The Employment Contract in Private International Law

By

CLIVE MASSYN

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Supervisor: Prof. Dr. Jan L Neels

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Clive Massyn[1]

1. *Introduction*

> "It is in this very context of employment relationships which have a cross-border dimension that conflict of law between individual legislative systems in the area of employment law raise complex questions of law. One of the consequences of this is that they often present the courts … which are called upon to determine the law applicable to an employment contract with considerable problems. Alongside the customary difficulties associated with interpreting the employment contract comes the uncertainty as to what the best approach is to determining the applicable law. These difficulties in judicial practice are on the increase as it becomes more common for workers to be posted, more EU citizens avail themselves of the freedom of movement for workers and more undertakings enter into relationships with firms overseas or operate places of business in other countries. The – temporary or indefinite – posting of large numbers of employees has become an important aspect of international economic relations, not only within the European internal market but, more generally, throughout the world. It is for that very reason that there is an urgent need for conflict of law rules which offer the contracting parties foreseeable solutions to the numerous problems that affect employment relationships..."[2]

Like Advocate General Trstenjak,[3] South African writers are not ignorant of the complications that international contracts of employment bring. As correctly pointed out by Calitz,[4] globalisation has resulted in many South African employees increasingly working for South African employers outside of South Africa and the determination of any disputes that may arise in these unique employment relationships requires the application of conflict of laws. This is problematic and the present author submits that there is a *lacuna* in South African private international law in respect of employment contracts involving a foreign element. A number of factors have contributed to this gap in South African private international law, namely the infrequency with which judges in South African courts have been called upon to determine such issues and then in these limited opportunities the judges

[1] I dedicate this paper to my grandmother Beryl Peters. Her unfailing belief in my abilities has shaped me into the man that I am today. *Je t'aime encore!* A special thanks also goes to Prof Jan Neels for his thought-provoking questions and guidance without which this paper would have many shortcomings.

[2] Opinion of Advocate General Trstenjak delivered on 8 September 2011 in respect of Voogsgeerd v Navimer SA Case C-384/10 at par 41 available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62010CC0384:EN:HTML (23 September 2013).

[3] n 2 above.

[4] Calitz "The Jurisdiction of the Labour Court in International Employment Contracts in Respect of Workplaces Outside South Africa" 2011 *Obiter* 678.

have had difficulty in distinguishing the determination of jurisdiction with the enquiry into determining the proper law of the contract.[5] Most of the academic writings in this area of private international law, at least from a South African perspective, have also focused on the question of jurisdiction rather than a determination of the proper law of the international employment contract.[6]

In the first part of this paper the present author sets out the relevant principles applicable under European private international law in respect of employment contracts, followed by an exposition of the relevant legal principles in South African law with regards to identifying the applicable law (proper law) of a contract. In the last part of this paper the present author attempts to apply the principles under European private international law to two cases that came before the South African labour court in an attempt to show that adopting a principled approach in the quest to determine the proper law of an international employment contract can lead to international harmony of decision.

2. *European Private International Law*

2.1 A brief history on the development of the law on contractual obligations

As early as 1967 there was a proposal from the governments of the Benelux countries[7] to the Commission of the European Communities for the unification of private international law rules, particularly in the field of contract law. After much negotiation between experts from the nine Member States of the European Community extensive amendments were made to a draft Convention culminating in the Rome Convention.[8] The Rome Convention was

[5] This difficulty with the distinction between questions of jurisdiction and the proper law of an employment contract are not uncommon. See in this regard Merrett *Employment Contracts in Private International Law* (2011) 5 par 1.11.

[6] See in this regard Roodt "Jurisdiction of the South African Labour Court: Employer Identity and Party Autonomy" 2003 *SA Merc LJ* 135; Calitz (n 4) above; MP Olivier "Determining the applicable legal system(s) for purposes of the employment relationship: issues, challenges and possibilities from a South African perspective" paper delivered at the private international law conference, 17 – 20 January 2005, the University of Johannesburg.

[7] Belgium, the Netherlands and Luxembourg.

[8] The Convention on the Law Applicable to Contractual Obligations 1980 available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:41980A0934:EN:NOT (23 September 2013). It was signed in Rome, Italy, on 19 June 1980 and entered into force in 1991. It was a measure in private international law or the conflict of laws which created a common choice of law system in certain commercial contracts. The convention determined which law should be used, but did not harmonize the substance (the actual law). The convention is now only applicable to contracts concluded prior to 17 December 2009.

accompanied by the *Giuliano-Lagarde* Report, an explanatory report written by members of the working group who were responsible for drafting the Convention.[9]

In 2003 the European Commission published a *Green Paper* on the conversion of the Rome Convention into a community instrument.[10] In 2005, the European Commission put forward a proposal that the Rome Convention should be converted to a regulation and that its provisions should be modified.[11]

The Rome I Regulation[12] was formally adopted by the Council and now governs the choice of law, among other aspects, in the European Union. The Rome I Regulation is based upon and replaces the Rome Convention in respect of contracts concluded after April 2009. It was noted in the *Green Paper* that according to practitioners and academic writers the employment provisions in the Rome Convention were generally considered relatively well drafted.[13] As a result, the employment rules set out in the Rome I Regulation do not differ significantly from those in the Rome Convention.[14]

2.2 The relevance of case law on the Brussels I Regulation on the interpretation of the Rome Convention and the Rome I Regulation

Recital (7) in the preamble to the Rome I Regulation provides:

> 'the substantive scope and the provisions of this Regulation should be consistent with Council Regulation (EC) No 44/2001 of 22 December 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (Brussels I)'

[9] Giuliano and Lagarde report [1980] OJ C282/1 available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31980Y1031(01):EN:HTML (23 September 2013).

[10] Green Paper on the conversion of the Rome Convention of 1980 on the Law Applicable to Contractual Obligations into a Community Instrument and its Modernisation COM (2002) 654 available at http://eur-lex.europa.eu/LexUriServ/site/en/com/2002/com2002_0654en01.pdf (23 September 2013).

[11] Proposal for a regulation of the European Parliament and the Council on the Law Applicable to Contractual Obligations (Rome I) COM (2005) 650 final available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2005:0650:FIN:EN:PDF (23 September 2013)

[12] Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the Law Applicable to Contractual Obligations (Rome I) available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:177:0006:0016:En:PDF (5 January 2014)

[13] See (n 10) par 3.2.9.2

[14] For a comprehensive discussion on the differences between the provisions of art 6 of the Rome Convention and art 8 of the Rome I Regulation, see Mankowski 'Employment Contracts under Article 8 of the Rome I Regulation" in Ferrari and Leible (eds) *Rome I Regulation. The Law Applicable to Contractual Obligations in Europe* (2009) 171.

Advocate General Trstenjak[15] explains at length the connections between the Brussels Convention (the predecessor to the Brussels I Regulation) and the Rome Convention and goes on to state that it is because of these similarities, that the European Court of Justice, in its case law, has attempted to adopt a parallel interpretation of similarly worded provisions of the Regulations, in so far as the subject matter of the relevant provisions makes this possible. The Advocate General goes on to further state that such an approach secures an interpretation of the concepts of private international law which are as uniform as possible.

It is therefore apparent that the existing body of jurisprudence by the European Court of Justice on the Brussels Convention and the Brussels I Regulation remain vital interpretation tools in respect of the Rome Convention and the Rome I Regulation. This can be seen by the application of the relevant case law in respect of the Brussels Convention, by the European Court of Justice, in reaching its conclusions in the cases discussed below.

2.3 Rome I Regulation

2.3.1 Article 8 - Individual Employment Contracts

1. An individual employment contract shall be governed by the law chosen by the parties in accordance with Article 3. Such a choice of law may not, however, have the result of depriving the employee of the protection afforded to him by provisions that cannot be derogated from by agreement under the law that, in the absence of choice, would have been applicable pursuant to paragraphs 2, 3 and 4 of this Article.

2. To the extent that the law applicable to the individual employment contract has not been chosen by the parties, the contract shall be governed by the law of the country in which or, failing that, from which the employee habitually carries out his work in performance of the contract. The country where the work is habitually carried out shall not be deemed to have changed if he is temporarily employed in another country.

3. Where the law applicable cannot be determined pursuant to paragraph 2, the contract shall be governed by the law of the country where the place of business through which the employee was engaged is situated.

[15] See (n 2) above.

4. Where it appears from the circumstances as a whole that the contract is more closely connected with a country other than that indicated in paragraphs 2 or 3, the law of that other country shall apply.

2.3.2 'Individual' employment contract

Article 8(1) provides that an individual employment contract shall be governed by the law chosen by the parties in accordance with article 3. It is clear from this terminology that the rules in the regulation are intended to determine the law applicable to contracts concluded between an individual employee and his or her employer specifically and not the law applicable to collective agreements.[16]

2.3.3 Definition of employment contract

The European Court of Justice in the case of *Lawrie-Blum v Land Baden-Württemberg*[17] held that '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] Where the facts of the case show this to be the nature of the relationship between the parties the provisions of article 8 of the Regulation will be applicable.[19]

2.3.4 The law chosen by the parties in accordance with article 3

[16] See Giuliano-Lagarde (n 9) and the commentary to art 6 par 2 where it is clear that art 8 rules cover individual employment contracts rather than collective agreements. Merrett (n 5) 186 par 6.26 suggests that it is likely that the question of whether terms from a collective agreement are incorporated into an individual contract of employment will still be determined by the law applicable under art 8. According to Plender and Wilderspin *The European Private International Law of Obligations (2009)* 302 par 11-003 the law applicable to collective agreements will be determined by the general rules laid down in arts 3 and 4 of the Rome I Regulation. Mankowski (n 14) is of the opinion that art 8 justifiably refrains from adding conflict rules for collective agreements.

[17] [1986] ECR 2121 available at http://eur-lex.europa.eu/smartapi/cgi/sga_doc?smartapi!celexplus!prod!CELEXnumdoc &numdoc=61985J0066& lg=en (23 September 2013).

[18] Merrett (n 5) 186 par 6.27 argues that it is likely the same autonomous EU meaning from the Brussels I Regulation will apply to contracts of employment in the Rome I Regulation. Plender and Wilderspin (n 16) 308 – 309 par [11-018] – [11-024] set out reasons why they believe that creating an autonomous construction could cause significant problems.

[19] Plender and Wilderspin (n 16) par [11-010] – [11-024] set out three possibilities for deciding which legal system should be used to characterise the contract and ultimately suggests, with some hesitation, that 'the bootstrap solution' is preferred i.e. the question of whether or not an arrangement is an employment contract is to be determined in accordance with the lex causae, the legal system identified under art 8 par (2), (3) or (4) thereby suggesting a form of putative lex causae.

The primary rule under article 8 of the Rome I Regulation is that a contract of employment is to be governed by the law, if any, chosen by the parties. This choice, according to the wording of article 3, must be made expressly or clearly demonstrated by the terms of the contract or the circumstances of the case.[20]

In the *Giuliano-Lagarde Report,* it was acknowledged that the choice of law by the parties will often be express but that the Rome Convention recognises the possibility that the court may, in light of all the facts, find that the parties have made a real choice of law although this is not expressly stated in the contract.[21] In the *Report* three examples were given where an implied choice of law could be appropriate, namely:

1. Standard form contracts - where the contract is in a standard form which is known to be governed by a particular system of law, even in the absence of an express statement to this effect, it may be possible to imply a choice of that law;[22]
2. A course of dealing between the parties - the *Report* referred to two situations where a course of dealing between the parties might provide the basis for an implied choice of law, namely:
    a. where a previous course of dealing between the parties, regulated by a contract containing an express choice of law, may leave the court in no doubt that the contract in question is to be governed by the law previously chosen, provided that where the choice of law clause has been omitted there are not any circumstances indicating a deliberate change of policy by the parties;
    b. an express choice of law in related transactions between the same parties might lead to an implied choice of law;[23]

[20] art 3(1) of the Rome Convention required that the choice had to be demonstrated 'with reasonable certainty'.
[21] According to Magnus "Article 4 Rome I Regulation: The Applicable Law in the Absence of Choice" in Ferrari and Leible (eds) *Rome I Regulation. The Law Applicable to Contractual Obligations in Europe* (2009) 27 several reasons may be responsible that no choice was reached eg. the parties could not agree on a single applicable law because each party insists on their own law (probably not that relevant to employment relationships) or the parties may have overlooked the possibility of designating a governing law or the choice of law is invalid.
[22] Merrett (n 5) 194 is of the opinion that standard forms strongly associated with a specific legal system are unlikely to be used in employment cases.
[23] According to Merrett (n 5) 198 par 6.51 a contract between different parties might also be relevant, for instance where an individual contract of employment refers to a collective agreement, which reference might be taken to demonstrate an intention that the law governing the collective agreement was also to govern the individual employment contract.

3. Jurisdiction and arbitration clauses - the *Report* confirmed that in some cases the choice of a particular forum may show, in no uncertain manner, that the parties intended the contract to be governed by the laws of that forum, albeit that this must always be subject to the other terms of the contract and circumstances of the case. The choice of a place where a dispute is to be settled by arbitration may also indicate that the arbitrator should apply the law of that place.[24]

Recital (12)[25] of the Rome I Regulation provides that an agreement between the parties to confer on one or more courts or tribunals of a member state exclusive jurisdiction to determine disputes under the contract should be one of the factors to be taken into account in determining whether a choice of law has been clearly demonstrated.[26]

2.3.4.1 Limitation on the freedom of choice

It is apparent from the wording of article 8 that the first question to be asked when determining the proper law of the contract is whether there is an express or an implied choice of law. Article 8(1) does however set a limit on the parties freedom to choose the applicable law in that it provides that the choice in contracts of employment 'may not have the result of depriving the employee of the protection afforded to him by provisions that cannot be derogated from by agreement under the law that, in the absence of choice, would have been applicable pursuant to paragraphs 2, 3 and 4 of this article'.

Article 6(1) of the Rome Convention contained a similar limit on the freedom of choice and in the *Giuliano-Lagarde report* it was explained that the purpose of the text was that if the law applicable to paragraph 2 granted the employee protection which is greater than that resulting from the law chosen by the parties, the result is not that the choice of law was completely without effect but rather the law that was chosen would continue, in principle, to

[24] Merrett (n 5) 195 6.42 The English courts at common law have readily assumed that unless they had provided otherwise the parties must have had in mind that the chosen court or arbitrator would apply its own law and often used a choice of forum clause as the basis for an implied choice of law.
[25] According to Mankowski (n 14) 183 Recitals are the most important means of interpretation and, although they do not carry binding character, judges rarely openly refuse to follow what has been expressed in a Recital.
[26] According to Merrett (n 5) 196 the influence that choice of jurisdiction can be presumed to have been coupled with an inferred choice of law in favour of that jurisdiction will have interesting consequences in employment cases particularly in light of the fact that in employment contracts jurisdiction agreements are given very limited effect under the Brussels I Regulation but that it could still be important as the basis for an implied choice of law.

be applicable and insofar as the provisions of the law applicable pursuant to paragraph 2 gave the employee better protection than the chosen law, then the chosen law would be set aside and the law applicable in terms of paragraph 2 would take its place.[27] The *Report* further explains that the mandatory rules from which the parties may not derogate consist not only of the provisions relating to the contract of employment itself but also provisions such as those concerning industrial safety and hygiene.

In *Jan Voogsgeerd v Navimer SA*[28] it was explained as follows:

> 'In order for it to be possible to set aside the basic rule laid down in article 3, the National court must therefore ascertain, in accordance with article 6(1) of the convention, which law would have been applicable if the parties had not made a choice of law and whether that choice of law may deprive the employee of the protection afforded to him by the mandatory rules of the law of the other country. This is for the National court to determine, in essence by assessing which law – the law chosen or the law otherwise applicable – affords greater protection to the employee (conflict of law principle of the more favourable provision) and whether the relevant rules of the more favourable law have mandatory status under the legal system in question. If the law chosen has no mandatory protection provisions or fall short of the standards set by the law applicable under article 6(2) of the convention, it is the mandatory rules of the latter legal system, being more favourable to the employee, which apply. This may mean that the employment relationship is subject to different legal systems. Where, on the other hand, the law chosen by the parties affords the employee just as much protection as, or more protection than, the law applicable under article 6(2) of the convention, the law chosen will remain applicable.'

So it would seem that the first step would be to determine what law would govern the contract in terms of article 8(2), (3), or (4). Once that law has been identified the court must then ascertain whether there is an express or implied choice of a different law in accordance with article 3 and if there is, that chosen law will be applied except that it may not deprive the employee of the protection afforded to him and that cannot be derogated from by agreement under the law identified in the first step.[29]

[27] See (n 9) above comment on art 6.
[28] See (n 2) par 48.
[29] art 6(1) of the Rome convention was explained in this way in the Giuliano-Lagarde report (n 9) 25.

According to Merrett[30] the intention of article 8(1) does not seem to be to allow the employee to accumulate remedies and that the best solution seems to be to give the employee the choice, he can elect which of the rules he wishes to rely on and that if the employee wishes to adopt and confirm the choice of law clause in some respects he or she must do so in its entirety because it amounts to an acceptance that the choice of law was not forced on him or her.

2.3.4.2 Mandatory rules and public policy

Although the court may have applied the choice of law process to determine the applicable law, that is not the end of the matter as the court must always consider the possible application of mandatory rules and public policy which may override or supplement the choice of law rules.

Whether or not a rule is intended to be mandatory is essentially a matter for the internal law of the relevant country, whose rule is involved,[31] to determine, as mandatory rules and public policy reflect interests which are so important that they must be applied regardless of the usual choice of law considerations.

Issues of public policy provide a final check at the end of the normal choice of law process. Once the court has determined and applied the applicable law it may refuse to carry out the result of that process if it contradicts the public policy of the forum.[32]

According to Merrett[33] the three main areas outside of slavery and forced labour in which public policy might be relevant in employment cases are:

- discriminatory provisions;
- restraint of trade;
- the limitation of the right to bring claims relating to employment injuries.

Labour legislation will generally fall under the category of mandatory provisions, however, the application of such statutory restriction will depend on the language of the rule itself, in

[30]Merrett (n 5) 217 par 6.87.
[31] Merrett (n 5) 225 par 7.01.
[32]Merrett (n 5) 227 par 7.07.
[33] Merrett (n 5) 229 par 7.11.

its context. Plender and Wilderspin correctly point out that the provisions in article 8 simply designate a system of law, they do not require that law to extend to situations to which it was not intended to apply; its provisions demand no more than that the contract shall be governed by a system of law and under that system of law it will have to be determined whether that legislation is applicable to the situation or not.[34]

2.3.5 Applicable law in the absence of choice

If there is no express or implied choice of law, article 8(2), (3) and (4) provide rules for determining the applicable law in employment contracts:

2.3.5.1 Article 8(2): work habitually carried out in or from one country

The Regulation provides that 'to the extent that the law applicable to the individual employment contract has not been chosen by the parties, the contract shall be governed by the law of the country in which or, failing that, from which the employee habitually carries out his work in performance of the contract. The country where the work is habitually carried out shall not be deemed to have changed if he is temporarily employed in another country'.

This first presumption according to the *Giuliano-Lagarde* report came about after a thorough examination of the various problems raised by contracts of employment in private international law and the working Group finally adopted the solution that if the employee habitually works in one and the same country the contract of employment is governed by the law of that country even if the employee is temporarily employed in another country.

According to the *Green Paper*[35] the purpose of this provision is to determine the law with which the contract is most closely connected and distinguishes according to whether the worker habitually carries out his work under the contract in the same country or not.

Unlike in the Rome Convention, article 8(2) now refers to the country 'in which or, failing that, from which' the employee habitually carries out his work. The justification for this modification, as stated in the *proposal for a regulation*, was to take into account the

[34] Plender and Wilderspin (n 16) 323 par 11–064.
[35] See (n 10) 35 par 3.2.9.1.

jurisprudence of the European Court of Justice in relation to Article 18 of the Brussels I Regulation[36] and its broad interpretation of the habitual place of work.[37]

2.3.5.1.1 Temporarily employed in another country

The presumption in article 8(2) applies even where the employee is temporarily employed in another country. This means that the law applicable to the contract of a worker sent abroad for a given duration or for the needs of a specific job does not change, whereas expatriation entails the application of the law of the new country as that is now the country in which the worker habitually carries out his work. The Regulation has however left it to the courts to determine the duration beyond which employment ceases to be temporary.

The wording adopted by the Rome I Regulation does not contain any express time-limit and leaves the court with a wide discretion as to when a move is temporary. However, Recital (36) makes it clear that the intention of the parties is paramount and that work carried out in another country is to be regarded as temporary if the employee is expected to resume working in the country of origin after carrying out his tasks abroad.[38]

In *Koelzsch v Luxembourg*[39] an international lorry driver domiciled in Germany with a contract entered into in Luxembourg alleged that his dismissal was contrary to the mandatory rules of German law on the protection against dismissal. The employer's business involved the transfer of flowers and plants from Denmark to destinations in Germany and other European companies by means of lorries that were stationed in Germany. The lorries were registered in Luxembourg and the drivers were covered by Luxembourg social security. The contract contained an exclusive jurisdiction agreement in favour of the courts of Luxembourg

[36] Council Regulation (EC) no 44/2001 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2001:012:0001:0023:en:PDF (16 October 2013).

[37] (n 11) The basic rule in paragraph 2(a) has been amplified and the reference is now to the "country in or from which …". This change will make it possible to apply the rule to personnel working on board aircraft, if there is a fixed base from which work is organised and where the personnel perform other obligations in relation to the employer (registration, safety checks). The text then provides additional guidance as to whether an employee posted abroad is temporarily employed there, though there is no rigid definition as the courts are to have regard to the intentions of the parties.

[38] According to Mankowski (n 14) 185 Recital 36 elevates the most convincing and traditional elements, namely the employee's *animus revertendi* and the employer's *animus retrahendi,* to become the relevant factors and gives proper weight to the parties' contractually measured intentions.

[39] Case C29/10 available at http://curia.europa.eu/juris/document/document.jsf?text=&docid=84441&pageIndex= 0& doclang=EN&mode=lst&dir=&occ=first&part=1&cid=28795 (5 January 2014) was the first case in which the ECJ was called upon to interpret art 6 of the Rome Convention.

and referred to Luxembourg law. The employee wanted the mandatory rules of German law to be applied in terms of article 6(1) of the Rome Convention. This meant that it was necessary to determine whether the contract would have been governed by German law in the absence of a choice by the parties. The referring court asked the court of justice whether article 6(2)(a) of the Rome Convention was to be interpreted as meaning that, in the situation where the employee works in more than one country but returns systematically to one of them, that country must be regarded as the country in which the employee habitually carries out his work.

The court began by reiterating the intention behind article 6 as evidenced by the *Giuliano-Lagarde* report i.e. 'more adequate protection for the party who from the socio-economic point of view is regarded as the weaker in the contractual relationship' and that in order to guarantee adequate protection for the employee:

> 'the provision must be understood as guaranteeing the applicability of the law of the state in which he carries out his working activities for it is in this state that the employee performs his economic and social duties and it is there that the business and political environment affects employment activities. Therefore, compliance with the employment protection rules provided for by the law of that country must, so far as is possible, be guaranteed.'[40]

The court of justice further confirmed that in light of the objective of article 6 it must be held that the criteria of the country in which the employee 'habitually carries out his work' must be given a broad interpretation while the criteria in article 6(2)(b) ought to apply in cases only where the court is not in a position to determine the country in which the work is habitually carried out.[41]

The court further confirmed that the case law on article 5(1) of the Brussels Convention also remains relevant for purposes of analysis of article 6(2) of the Rome Convention.[42]

The court determined that the criteria of work being habitually carried out must be understood as referring to the place in which or from which the employee actually carries out

[40] (n 39) par 40-42.
[41] (n 39) par 43.
[42] (n 39) par 45.

his working activities and, in the absence of a centre of activities, to the place where he carries out the majority of his activities[43] and in particular the court must determine:

> 'in which state is situated the place from which the employee carries out his transport tasks, receives instructions concerning his tasks and organises his work, and the place where his work tools are situated. It must also determine the places where the transport is principally carried out, where the goods are unloaded and the place to which the employee returns after completion of his tasks'[44]

In reply to the question addressed by the referring court, the view was taken that article 6(2)(a) of the Rome Convention must be interpreted as meaning that, in a situation where an employee works in more than one contracting state, the country in which he habitually carries out his work in performance of the contract within the meaning of that article is the country in or from which, taking account of all the circumstances of the case at issue, the employee in fact performs the essential part of his duties vis-à-vis his employer, and that assessment must be carried out by the national court, taking into account all the facts of the case.

The effect of the *Koelzsch* case is that for purposes of determining the place where the employee 'habitually carries out his work' one may have regard to the following connecting factors:

- the place from which the employee mainly carries out his obligations towards his employer;[45]
- the place in which he has established the effective centre of his working activities;[46]
- in the absence of an office, the place in which the employee carries out the majority of his work.[47]

Additional factors which may be relevant to determining the centre of an employee's activities may include:

[43] (n 39) par 45.
[44] See (n 39) par 49.
[45] Case C-125/92 Mulox IBC Ltd v Geels [1993] ECR I-4075 par 21-23 available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:61992CJ0125:EN:HTML (23 September 2013).
[46] Case C-383/95 Rutten v Cross Medical Ltd [1997] ECR I-57 par 23 available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:61995CJ0383:EN:NOT (23 September 2013).
[47] Case C-37/00 *Weber v Universal Ogden Services Ltd* available at http://eur-lex.Europa.eu/Lex UriServ/LexUriServ.do?uri=CELEX:62000CJ0037:EN:HTML (23 September 2013).

- the place where the employee is working at the time a dispute arises;
- the place where the equipment used by the employee is located.[48]

2.3.5.1.2 Employees transferred to a different jurisdiction

When an employee habitually carried out work in one country but is then transferred to another country the court of justice in the *Weber*[49] case stressed that all of the employment is to be taken into account unless there is a reason not to, for example if there was a clear intention that the most recent place was to become the new habitual place of employment. Failing any other criteria, the place where the employee habitually carried out his work will be the place where the employee has worked the longest.

When an employee works abroad temporarily, he will remain habitually working in the former country and that law will govern.[50] If the employee moves permanently abroad, that law will govern.[51]

According to Merrett[52] the first question is therefore whether the employee had or has a base in one country. If so, that is likely to be the place where or from which the employee principally discharged his obligations towards his employer (*Mulox* case) or the place where he had established the effective centre of his working activities (*Rutten* case) or the place in which or from which, in the light of all the factors which characterise that activity, the employee performs the greater part of his obligations towards his employer (*Koelzsch* case). If he does not, the length of time working in different countries is likely to be more significant (*Weber* case).

[48] These factors are relevant according to the opinion of Advocate General Trstenjak delivered on 16 December 2010 in respect of the *Koelzsch* case (n 39) at par 96 available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62010CC0029:EN:PDF (16 October 2013).
[49] See (n 47) par 58 a case which was decided in the context of jurisdiction available at http://eur-lex. Europa .eu/LexUriServ/LexUriServ.do?uri=CELEX:62000CJ0037:EN:HTML (23 September 2013).
[50] As expressly provided in article 8(2) of the Rome I Regulation.
[51] See (n 38) in respect of Recital (36) where the intention of the parties is paramount.
[52] See Merrett (n 5).

Plender and Wilderspin[53] submit that the appropriate time for identifying the country in which the employee habitually carries out his work in performance of the contract is the time of the occurrence of the event forming the subject matter of the dispute.

2.3.5.2 Article 8(3) – country where the employee was engaged

When the law applicable to the contract cannot be determined pursuant to article 8(2), article 8(3) steps in as an alternative and designates the law of the country where the place of the business which engaged the employee is situated as the proper law of the contract.[54] This could be the situation where work is not habitually carried out anywhere or it is habitually carried out in more than one place. According to the *Giuliano-Lagarde* report it is also intended to apply where the work is habitually carried out in a place which is not a country e.g. on a ship or an oil rig.[55] The relevant time for determining the place of business that engaged the employee is the time of the employee's engagement.[56]

Once again the wording employed under article 8(3) is very similar to the provisions in article 19(2)(b) of the Brussels I Regulation.[57]

In *Jan Voogsgeerd v Navimer SA*[58] the referring court wished to ascertain whether the term 'place of business of the employer' in article 6(2)(b) of the Rome Convention means the place in which the employee was engaged according to the employment contract or, rather, the place in which he was actually employed.

Although the court had determined, after examining all the circumstances of the situation, that article 6(2)(a) of the convention was applicable to the contractual obligation and that recourse to article 6(2)(b) was precluded, under the circumstances the court nevertheless

[53] Plender and Wilderspin (n 16) 318 par 11–051.
[54] Plender and Wilderspin (n 16) 319 par 11-053 believe that it is unacceptable that a presumption as to the applicable law should be created by fortuitous selection of a particular place of business, the place of business should be more than just a mailbox but rather where the employee was actively engaged.
[55] See (n 9) and the comment on art 6.
[56] Plender and Wilderspin (n 16) 320 par 11–054.
[57] See (n 36). However in article 8(3) there is no choice of the place where the business is or was situated but rather only the place where the business is situated. Merrett (n 5) suggests that where a subsequent relocation of that place of business is significant this might be a reason for displacing the presumption in terms of article 8(4).
[58] Case C-384/10 available at http://eur-lex.europa.eu/ LexUriServ/LexUriServ.do?uri=CELEX:62010CC0384: EN:HTML (23 September 2013).

found that it was obliged to answer the questions posed by the referring court and provided that article 6(2)(b) is to be interpreted as follows:

- 'the place of business through which the employee was engaged' must be understood as referring exclusively to the place of business which engaged the employee and not to that with which the employee is connected by his actual employment;

- the possession of legal personality does not constitute a requirement that must be met by the place of business of the employer within the meaning of the provision;

- the place of business of an undertaking other than that which is formally referred to as the employer, with which that undertaking has connections, may be classified as a 'place of business' within the meaning of Article 6(2)(b) if objective factors make it possible to establish that there exists a real situation different from that which appears from the terms of the contract, even though the authority of the employer has not been formally transferred to that other undertaking.

According to the court's judgment, on a proper construction of Article 6(2) of the Rome Convention, a national court must first establish whether the employee, in the performance of his contract, habitually carries out his work in any one country, which is that in which or from which, in the light of all the aspects characterising that activity, the employee performs the main part of his duties to his employer and only in the event that the national court takes the view that it cannot rule under Article 6(2)(a) on the action before it, should recourse be had to Article 6(2)(b) of the Rome Convention.

2.3.5.3 Article 8(4) – the country of closest connection (the escape device)

Where it appears from the circumstances as a whole that the contract is more closely connected with a country, other than the country in which the employee habitually carries out his work (article 8(2)) or the country in which the place of business in which he was engaged is situated (article 8(3)), the law of that country shall apply.

At this point it is important to note that this rule of closest connection is more flexible than the escape clause in article 4 of Rome I as the words 'clearly' and 'manifestly' are not repeated. It is submitted that this could be to ensure maximum protection for the employee as the weaker party.

According to Plender and Wilderspin the following principles emerged from an analysis of various cases conducted from the United Kingdom, France, Germany and the Netherlands:

- Where all the factors apart from the place where the employee works are connected with a single country, the law of that country will be likely to govern the contract in terms of the article 8(4) proviso;
- when the employee has worked in one country for a sufficiently long period of time, that period of work in that country can preclude the proviso from operating, despite all other factors being connected with a single different country.[59]

According to Merrett[60] two factors which might be of particular importance in employment cases and indicative of whether the presumptions should be displaced include:

1. connected contracts i.e. the existence of related contracts is expressly acknowledged as a possible ground for displacing the presumptions in recital (20) of the Rome I regulation e.g. in the employment context equality of terms and the desirability of ensuring that all employees working together should work under a contract governed by the same law; and
2. the strength of the presumptions in articles 8(2) and 8(3) will depend on whether the presumed law is more or less protective of the employee.

There is no shortage of evidence in support of Merrett's second factor. The protection of the weaker party as a key consideration in European private international law can be found in:

- Recital (23) to the Rome I Regulation: as regards contracts concluded with parties regarded as being weaker, those party should be protected by conflict of law rules that are more favourable to the interests than the general rules;

[59]Plender and Wilderspin (n 16) par 11-056.
[60] See (n 5) 211-214.

- In the *Giuliano-Lagarde* report the comments on article 6 also make the point that it mirrors the rules for consumer contracts wherein both cases the aim being to secure more adequate protection for the party who, from the socio-economic point of view is regarded as the weaker in a contractual relationship;
- In the *Koelzsch* case the court of justice applied a purposive construction to article 6 (2)(a) and applied a broad meaning to the place of habitual performance because the law the place where the employee was engaged is likely to protect the employee.

Advocate General Trstenjak, in her opinion on the *Navimer* case,[61] lists the language of the contract, the use of legal concepts from a specific legal system, the currency used, the duration of the employment contract, its entry in the staff register, the nationality of the contracting parties, the normal place of residence, the place where the employer supervises his staff and the place where the contract is concluded as criteria which may be indicative of a closer connection with a specific country. The Advocate General however stresses that it must be borne in mind that the last subparagraph of article 6(2) of the Rome Convention (the escape device) simply contains a derogation which is applicable only after the relevance of the provisions in article 6(2)(a) and (b) has been examined.

In September 2013 the European Court of Justice handed down judgment in the case of *Schlecker v Boedeker*.[62] This was the first case in which the Court was called upon to rule on the implications of the second part of Article 6(2) of the Rome Convention i.e. the escape clause where it is possible for a national court to disregard the law identified by articles 6(2)(a) and (b) where it 'appears from the circumstances as a whole that the contract is more closely connected with another country'.[63]

Ms Boedeker was employed by Schlecker, a German company with branches in a number of Member States. After working in Germany from 1 December 1979 until 1 January 1994, Ms

[61] See (n 58) par 74.
[62] Case C-64/12 available at http://csdle.lex.unict.it/Archive/LW/EU%20social%20law/EU%20case-law/Judgments/20130913-111151_C_64_12enpdf.pdf (12 January 2014). See also in this regard Van Den Eeckhout 'De ontsnappingsclausule van artikel 6 lid 2 slot EVO Verdrag (artikel 8 lid 4 Rome I Verordening): Hoe bijzonder is de zaak Schlecker? 12 September 2013, C-64/12, Schlecker/Boedeker (The Escape-Clause of Article 6 Rome Convention (Article 8 Rome I Regulation): How Special Is the Case Schlecker?)' available at http://papers.ssrn.com/sol3/Delivery.cfm/SSRN_ID2364358_code919707.pdf?abstractid=2364358&mirid=1 (12 January 2014).
[63] See in this regard the Introduction in the Opinion of Advocate General Wahl delivered on 16 April 2013 in respect of *Schlecker v Boedeker Case* (n 62) available at http://csdle.lex.unict.it/ Archive/LW/EU%20social %20law/ EU%20case-law/Opinions/20130416-064354_Conc_64_12enpdf.pdf (12 January 2014).

Boedeker entered into a new employment contract, under which she was appointed as Schlecker's manager in the Netherlands. By letter dated 19 June 2006, Schlecker informed Ms Boedeker that her position as manager for the Netherlands was to be abolished with effect from 30 June 2006 and invited her to take up, under the same contractual conditions, the post of Head of Accounts in Dortmund (Germany) with effect from 1 July 2006. Ms Boedeker lodged a complaint against her employer's unilateral decision to change her place of work, but she presented herself in Dortmund on 3 July 2006 to take up her new post. She then declared herself unfit for work on medical grounds on 5 July 2006. Since 16 August 2006, Ms Boedeker had been in receipt of benefits from the German health insurance fund.

Ms Boedeker brought various actions before the courts in the Netherlands. In one such action, she claimed that Netherlands law should be declared applicable to her employment contract, that her second employment contract should be annulled, and that she should be awarded damages. In an interim judgment on the merits, subsequently upheld on appeal, the Dutch court annulled the second employment contract with effect from 15 December 2007 and awarded compensation to Ms Boedeker. However, that decision could not become final unless it was recognised that the employment contract was governed by Netherlands law. On that point, the Dutch court handed down another judgment finding that Netherlands law applied.

In appeal proceedings brought by Schlecker, the Dutch appeal court upheld the judgment of the first instance court relating to the law applicable to the contract, finding that German law could not have been chosen tacitly. The appeal court found, in particular, that under article 6(2)(a) of the Rome Convention, the employment contract was governed by Netherlands law, which is the law of the country in which the employee habitually performed her duties. The appeal court accordingly found that the various factors relied on by Schlecker (relating in particular to membership of various pension, sickness insurance and invalidity schemes) did not support the inference that the employment contract was more closely connected with Germany and that, in consequence, it could not be held that the contract was governed by German law.

Schlecker brought an appeal before the Dutch Supreme Court against the decision of the appeal court on the applicable law. The Dutch Supreme Court, being uncertain as to the

interpretation to be given to the concluding part of article 6(2) of the Rome Convention referred 2 questions to the European Court of Justice, namely:

> 'Is Article 6(2) of the Rome Convention on the law applicable to contractual obligations to be interpreted in such a way that, if an employee carries out the work in performance of the employment contract not only habitually but also for a lengthy period and without interruption in the same country, the law of that country should be applied in all cases even if all other circumstances point to a close connection between the employment contract and another country?'[64]

In reaching its decision the ECJ acknowledged that article 6(2) of the Rome Convention identifies the specific connecting factors which, in the absence of a choice made by the parties, enable the *lex contractus* to be determined i.e. the factors in articles 6(2)(a) and (b).[65] The Court however went further to state that in order to ensure the guarantee of adequate protection for the employee (the objective of article 6 of the Rome Convention) the law applied to the employment contract must be the law of the country with which that contract is most closely connected. The Court agreed with the opinion of Advocate General Wahl that this interpretation does not however mean that in all cases the law most favourable to the worker must automatically be applied.[66]

The court must first determine the applicable law by reference to the specific connecting factors but where it appears from the circumstances as a whole that the contract is more closely connected to another country, it is for the national court to disregard the connecting factors in articles 6(2)(a) and (b) and apply the law of that country.[67] The Court stated that this interpretation is also consistent with the new provisions of article 8(4) of the Rome I Regulation.[68] Accordingly, the national court 'must take account of all the elements which define the employment relationship and single out one or more as being, in its view, the most significant'. However the Court stressed that the national court

> 'cannot automatically conclude that the rule laid down in article 6(2)(a) of the Rome Convention must be disregarded solely because, by dint of their number, the other relevant

[64] See (n 62) par 15.
[65] See (n 62) par 24.
[66] See (n 62) par 34.
[67] See (n 62) par 35 and 36.
[68] See (n 62) par 38.

> circumstances – apart from the actual place of work – would result in the selection of another country'.[69]

The ECJ went on to provide a non-exhaustive list of factors which it finds to be significant factors suggestive of a connection with a particular country, namely a) account should be taken of the country in which the employee pays taxes on the income from his activity; b) the country in which the employee is covered by social security schemes and pension, sickness insurance and invalidity schemes and c) the parameters relating to salary determination and other working conditions.[70]

In response to the referred question, the ECJ ruled that:

> '[A]rticle 6(2) of the Rome Convention must be interpreted as meaning that, even where an employee carries out the work in performance of the contract habitually, for a lengthy period and without interruption in the same country, the national court may, under the concluding part of that provision, disregard the law of the country where the work is habitually carried out, if it appears from the circumstances as a whole that the contract is more closely connected with another country'.[71]

It would appear from the ruling in the *Schlecker* case that the escape clause in article 6(2) of the Rome Convention and consequently article 8(4) of the Rome I Regulation must be 'conceived as an open conflict rule capable of supplanting both the law of the place where the work is habitually carried out and the law of the place of engagement'.[72]

It is apparent that once this case is referred back to the courts in the Netherlands, the only possible interpretation will be that German law will be the applicable law. The ECJ clearly

[69] See (n 62) par 40.
[70] See (n 62) par 41.
[71] See (n 62) par 45. The ECJ did not rule on the second question referred, however in his Opinion (n 63) par 77 Advocate General Wahl concluded that specific information which has been brought to the attention of the parties concerning the place of performance of the contract may be of some assistance. Consequently, the intention or awareness of the parties at the time of concluding the contract – or, possibly, on the date on which performance commenced – may, where based on specific and objective evidence, be a relevant indicator for the purposes of identifying the country with which the employment contract is most closely connected.
[72] See (n 63) par 51. In his Opinion (n 63) par 61 Advocate General Wahl states that the point is not that the significant connection criterion generally constituted by the habitual place of performance of the work is marginalised, but rather that the national court is free to disregard that criterion in the event that, in the circumstances of the case, it appears that the centre of gravity of the employment relationship is not located in the country in which the work is carried out. The second part of Article 6(2) of the Rome Convention must be viewed as a safeguard mechanism. It must not obscure the connections referred to in the first part of article 6(2), especially the strong connection constituted by the law of the place of work, thereby at the same time making the approaches ultimately adopted wholly unpredictable.

states in its judgment that the referring court in the Netherlands had already found that the employment contract was more closely connected with Germany, which finding will effectively trump the fact that Ms Boedecker had habitually worked in the Netherlands.[73]

3. *South African Private International Law of Contract*

3.1 Introduction

South Africa, unlike the European Union, does not have a black letter[74] private international law, especially not in respect of the rules to be applied when determining the proper law of an international contract of employment where no express or tacit choice of law was made by the parties.[75]

According to the common-law principle of party autonomy, parties to a contract may in principle freely, either expressly or tacitly,[76] choose the proper law of their contract.

Where the parties to the contract have not chosen the legal system to govern their contract, there are two views in South African law regarding this position. The first approach followed by the appellate division in *Standard Bank of SA Ltd v Efroiken and Newman*[77] is that the court presumes that the parties intended a legal system to be applicable to their contract (subjective test).[78] Forsyth however states that it is artificial to refer to the parties presumed intention.[79] The second approach is that the court determines the applicable legal system by establishing the law with which the contract has its closest and most real connection or the centre of gravity of the contract (objective test).[80] Authority for this view is found in *obiter dicta* in *Laconian Maritime Enterprises Ltd v Agromar Lineas Ltd*[81] and *Improvair*

[73] See (n 62) par 28.
[74]The term black letter law is used here to refer to the technical legal rules to be applied in a particular area, which are most often largely well-established and codified.
[75] For a discussion on the application of South African Private International law of contract to an independent contractor agreement see Fredericks and Neels "The music performance contract in European and Southern African private international law (1)" 2008 *THRHR* 351.
[76] Forsyth *Private International law. The Modern Roman Dutch Law including the Jurisdiction of the Supreme Court* 287
[77] 1924 AD 171
[78] (n 77) 185.
[79] (n 76) 283 n 62.
[80] Forsyth (n 76) 287 and 288. Fredericks and Neels 'The Proper Law of a Documentary Letter of Credit (part one*)* (2003) 15 *SA Merc LJ* 63 submit that this is the correct approach.
[81] 1986 (3) SA 509 (D) at 526D-H and 530H-I.

(Cape)(Pty) Ltd v Establissements Neu.[82] Although the judges are in favour of the second approach, they state that they are bound by the *Standard Bank* case. A remark in passing by Corbett CJ to 'the system with which the contract has its closest and most real connection' in *Ex Parte Spinazze*[83] further supports the second approach. This approach has also been applied by the Supreme Court of Appeal in *Society of Lloyd's v Price and Pride; Society of Lloyd's v Lee.*[84]

In South African case law authority can be found for two approaches that could be followed when applying the objective test. The first approach is found in the *Laconian* case where the proper law is determined by weighing all the relevant factors. The court in the *Laconian* case however expressed that 'whilst counting contacts or factors favouring one or the other country's law is an unsatisfactory way of deciding legal issues, a large number of important factors pointing one way is a strong indicator'[85]

Fredericks and Neels[86] suggest that the following factors may be taken into account to determine the legal system of the closest and most real connection:

1. the *locus solutionis* (the place of performance);
2. the *locus contractus* (the place of conclusion of the contract);
3. the place of offer;
4. the place of acceptance;
5. the place of agreed arbitration;
6. the choice of jurisdiction;
7. the domicile of the parties;
8. the place where the parties carry on business;
9. the future domicile of the parties;
10. the (habitual) residence of the parties;
11. the nationality of the parties;
12. the form, terminology and language of the contract;
13. the currency in which the contractual obligation of payment is expressed;
14. the incorporation of a statute in the contract.

[82] 1983 (2) SA 138 (C) at 146H-147B.
[83] 1985 (3) SA 633 (A), a case involving an anti-nuptial contract.
[84] 2006 (5) SA 393 (SCA). See the discussion on this decision by Neels 'Falconbridge in Africa' 2008 *Journal of Private International Law* 167.
[85] See (n 81) at 528G-H.
[86] See Fredericks and Neels (n 80) 5- 8 and the cases referred to in fn 37 -57 therein.

The second approach according to Fredericks and Neels,[87] is the principle that can be deduced from the relevant South African cases that the *lex loci solutionis* constitutes the proper law of the contract unless specific circumstances indicate that another legal system has to be applied. This approach would certainly be consistent with the first presumption regarding employment contracts found in Article 8(2) of Rome I (as discussed above).

The *locus solutionis* in respect of the characteristic performance of the contract (such as the rendering of services) may differ from the *locus solutionis* in respect of payment. Whenever the *locus solutionis* are split, there are two possibilities – one may apply the scission principle i.e. each obligation has its own proper law (the *Laconian* case)[88] or the unitary principle i.e. the obligations of the parties are closely connected and should be governed by one proper law (the *Improvair* case).[89]

3.2 Impact of the South African constitution on mandatory rules and public policy

Section 23 of the Constitution of the Republic of South Africa 1996 entrenches the right to fair labour practices. In her article Calitz[90] poses the question whether these constitutional rights would be applicable to South African employees working in other countries or foreigners working in South Africa from countries where these rights are not protected.

The question as the present author understands it is this: once the court has determined that it does indeed have jurisdiction and it has characterised the dispute as one involving an international contract of employment, the court has then determined that the proper law of the employment contract is that of another foreign jurisdiction and expert evidence has been led to ascertain the content of the applicable foreign legal system – should the rules of that applicable legal system be derogated from, under the justification of the constitutional mandate, when the rules of that legal system are less favourable for the affected employee?

Calitz submits that the answer to this question is to be found in the influence (if any) of the constitution on the rules of private international law applied by South African courts. Forsyth

[87] Fredericks and Neels (n 80) 8.
[88] See (n 81) 529A-B.
[89] See (n 82) 147F-G.
[90] Calitz "Globalisation, the development of constitutionalism and the individual employee" *PEJL* 2007 (10) 2 8/115.

provides a response to the question of the influence of the constitution on private international law as follows:

> 'The constitution has not yet brought about fundamental changes in private international law. This is, because on the whole, the existing law is compliant with the standards of the constitution. The new constitutional order thus does not dominate but exerts a beneficial influence on this branch of the law'[91]

To which Calitz adds that the current rules of private international law already provide the basis for constitutionalism as they provide for the application of mandatory rules that can be seen as the embodiment of public policy principles.[92]

According to Neels,[93] the question of whether the Bill of Rights also applies to foreign law has not been pertinently considered by the South African courts, he opines that the dicta in international delict and marine insurance law strongly suggest that there is indeed a direct link between constitutional values and external public policy.[94]

With this as a point of departure, it will have to be ascertained which of the current labour laws are regarded as mandatory, if any, and to what extent. The wording employed within the statute will determine the extent of its application.

In South Africa, public policy operates as an overriding check upon the application of the rules of the foreign lex causae.[95] Public policy acts to suspend the application of choice of law rules (where they refer to a foreign law) – not to favour one particular legal system over another – since it operates as an exception in the conflict of laws.

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[91] Forsyth (n 76) 17.
[92] Calitz (n 90) 8/115.
[93] Neels "The Positive Role of Public Policy in Private International Law and the Recognition of Foreign Muslim Marriages" 2012 *SAJHR* 226.
[94] In this regard Neels (n 93) 226 relies on two cases. *Burchell v Anglin* 2010 (3) SA 48 (ECG) a cross-border defamation case where Crouse AJ decided that the law of Nebraska would prima facie apply but that the law of Nebraska needed to comply with South African constitutional values. And also *Representative of Lloyds v Classic Sailing Adventures (Pty) Ltd* 2010 (5) SA 90 (SCA) as case involving overriding mandatory rules of the *lex fori* and that the parties cannot contract out of the norms and values of the Constitution as these norms are always directly applicable.
[95] *Sperling v Sperling* 1975 (3) SA 707 (A) at 722C-D.

Pillay J's remark in the *Kleinhans* case (discussed below) that the court would favour forum law on the basis that it subscribes to international labour and human rights standards seems to appear to have prejudged the willingness and ability of the foreign forum to give effect to the exigencies of justice. Roodt[96] submits that the public policy principle cannot be used as a basis for what is known as the first stage in the conflict of laws process, when the governing law is still being identified. South African law allows public policy to be used to bar the application of foreign rules. It is not often used to justify the application of forum law. Once the lex causae has been determined, the forum is free to decline to apply a particular rule of the applicable legal system for reasons related to the public interest. If the application of the foreign law is in breach of South African public policy, the choice of law clause or the tacit choice of the parties will not be given effect to.[97]

Public policy reservation is a well-known principle, which is also present in international instruments such as the Rome I Regulation, as discussed above, and is primarily aimed at avoiding a scenario where a choice of law clause puts the weaker contracting party, e.g. such as an employee, at a distinct disadvantage.

3.3 The Labour Court decisions

A survey of the judgments handed down by the Labour Court in matters involving a foreign element reveals that the Labour Court will readily assume jurisdiction and further find that South African law is the proper law of the contract in order to protect the constitutional rights of employees working in or outside South Africa.

In *Kleinhans v Parmalat*[98] the Labour Court held that it had jurisdiction to hear a dispute regarding the termination of an international fixed term employment contract where the employee had performed work in Mozambique. Pillay J correctly approached the dispute from a private international law perspective but for some reason the learned judge believed that the proper law governing the contract was the first issue to be determined[99] but then the learned judge states that before determining the proper law of the contract and jurisdiction, the nature of the dispute must be characterised by reference to the *lex fori*.[100] Despite

[96] See (n 6) 148.
[97] See (n 90) 148.
[98] (2002) 23 ILJ 1418 (LC).
[99] (n 98) 1424 13C.
[100] (n 98) par 15 Pillay J determines that the case involves the breach of an international contract.

acknowledging that the question of jurisdiction and the ascertainment of the proper are two distinct enquiries, the learned judge proceeded to treat the two questions as one step. Pillay J referred to the subjective and objective tests and was of the opinion that, although the subjective test had never been rejected, the objective test favoured by the Appellate Division in the *Spinazze*[101] case is preferable 'in a modern, global economy' and posed the following question: to which law and jurisdiction does the contract have the most real connection?

According to Roodt[102] the simplest approach to dealing with the jurisdiction question in this case would have been to determine the identity and residence of the company that hired Kleinhans and laid him off, as clarity as to the true identity of the defendant and the establishment of its residence would be sufficient grounds for jurisdiction.

Having regard to the facts of the case, Pillay J found that the parties tacitly agreed to South African law being the proper law of the contract.[103] The court was motivated by the fact that the three-year contract guaranteed that Kleinhans' conditions of employment in his original contract would 'remain the same'.[104] Pillay J also held 'if I am wrong in concluding that there was such a tacit agreement, then I turn to consider the connecting factors referred to by Forsyth and case law to assign the proper law of the contract…'.[105]

Several factors pointed to South African law as the proper law of the fixed term contract, namely:

- Kleinhans was domiciled and habitually resident in South Africa.
- Kleinhans is a South African national.
- Parmalat SA, signatory to the contract, was resident in South Africa.
- Kleinhans never resigned from Parmalat SA but was seconded from its service.
- Parmalat SA never intimated that it was acting as an agent for Parmalat Mozambique.
- The contract was concluded in South Africa.
- Parmalat Mozambique made the job offer in South Africa.
- Kleinhans accepted the job offer in South Africa.
- Parmalat SA paid Kleinhans' salary in South Africa.

[101] See (n83).
[102] Roodt (n 6) 140.
[103] See (n 98 1425D-F.
[104] (n 98) 1424 par 25.
[105] (n 98) 1425 par 29.

- Parmalat SA paid Kleinhans' salary in South African Rand.
- The language of the contract was English (not Portuguese).
- The contract implicitly incorporated South African labour law.
- Parmalat SA issued the communication terminating the secondment of Kleinhans to Parmalat Mozambique.

After weighing all the connecting factors, Pillay J held that South African law was the proper law the contract.[106] In arriving at this conclusion the court expressly rejected the second approach identified and supported by Fredericks and Neels,[107] i.e. that the default position should be in favour of the *lex loci solutionis,* by stating:

> '[t]he *lex loci solutionis* is but one of the connecting factors considered when determining the proper law of contract… I disagree with the submission by… counsel for the respondent… and the authority cited in support thereof, that it is decisive.' [108]

However, the present author agrees with Fredericks[109] that the locus solutionis must at least be held to be the most important factor to be taken into account.[110]

In her article Roodt[111] correctly states that it is not always immediately apparent which is the 'characteristic performance' and refers to article 4 of the Rome Convention in this regard. Roodt also correctly points out that the approach that would best foster international harmony of decision should probably be preferred. Roodt then refers to the *Laconian* case and the fact that the choice fell on the *lex loci solutionis* in respect of payment and reaches the conclusion that regardless of whether one considers the weighing of the factors or favours the law of the place where payment was effected that South African law would be the applicable law.

It is important to note that, as discussed above, the Rome Convention contained specific provisions relating to employment contracts and it is submitted that the 'characteristic performance' would be that of the actual rendering of the service and not the payment thereof

[106] See (n 98) 1432 par 105.
[107] See (n 80).
[108] See (n 80) par 85.
[109] Fredericks 'The proper law of the international contract of employment: interpreting the Kleinhans decision' (2006) 18 *SA Merc LJ* 75.
[110] See (n 109 80.
[111] See (n 6) 144.

as evidenced by the first presumption in the Convention, and it is submitted that accepting this approach as the starting point would best foster international harmony. This is also consistent with the second approach advocated by Fredericks and Neels.[112]

In *Parry v Astral Operations*[113] the labour court was once again faced with an international contract of employment. After being retrenched from the South African division the employee was appointed as general manager of the Africa operations and relocated to Malawi. His position in Malawi gradually became redundant and eventually his services were terminated. The employee brought an application in the labour court alleging among other things breach of contract and damages in terms of the Basic Conditions of Employment Act,[114] a failure by the employer to follow a fair procedure as required by s 189 of the Labour Relations Act[115] and a breach of his constitutional right to fair labour practice.

It was argued that the *Kleinhans* decision was distinguishable from the present case because Kleinhans was seconded to work in Mozambique for a fixed term, before the secondment he was employed in South Africa and after the secondment expired he was to return to employment in South Africa[116]

The court in the *Parry* case explained that the preference generally of the *lex locus solutionis,*

> 'is that employees are too weak to resist a choice of law imposed by the employer. The law of the place of work then becomes normally applicable. Another reason for preferring the law of the place of work is that, as discussed above, protective Labour laws are so closely connected to the social order of the state of the forum, that their application is mandatory and independent of the proper law of the contract. The territoriality of Labour laws reinforces preference for the law of the place of work'.[117]

The court went on further to say that the law of the place of work can, however, disadvantage workers if it offers less protection than the law of the place chosen by the parties and gives the example of where parties choose Canadian law because it provides for 25 months' notice

[112] See n 80.
[113] (2005) 26 ILJ 1479 (LC).
[114] 75 of 1997.
[115] 66 of 1995.
[116] n 113 par 25.
[117] n 113 par 67.

for dismissal whereas if South African law was to be applicable the employee would get no more than the statutory notice of four weeks.[118]

The court in the *Parry* case also referred to the Rome Convention and its special provisions of international employment contracts and stated that although South Africa is not bound by the convention, perhaps the time is ripe to consider it. It protects workers; contracting parties retain their autonomy and nothing in the Convention conflicts with the constitution or our labour laws.[119] The court further found that the convention would be especially helpful in cases where the parties choose foreign law to apply to a contract concluded in South Africa, or if the employer is South African. The court goes on to say:

> 'Guided by the convention, the first enquiry would be to establish that the employee has not been deprived of the protection of the mandatory rules. Given the breadth of the mandatory provisions of South African labour legislation, discharging this onus is a hard row to hoe. Added to this is the onus on the party relying on the foreign law to prove its contents. A convention will not only facilitate adjudication of international employment contracts in South Africa but also discourage foreign law being chosen to avoid the protection provided by South African law. Effectively, a convention similar to the Rome convention will complete the circle of protection afforded by the regulatory framework.'[120]

The court found that the parties tacitly, alternatively impliedly, chose South African law and went on to give further evidence in support of the conclusion that the parties chose South African law:

1. The contract is a standard template used by the respondent for employees engaged in South Africa and abroad.
2. The contract for employment was prepared in South Africa for South Africans.
3. Despite denying initially in proceedings before the CCMA that it was the employer, the respondent admitted in these proceedings that it was the employer.
4. The applicant remained under the control and supervision of the board of the respondent. He represented 'the employer' in Malawi. There was no one more senior to him there.
5. The applicant was on the payroll of the respondent South African head office. The respondent paid his salary and reviewed his performance for annual salary

[118] n 113 par 68.
[119] n 113 par 71.
[120] n 113 par 72.

adjustments. Such review was linked to the respondent's performance and effected in accordance with the latter's policy.

6. The applicant continued to contribute to the Tiger Brands provident fund and was subject to its rules and regulations. Deductions were made from his salary for this purpose.
7. He also remained a member of the Tiger Brands medical society and was obliged to join any other society with which the respondent contracted.
8. Although the applicant was conditionally released from his restraint of trade agreement, which he had concluded before his 2001 retrenchment, payment made by the respondent in respect of that agreement would have been forfeited if the applicant breached the condition in the African operations contract of employment.
9. As a term of his employment, the applicant retained his shareholding in Tiger Brands, a company listed on the Johannesburg stock exchange.
10. The court held that by applying the "officious bystander" test there could be no doubt that the only law applicable to the employment relationship in the minds of the parties at the time of contracting was South African.[121]

Pillay J went on to state that 'if I'm wrong in finding that the parties tacitly or impliedly exercised their choice of law, then the same factors mentioned as indicators of an implied choice of law are also strong factors connecting the contract, the disputes, the parties and their rights to South Africa.'[122] According to the court the conflicts rule of the law of the place where the work is done was clearly inappropriate in the circumstances as the employee rendered services in four countries.[123]

The Labour Appeal Court in *Astral Operations v Parry*[124] overturned the decision of the labour court in *Parry v Astral Operations*[125] which followed the decision in the *Kleinhans*[126] case that the workplace used to be, but is no longer, the most important factor in determining jurisdiction.[127] Sadly the Labour Appeal court did not address any of the issues in respect of the proper law of the contract.

[121] n 113 par 83.
[122] n 113 par 84.
[123] n 113 par 85.
[124] (2008) 29 ILJ 2668 (LAC).
[125] See n 113.
[126] See n 124.
[127] For an extensive discussion on the case and its impact on the future jurisdiction of the courts see Calitz (n 4).

The uncertainty created by the decision of the Labour Appeal Court in the *Astral Operations* case, particularly in respect of the proper procedure to follow to determine the proper law of an international contract of employment, leaves one wondering what the outcome would have been had the principles in the Rome I Regulation been applied to the facts of the *Kleinhans* and *Parry* cases?

3.4 Application of the Rome I Regulation to the facts of the *Kleinhans* and *Parry* case

In *Jafta v Ezemvelo KZN Wildlife*[128] the Labour Court was called upon to determine whether notice of acceptance of an offer of employment via SMS was an appropriate mode of communicating acceptance of the offer. The court was guided by the warning by Justice O' Regan in *K v Minister of Safety and Security*[129] against parochialism

> 'and urged practitioners to seek guidance, positive or negative, from other legal systems struggling with similar issues. By inviting the parties to address it on international and foreign law, the court hoped to broaden its mind, to acquire "a new optic" on whether the problem in this case is common and how it is solved by other judges.'

The Rome I Regulation is arguably the most comprehensive codified regime in the world governing the law applicable to contractual obligations[130] and in heed of the warning against parochialism issued by the constitutional court in *K v Minister of Safety and Security*[131] I shall attempt to broaden my mind to acquire "a new optic" on whether the problems in the *Kleinhans* and *Parry* case could be solved by applying the principles of the Rome I Regulation. To this end, like Schutz J in the *Laurens* v Von Höhne,[132] I 'propose to follow it through wherever it leads'.

At the outset, South African labour laws and Rome I share a common understanding of 'individual employment contract'. According to section 1 of the Basic Conditions of Employment Act[133] ''employee'' means—

> (a) any person, excluding an independent contractor, who works for another person or for the State and who receives, or is entitled to receive, any remuneration; and

[128] (2009) 30 ILJ 131 (LC).
[129] 2005 9 BLLR 835 (CC) par 345
[130] Marshall "Reconsidering the Proper Law of the Contract" *Melbourne Journal of International Law* (2012) 1.
[131] See (n 129) above.
[132] 1993 2 SA 104 (W).
[133] (n 114). Section 203 of the Labour Relations (n 115) contains an identical definition.

(b) any other person who in any manner assists in carrying on or conducting the business of an employer.

3.4.1 A law chosen by the parties (art 8(1))?

It is clear from the facts of the *Kleinhans* and *Parry* case that neither case involved an express choice of law. However, even if that was not the case, according to the *Guiliano-Lagard*[134] report the first step in the process would be to determine the applicable law, that in the absence of a choice, would be applicable as determined by the presumptions in article 8(2) and (3).

3.4.2 Article 8(2) work habitually carried out in or, failing that, from one country, notwithstanding temporary employment in another country?

3.4.2.1 The facts of the *Kleinhans* case:

- Kleinhans had been employed by Parmalat SA since 1990 and after 10 years of service to Parmalat in South Africa he entered into a fixed term contract of three years to work for Parmalat in Mozambique.
- The agreement catered for the transport of a private vehicle to Mozambique and made reference to a vehicle being transferred back to South Africa.
- In the letter addressed to Kleinhans reference was made to the fact that his secondment to Mozambique would be terminated and that he would be restored to the same position that he held in South Africa immediately prior to taking up the secondment.
- The letter further stated that if he was to reject the position to which he was restored then his employment contract with Parmalat SA would be terminated which confirms that his employment with Parmalat SA was automatically restored after the secondment terminated and further supports the inference that he remained employed with Parmalat South Africa whilst seconded to Mozambique.
- Parmalat South Africa regarded Parmalat Mozambique as its Mozambican organisation which implies that Parmalat South Africa controlled Parmalat Mozambique.
- Kleinhans clearly carried out the majority of his work in performance of his contract to

[134] See (n 9) above.

Parmalat in South Africa and so the fact that he was temporarily employed in another country does not change the fact that he habitually carried out his work in South Africa and therefore South African law should be applicable and according to the *Weber* case all employment must be taken into account.

- Kleinhans was sent abroad for a given duration of 3 years and according to recital (36) the intention of the parties is paramount and that work carried out in another country is to be regarded as temporary if the employee is expected to resume working in the country of origin after carrying out his tasks abroad. Kleinhans was to return to South Africa after 3 years, which means that for purposes of article 8(2) Kleinhans would be regarded as habitually working in South Africa and therefore South African law would be applicable.
- After examining all the circumstances of the situation and having found that article 8(2) is applicable recourse to article 8(3) would be precluded as decided in the *Navimer SA* case.

However the matter would not end here, as explained in the *Giuliano-Lagarde* report, once that law has been identified by one of the presumptions, the court must then ascertain whether there is an express or implied choice of a different law in accordance with article 3.

If we look at whether there was an implied choice of law in the *Kleinhans* case the answer would be in the affirmative. The previous dealing between the parties i.e. Kleinhans' employment contract with Parmalat SA would undoubtedly be governed by South African law and this was imported into the secondment agreement which provided that all of the terms and conditions of his employment would remain unaffected. The implied choice therefore also points to South African law as being the applicable law.

It is submitted that it would therefore be unnecessary to employ the escape device in article 8(4) in light of the fact that its application would also point to South African law (and which is consistent with the ultimate decisions reached by Pillay J).

3.4.2.2. The facts of the *Parry* case

- Parry's employment was terminated in 2001 and he subsequently signed a new contract.
- Parry relocated to Malawi where, with the exception of the occasional trips to Zimbabwe

and Zambia, Parry habitually worked in one and the same country i.e. Malawi to which he would return after his business trips.

- Not only did Parry have a centre of activities in Malawi but it was also there that he carried out the majority of his activities and performed the essential part of his duties *vis-à-vis* his employer.
- His new contract did not envisage a temporary sojourn in Malawi, he was based there, established an office there and spent most of his time there.
- Operations in Malawi were separate from the operations in South African.
- None of the duties that Parry performed outside of Malawi were performed in South Africa.
- In terms of the *Weber* case all employment is to be taken into account, unless, as in this case, there is a clear intention that the most recent place was to become the new habitual place of employment, as evidenced by Parry's relocation to Malawi.
- Like the situation in the *Navimer SA* case, after examining all the circumstances of the situation and having found that article 8(2) is applicable, recourse to article 8(3) would be precluded.

Once again, the matter would not end here, as explained in the *Giuliano-Lagarde* report, once that law has been identified by one of the presumptions, the court must then ascertain whether there is an express or implied choice of a different law in accordance with article 3.

If we look at whether there was an implied choice of law in the *Parry* case the answer, it is submitted, is that the circumstances of the particular case could not be said to clearly demonstrate an implied choice of the governing law as required by article 3 for the following reasons:

- As indicated by Merrett standard form contracts are not common in labour law matters and would it therefore be difficult to rely on this to impute an intention.
- The intention of the parties was that Parry was going to permanently relocate to Malawi to take up the new employment with another entity.
- The normal hours of work were to be regulated by 'relevant legislation'.
- Although the contract of employment subjected Parry to Astra's policies, which contained references to the Basic Conditions of Employment Act, it was disputed during the proceedings as a mistake. In the *Green Paper* it was explained that article 3

provided that the parties may choose a law governing the contract after its conclusion and that they may change that choice at any time during the life of the contract and possibly even in the course of proceedings.

- A reading of the facts contained in the judgement do not indicate any jurisdiction and arbitration clauses.

In light of an absence of a clear choice of governing law by the parties, the presumption in article 8(2) would determine the proper law of the contract and therefore Malawian law should apply.

Notwithstanding the fact that Parry continued to contribute to the Tiger Brands provident fund and was subject to its rules and regulations and that he also remained a member of the Tiger Brands medical society (factors which according to the *Schlecker* case are significant to determining a connection with a particular country), from the circumstances of the case as a whole, it does not appear that the contract is more closely connected with a country other than the country in which Parry habitually carried out his work i.e. Malawi and therefore recourse to the escape device in article 8(4) to supplant the law of the place where the work is habitually carried out would not be justified. In accordance with the Opinion of Advocate General Wahl,[135] the national court is only free to disregard that criterion in the event that, in the circumstances of the case, it appears that the centre of gravity of the employment relationship is not located in the country in which the work is carried out, and it is submitted that that is not the case in respect of the facts of the *Parry* case.

The present author agrees with the sentiments expressed by Roodt with reference to the *Kleinhans* case:

> 'While the decision in the case could not have been any different , the remote vineyard of legal academe known as the conflict of laws would give a better yield if sufficient light, in the form of analytical reasoning in the cases, can reach it.'[136]

It is submitted that an adoption of the principles set out in article 8 of the Rome I Regulation would go a long way to assist with the analytical reasoning suggested by Roodt.

[135] See (n 72).
[136] Roodt (n 6) 149.

4 *Conclusion*

Unlike Fredericks,[137] who expressed no preference for or against the formulation of a separate conflict rule for employment contracts, the present author agrees with the sentiments expressed by Pillay J in the *Parry* case that the time is ripe for South Africa to consider adopting the principles of the Rome Convention (now the Rome I Regulation).[138]

The present author is in support of the establishment of a rule(s) to determine the applicable law lest we fall into a situation where, as observed by Van Zyl J in the case of *Society of Lloyd's v Romahn*[139] with reference to the *Laconian* case, that 'in the absence of a rule determining the applicable legal system, Booysen J opted for South African law on the basis that he was enjoined to do so by virtue of his judicial oath to apply such law'.[140]

Schutz J in the *Laurens case*[141] emphasised that 'private international law is a developing institution internationally, and that our own South African private international law cannot be allowed to languish in a straitjacket'.[142]

To overcome the difficulty of applying a formula of uncertain content like 'the law of closest and most real connection', the European community introduced the rebuttable presumptions contained in Article 8 of the Rome I Regulation and it is submitted that in South African law the starting point for determining the proper law of an international employment contract should be that it is presumed that the international employment contract, in the absence of an express or implied choice of law, is more closely connected with the law of the place where the employee habitually performs his work. This should be adopted for the sake of international uniformity. Mpedi[143] is of the opinion that the approach in the Regulation 'may easily be reconciled with the South African private international law of contract as it is

[137] See (n 109.
[138] Becoming a member country of the Rome Convention is not possible, as the Rome Convention is a regional treaty for European Union states only.
[139] 2006 (4) SA 23 (C).
[140] See (n 139) 40C.
[141] n 132 above.
[142] n 132 44G.
[143] Mpedi "The Proper Law of the Individual Labour Contract: Some Perspectives from Southern African Private International Law" *The International Journal of Comparative Labour Law and Industrial Relations* 26, no 3 (2010) 327.

generally accepted that the locus solutionis is the most important connecting factor to determine the proper law of the contract.' According to Mpedi[144] there are two options for implementing this approach i.e. codify or consolidate South African private international law by legislation or to leave the development of private international law to the courts, however Mpedi favours the common law approach (i.e. development by the courts) as the learned author is of the opinion that this approach has worked well over a long period of time and therefore should be retained. While the present author is not opposed to the common law approach, the present author does have some concerns with regard to the courts willingness to undertake such an exercise in that despite the opportunities to do so in the labour court decisions discussed in this paper, the courts have failed to develop the common law in this regard.

The broad judicial discretion inherent in the application of the common law test should be circumscribed by reducing it to an escape clause. The second step should be to adopt the presumption that the characteristic performance in the case of an employment contract is that of the rendering of the service, resulting in the escape clause only being activated where, in exceptional cases, the contract is more closely connected to another legal system. While adopting this presumption does not completely eliminate all uncertainty, as it would only create a presumption, Castel correctly points out that:

> '[T]he search for the real and substantial connection leaves too much freedom to the courts, which can easily manipulate the facts to suit their views. For instance, especially in borderline cases, they may be tempted to choose what they believe to be the "better" forum or law by taking jurisdiction or applying the *lex fori* and justifying their choice after the fact by selecting the appropriate connecting factors leading to the solution.'[145]

Castel further goes on to say:

> '[O]nly where the application of the relevant private international law rule results in the designation of the jurisdiction or law that has no or very little connection with the issues before the court should the principle of proximity be invoked in order to perform a *corrective* function so as to avoid a totally unjust end result. Such an approach could be called *limited principled flexibility*, and would hold predictability in check.'[146]

[144] Mpedi (n 143) 329.
[145] Castel "The uncertainty factor in Canadian Private International Law" 2007 52 McGill LJ 555 569.
[146] Castel (n 145) 569.

In the same way that Fredericks and Neels[147] suggest that the proper law of a documentary letter of credit should be determined in a similar way to the Rome Convention as that approach offers an opportunity to bring our legal system into conformity with that of our most important trading partner i.e. the European Union, the development of a South African black letter rule of private international law to determine the proper law of an international employment contract will have the advantage of not only bringing our legal system into conformity with that of the European Union but will also bring about uniformity in respect of the principles that would be applied in Brazil,[148] Israel,[149] Turkey,[150] Japan[151] and South Korea.[152] Uniformity, according to Forsyth, should be the guiding principle for the development of private international law.[153]

What is needed is workable certainty consistent with some flexibility.[154]

[147] See Fredericks and Neels (n 80) 10-11
[148] Dolinger *Private International law in Brazil* (2012) 265 par 951 and 266 par 958. The Labour relationship is governed by the law in force in the country where the labour is performed and not by the law of the place of contracting; one applies the law the place where the work is executed, but if another law, that has some connection to the situation such as his national law, is more advantageous to the employee, this law will be chosen.
[149] Einhorn *Private International Law in Israel* (2009) 93-97 par 173-187. In Israel, like in South African law, there are no black letter private international law rules regarding individual employment contracts. The Israeli Labour court therefore sensed that a special private international law rule should be devised and in several cases the Israeli national labour court and district labour courts have sight of the Rome convention as a source from which Israeli law can draw the necessary rules, and adopted the general rule set out therein i.e. applying to the contract the law of the country in which the employee habitually carries out his work in performance of the contract.
[150] art 27 of the Turkish Code on Private International Law and International Civil Procedure *Yearbook of Private International Law*, volume 9 (2007) 592.
[151] art 12 of the Private International Law Code of Japan *Yearbook of Private International Law*, volume 8 (2006) 432.
[152] art 28 of the New Conflict of Laws Act of the Republic of Korea *Yearbook of Private International Law*, volume 5 (2003) 324.
[153] Forsyth (n 76) 60-61 and the authorities referred to at 60 n 250.
[154]Castel (n 145) 571.

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