexit’, will have on the private international law of employment. If the UK and the EU agree on the arrangements for the withdrawal and eventually on their future relationship, any such agreement may contain provisions on

¹¹⁶ Ibid art 3(1a).

¹¹⁷ European Commission, ‘Proposal for a Directive of the European Parliament and of the Council amending Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services’ COM(2016) 128 final, 5: ‘Bulgaria, Czech Republic, Estonia, Hungary, Lithuania, Latvia, Poland, Slovakia and Romania... have argued that a review of the 1996 Directive is premature’.

¹¹⁸ Case C-620/18 *Hungary v European Parliament and Council of the European Union* [2018] OJ C427/31; Case C-626/18 *Poland v European Parliament and Council of the European Union* [2019] OJ C4/12.

¹¹⁹ This section is based on U Grušić, ‘The Effect of Brexit on the Private International Law of Employment’, forthcoming in [2019] *Revue critique du droit international privé*.

¹²⁰ Consolidated Version of the Treaty on the Functioning of the EU [2012] OJ C326/47 (TFEU), art 50(3); D Boffey and R Mason, ‘Theresa May agrees to October Brexit as Donald Tusk warns UK “don’t waste this time”’ *The Guardian* (11 April 2019) <www.theguardian.com/politics/2019/apr/11/may-agrees-to-october-brexit-after-franco-german-carve-up> accessed 25 June 2019.

employment law and judicial cooperation in civil and commercial matters. This section should, therefore, be read with caution.

The effect of Brexit on choice of law for individual employment contracts and the recognition and enforcement of judgments in employment matters is easy to predict. The UK will transpose the provisions of the Rome I and Rome II Regulations into domestic law on exit day. That much is made clear by the Law Applicable to Contractual Obligations and Non-Contractual Obligations (Amendment etc) (EU Exit) Regulations 2019.¹²¹ Absent an agreement on judicial cooperation in civil and commercial matters, the system of recognition and enforcement of judgments established by the Brussels I Regulation, Lugano Convention and related legal instruments¹²² will cease to apply to cross-border UK-EU employment relationships.¹²³ Any judgment given by a court or tribunal of a Member State will be given effect in the UK under the traditional law of the constituent parts of the UK. Similarly, any judgment given by a court or tribunal in the UK will be given effect in a Member State under the traditional law of that Member State. This section will deal with the likely effect of Brexit on employment law and the law of international jurisdiction over individual employment contracts.

4.1. Effect of Brexit on Employment Law

The following text will describe the likely immediate effect of Brexit on employment law in the UK and the EU. Crucially, free movement will cease. EU citizens will not enjoy free access to the UK's labour market and vice versa. Service providers established in a Member State will not be able to freely post their workers to Britain for the purpose of providing services in this country and vice versa. We also know that the Charter of Fundamental Rights of the EU¹²⁴ will cease to have any direct legal effect in the UK after Brexit.¹²⁵

It is much harder to predict the fate of secondary EU employment law. Some legal instruments, such as the Posted Workers Directive, Posting of Workers Enforcement

¹²¹ SI 2019/834.

¹²² Regulation (EC) 805/2004 of the European Parliament and of the Council of 21 April 2004 creating a European Enforcement Order for uncontested claims [2004] OJ L143/15; Regulation (EC) 1896/2006 of the European Parliament and of the Council of 12 December 2006 creating a European order for payment procedure [2006] OJ L399/1.

¹²³ Civil Jurisdiction and Judgments (Amendment) (EU Exit) Regulations 2019, SI 2019/479 (Civil Jurisdiction and Judgment Regulations 2019), regs 82, 84 and 89; European Enforcement Order, European Order for Payment and European Small Claims Procedure (Amendment etc) (EU Exit) Regulations 2018, SI 2018/1311.

¹²⁴ [2000] OJ C364/1; see also Treaty of Lisbon [2007] OJ C306/1, which gave the Charter the same legal value as the Treaties.

¹²⁵ EU (Withdrawal) Act 2018, s 5(4).

Directive and the European Works Councils Directive,¹²⁶ only make sense in the context of the transnational EU labour market and, therefore, cannot apply to cross-border UK-EU employment relationships after Brexit.¹²⁷ Some legal instruments, such as the directive on mutual recognition of professional qualifications,¹²⁸ support the exercise of free of movement of people. Once free movement ceases, the purpose of these legal instruments will fall away and it will make little sense for the UK and the EU to unilaterally apply their provisions. The primary purpose of some legal instruments, namely directives on collective redundancies,¹²⁹ transfers of undertakings¹³⁰ and insolvency protection,¹³¹ is to address the negative consequences of the free movement of capital across the EU. But courts have held that these legal instruments apply even in situations in which there is a close connection with a non-EU country.¹³² This case law demonstrates that there is nothing to prevent the UK from retaining the provisions of these legal instruments in UK law or Member States from continuing to apply their implementations of these legal instruments to situations with a close connection with the UK. Similarly, nothing precludes the transposition into UK law of the provisions of legal instruments on non-discrimination,¹³³ introducing minimum employment standards¹³⁴ and enhancing competitiveness.¹³⁵

¹²⁶ Directive 2009/38/EC of the European Parliament and of the Council of 6 May 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 (Recast) [2009] OJ L122/28.

¹²⁷ The UK Government has confirmed this point with respect to the European Works Councils Directive: Department for Business, Energy & Industrial Strategy, 'Guidance: Workplace rights if there's no Brexit deal' (23 August 2018) <www.gov.uk/government/publications/workplace-rights-if-theres-no-brexite-deal/workplace-rights-if-theres-no-brexite-deal#after-29-march-2019-if-theres-no-deal> accessed 25 June 2019.

¹²⁸ Directive 2005/36/EC of the European Parliament and of the Council of 7 September 2005 on the recognition of professional qualifications [2005] OJ L255/22.

¹²⁹ Council Directive 98/59/EC of 20 July 1998 on the approximation of the laws of the Member States relating to collective redundancies [1998] OJ L225/16.

¹³⁰ Council Directive 2001/23/EC of 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses [2001] OJ L82/16.

¹³¹ Directive 2008/94/EC of the European Parliament and of the Council of 22 October 2008 on the protection of employees in the event of the insolvency of their employer (Codified version) [2008] OJ L283/36.

¹³² *Seahorse Maritime Ltd v Nautilus Int* [2018] EWCA Civ 2789, [2019] IRLR 286 (on the territorial scope of the British implementation of the directive on collective redundancies); *Xerox Business Services Philippines Ltd v Zeb* [2018] ICR 419 (EAT) and *Holis Metal Industries Ltd v GMB* [2008] ICR 464 (EAT) (on the territorial scope of the British implementation of the directive on the transfers of undertakings); Case C-292/14 *Greece v Stroumpoulis* ECLI:EU:C:2016:116 (on the territorial scope of the directive on insolvency protection).

¹³³ Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast) [2006] OJ L204/23.

¹³⁴ Council Directive 89/391/EEC of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers at work [1989] OJ L183/1 and a number of other directives in the field of health and safety following this framework directive; Council Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding [1992] OJ L348/1; Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of

Theresa May has pledged to enshrine existing EU employment law in UK law after Brexit and to give Parliament the chance to consider any future changes in EU law that strengthen workers' rights or workplace standards.¹³⁶ But, as already mentioned, the transposition of some instruments of secondary EU employment law will either be impossible or make little sense. As for the rest, there will be no external restrictions preventing future governments or parliaments to pursue a distinct British social model, which could range from a drastic deregulation and flexibilization of the UK labour market (possibly as a way of achieving comparative advantage over its new neighbour, the EU) to the return to the legacy of Attlee and Wilson should a Labour government come to power.¹³⁷

4.2. Effect of Brexit on the Law of International Jurisdiction over Individual Employment Contracts

If the UK and the EU fail to reach an agreement on a system to replace the Brussels I Regulation and the Lugano Convention, the jurisdiction of UK courts over individual employment disputes will be determined exclusively by domestic law. Although the Brussels I Regulation will cease to be binding on it, the UK has unilaterally decided to transpose some of the provisions of the Regulation into domestic law after Brexit. The Civil Jurisdiction and Judgment Regulations 2019 will introduce a new section 15C into the Civil Jurisdiction and Judgments Act 1982 (1982 Act),¹³⁸ which will lay down the following rules of jurisdiction in relation to individual contracts of employment:

- (1) This section applies in relation to proceedings whose subject-matter is a matter relating to an individual contract of employment.
- (2) The employer may be sued by the employee—
 - (a) where the employer is domiciled in the United Kingdom, in the courts for the part of the United Kingdom in which the employer is domiciled,

working time [2003] OJ L299/9; Council Directive 94/33/EC of 22 June 1994 on the protection of young people at work [1994] OJ L216/12.

¹³⁵ Council Directive 91/533/EEC of 14 October 1991 on an employer's obligation to inform employees of the conditions applicable to the contract or employment relationship [1991] OJ L288/32; Council Directive 97/81/EC of 15 December 1997 concerning the Framework Agreement on part-time work concluded by UNICE, CEEP and the ETUC [1998] OJ L14/9; Council Directive 2010/18/EU of 8 March 2010 implementing the revised Framework Agreement on parental leave concluded by BUSINESSSEUROPE, UEAPME, CEEP and ETUC and repealing Directive 96/34/EC [2010] OJ L68/13.

¹³⁶ J Pickard, 'Theresa May Woos Labour MPs with Pledge on Workers' Rights' *Financial Times* (London, 5 March 2019) <www.ft.com/content/02d80812-3f63-11e9-9bee-efab61506f44> accessed 25 June 2019.

¹³⁷ K Ewing, 'On Labour's Constitution' (Current Legal Problems lecture given at University College London, 14 March 2019).

¹³⁸ Civil Jurisdiction and Judgment Regulations 2019, reg 26.

(b) in the courts for the place in the United Kingdom where or from where the employee habitually carries out the employee's work or last did so (regardless of the domicile of the employer), or

(c) if the employee does not or did not habitually carry out the employee's work in any one part of the United Kingdom, in the courts for the place in the United Kingdom where the business which engaged the employee is situated (regardless of the domicile of the employer).

(3) If the employee is domiciled in the United Kingdom, the employer may only sue the employee in the part of the United Kingdom in which the employee is domiciled (regardless of the domicile of the employer).

(4) Subsections (2) and (3) are subject to rule 11 of Schedule 4¹³⁹ (and rule 14 of Schedule 4¹⁴⁰ has effect accordingly).

(5) Subsections (2) and (3) do not affect—

(a) the right (under rule 5(c) of Schedule 4¹⁴¹ or otherwise) to bring a counterclaim in the court in which, in accordance with subsection (2) or (3), the original claim is pending,

(b) the operation of rule 3(e) of Schedule 4,¹⁴²

(c) the operation of rule 5(a) of Schedule 4¹⁴³ so far as it permits an employer to be sued by an employee, or

(d) the operation of any other rule of law which permits a person not domiciled in the United Kingdom to be sued in the courts of a part of the United Kingdom.

(6) Subsections (2) and (3) may be departed from only by an agreement which—

(a) is entered into after the dispute has arisen, or

(b) allows the employee to bring proceedings in courts other than those indicated in this section.

(7) For the purposes of this section, where an employee enters into an individual contract of employment with an employer who is not domiciled in the United Kingdom, the employer is deemed to be domiciled in the relevant part of the United

¹³⁹ The reference here is to para 11 of sch 4 of the 1982 Act, which concerns exclusive jurisdiction of UK courts.

¹⁴⁰ The reference here is to para 14 of sch 4 of the 1982 Act, which concerns examination as to jurisdiction and admissibility.

¹⁴¹ The reference here is to para 5(c) of sch 4 of the 1982 Act, which concerns jurisdiction over counter-claims in cases in which the defendant is domiciled in the UK.

¹⁴² The reference here is to para 3(e) of sch 4 of the 1982 Act, which concerns jurisdiction over disputes arising out of the operation of an establishment in cases in which the defendant is domiciled in the UK.

¹⁴³ The reference here is to para 5(a) of sch 4 of the 1982 Act, which concerns jurisdiction over co-defendants domiciled in the UK.

Kingdom if the employer has a branch, agency or other establishment in that part of the United Kingdom and the dispute arose from the operation of that branch, agency or establishment.

Four things are worth noting about the new section 15C.¹⁴⁴ First, if the defendant is domiciled in the UK, the jurisdiction of UK courts will be determined by the rules of jurisdiction which are modelled on the jurisdictional rules of the Brussels I Regulation. Second, if the employer is not domiciled in the UK, UK courts will have jurisdiction to hear an individual employment dispute brought by the employee if the habitual place of work is or was in the UK or, in the absence of a habitual place of work in the UK, if the engaging place of business is in the UK. This will not affect the operation of the otherwise applicable rules of jurisdiction in cases in which the defendant is not domiciled in the UK.¹⁴⁵ Third, the rule of jurisdiction based on the connecting factor of the engaging place of business of section 15C is different to the corresponding rule in article 21(b)(ii) of the Brussels I Regulation. It has already been said that the Court of Justice has given a very broad interpretation to the connecting factor of the habitual place of work and, correspondingly, a very narrow interpretation to the connecting factor of the engaging place of business. The Court of Justice has also confirmed that the Regulation's rule of jurisdiction based on the connecting factor of the engaging place of business cannot apply in situations in which there is a habitual place of work, but it is located outside the EU.¹⁴⁶ The consequence of this is that the Regulation's rule of jurisdiction based on the connecting factor of the engaging place of business is very rarely applicable. By contrast, the rule of jurisdiction based on the connecting factor of the engaging place of business of section 15C will apply not only in cases where there is no habitual place of work, but also in cases where there is a habitual place of work which is located outside the UK.¹⁴⁷ There will be nothing to prevent UK courts to expand the reach of their adjudicative

¹⁴⁴ See also new ss 15D (Further provisions as to jurisdiction) and 15E (Interpretation) of the 1982 Act, introduced by reg 26 of Civil Jurisdiction and Judgment Regulations 2019, and 42A (Domicile of corporation or association for purposes of certain civil proceedings), introduced by reg 42 of Civil Jurisdiction and Judgment Regulations 2019.

¹⁴⁵ For the traditional English rules of jurisdiction, which do not contain protective rules of jurisdiction for individual employment disputes, see L Merrett, *Employment Contracts in Private International Law* (Oxford University Press 2011), ch 5. For the traditional Scottish rules of jurisdiction, see the 1982 Act, s 20 and sch 8, in particular para 4 concerning individual employment contracts.

¹⁴⁶ Case 32/88 *Six Constructions Ltd v Humbert* [1989] ECR 341.

¹⁴⁷ It is unclear if this is a deliberate change. The Explanatory Memorandum accompanying the Civil Jurisdiction and Judgment Regulations 2019 is silent on this point: see Ministry of Justice, 'Explanatory Memorandum to the Civil Jurisdiction and Judgments (Amendment) (EU Exit) Regulations 2019' <www.legislation.gov.uk/ukdsi/2019/9780111176726/pdfs/ukdsiem_9780111176726_en.pdf> accessed 25 June 2019. In fact, para 7.12 of the Explanatory Memorandum suggests that the change is accidental: 'For contracts of employment, an employee may sue the employer in one of three places:... (iii) where the employee did not

power and to grant a greater degree of jurisdictional protection to claimant employees engaged in the UK to work abroad by relying on the rule of jurisdiction based on the connecting factor of the engaging place of business of section 15C. Finally, section 49 of the 1982 Act saves the power to stay proceedings on the basis of *forum non conveniens* or otherwise where the jurisdiction of a UK court is based on the rules of jurisdiction of the Act, which will include the new section 15C.

On the other hand, the jurisdiction of Member State courts over individual employment disputes that have a connection with the UK will depend on the domicile of the defendant and the location of the habitual place of work and the engaging place of business. If the defendant is domiciled in the EU, the jurisdiction of Member State courts will be determined by the rules of the Brussels I Regulation, even if the employment relationship has a strong connection with the UK.¹⁴⁸ If the defendant is not domiciled in the EU,¹⁴⁹ the employee will be able to rely on article 21(2) and sue the employer in a Member State if the habitual place of work is in that Member State or, in the absence of a habitual place of work, if the engaging place of business is in that Member State, even if the employment relationship has a strong connection with the UK. If the courts of a Member State have jurisdiction over an individual employment dispute under the Brussels I Regulation, they have to exercise that jurisdiction.¹⁵⁰ The only exception to this are articles 33 and 34 of the Regulation on *lis pendens* in third countries. Otherwise, the jurisdiction of Member State courts will depend on their traditional law.

5. Conclusion

This article has outlined the recent developments in the European private international law of employment. It is clear that this field of law remains an important part of EU law which deals with some of the most important social, economic and political challenges with which our societies are confronted, be it the employment within groups of companies, employment practices in the transport sector, Greek public debt crisis, social dumping in the transnational EU labour market or Brexit.

habitually work in one place, in the courts for the part of the UK where the business which engaged the employee is situated.’ (emphasis added)

¹⁴⁸ Similarly, if the defendant is domiciled in Norway, Switzerland or Iceland and the dispute is being heard in the courts of one of those countries or in the courts of a Member State or if the defendant is domiciled in the EU and the dispute is being heard in the courts of Norway, Switzerland or Iceland, jurisdiction will be determined by the rules of the Lugano Convention, even if the employment relationship has a strong connection with the UK.

¹⁴⁹ Or in Norway, Switzerland or Iceland.

¹⁵⁰ Case C-281/07 *Owusu v Jackson* [2005] ECR I-1383.

Generally speaking, the European private international law of employment is fit for purpose, although there is scope for improvement. The Court of Justice has given domestic courts relatively clear guidance, based on flexible criteria, on how to deal with the question whether a relationship between a person who is employed as a senior officers or manager within a group of companies falls within the scope of the protective rules of European private international law. With respect to employment practices in the aviation industry, the Court of Justice has rejected an interpretation of the rules of the European private international law of employment that would enable exploitation of workers and contribute to the achievement of circumvention strategies by airlines. Similarly, the EU legislator has adopted two directives that are aimed at remedying the shortcomings of the posted workers regime and combating social dumping in the transnational EU labour market. The strength of European private international law is also reflected in the fact that the UK has decided to transpose into domestic law both the choice-of-law rules for individual employment contracts of the Rome I Regulation and the protective rules of jurisdiction over individual employment contracts of the Brussels I Regulation.

By contrast, the *Nikiforidis* case, which concerned the effect of the Greek legislation aimed at reducing its public debt on an employment contract of a Greek public sector worker that was governed by German law and performed in Germany, demonstrates the limitation of the European private international law of employment. The main objective pursued by the rules of the European private international law of employment is the protection of employees. But, as the *Nikiforidis* case demonstrates, the objective is to be understood in an individualised sense, as the protection of the individual employee who is bound by an individual employment contract to his or her employer. This individualised focus sometimes precludes the courts from taking into account and giving effect to measures that are aimed at protecting a county's social and economic system, and thus of all workers, at the expense of particular interests of individual employees.