

---

## Introduction

This book is about the legal regulation of transnational employment relationships in the private international law of the European Union (EU).

Transnational employment relationships, that is, relationships between employer and employee that are connected to more than one country, are a common occurrence. People migrate from one country to another in search of a better life. Workers commute to a place of work in a neighbouring country. Employers post their employees, either temporarily or permanently, to a foreign place of business, branch, subsidiary or affiliate. Companies seek out workers abroad. Employees are ‘hired out’ to foreign businesses. There are workers whose occupations are ‘transnational’ by their very nature: commercial representatives covering territories of several countries, international transport workers such as lorry drivers, seamen, aircrew members, workers on offshore installations and so on.

The diversity of factual patterns under which transnational employment relationships arise suggests how widespread a social phenomenon they are, constantly growing in size and significance. This is a consequence of globalisation and the resulting interconnectedness and interdependence of markets, internationalisation of the production of goods and supply of services, rise of transnational corporations, increased international mobility of workers and the growth of the service industry. Looking particularly at the EU, the freedoms of movement of workers, of establishment and to provide services guaranteed by the Treaty on the Functioning of the EU (TFEU)<sup>1</sup> ensure the elimination of obstacles within the EU to the creation of factual patterns referred to above. Indeed, the growing number and significance of transnational employment relationships is reflected in the recent surge in the number of judgments concerning such relationships delivered by the Court of

<sup>1</sup> Arts. 45, 49 and 56, respectively, of the TFEU (consolidated version) [2012] OJ C326/47.

Cambridge University Press

978-1-107-08294-6 - The European Private International Law of Employment

Uglješa Grušić

Excerpt

[More information](#)

Justice of the EU (CJEU) and the courts of the United Kingdom (UK) and other Member States.

The various types of transnational employment relationships are almost universally understood, from a legal point of view, by reference to the legal institution of the contract of employment. But a truly international legal regulation of transnational employment relationships does not exist. International organisations such as the United Nations, International Labour Organisation and the Council of Europe have not achieved and cannot be expected to achieve in the foreseeable future a comprehensive worldwide or regional unification or harmonisation of labour laws. This does not mean, however, that legal instruments adopted under the auspices of such international organisations do not have a significant impact on domestic labour law systems. For example, the European Convention on Human Rights and the case law of the European Court of Human Rights are of particular importance for the member states of the Council of Europe.

In the EU, the Union and the Member States share the competence to legislate in the social sphere.<sup>2</sup> Although some important issues, namely pay, the right of association and the right to take industrial action, are expressly excluded from its competence, the EU is allowed to, and does, legislate in certain other areas of labour law. The main objectives of EU labour legislation have traditionally been the removal of obstacles to the free movement of workers, fight against discrimination and the prevention of actual or potential negative consequences of the creation of an internal market that are captured by the terms ‘social dumping’ and regulatory ‘race to the bottom’.<sup>3</sup> These objectives underlie the Treaty of Rome’s provisions on free movement and equal pay between men and women, which have been given effect through a number of instruments of EU law, and the labour law directives of the 1970s (on collective redundancies, transfers of undertakings and employer insolvency) and the 1990s (introducing minimum standards in the areas of health and safety, including working time, and on posting of workers). The turn of

<sup>2</sup> Title X TFEU, in particular Art. 153.

<sup>3</sup> H. Collins, ‘Justifying European Employment Law’ in S. Grundman, W. Kerber and S. Weatherhill (eds.), *Party Autonomy and the Role of Information in the Internal Market* (Berlin: Walter de Gruyter, 2001) 205; H. Collins, ‘Social Dumping, Multi-level Governance and Private Law in Employment Relationships’ in D. Leczykiewicz and S. Weatherill (eds.), *The Involvement of EU law in Private Law Relationships* (Oxford: Hart, 2013) 223. See generally C. Barnard, *EU Employment Law*, 4th edn (Oxford University Press, 2013), Ch. 1.

the millennium brought a shift in policy, with ‘flexicurity’, namely the combination of the ideas of flexibility in labour markets and employment security (rather than job security) as vehicles for greater economic efficiency and competitiveness of businesses, becoming the dominant objective. It is in this context that legal instruments concerning telework, part-time, fixed-term and temporary agency work were adopted, with some of these instruments being negotiated between European employers’ associations and trade unions. Another important objective of EU law in the social sphere has been the protection of fundamental rights, which was recently given a strong impetus by granting the Charter of Fundamental Rights of the EU the same legal value as the Treaty on European Union (TEU) and the TFEU.<sup>4</sup>

Apart from the areas of fundamental economic freedoms, equality and fundamental rights, EU labour legislation is contained in directives that do not lead to the uniformity of the Member States’ labour laws. Directives lay down goals, usually in the form of minimum standards, that have to be achieved by the Member States through domestic implementing measures. Although their domestic implementations differ across the EU, as does their interpretation by domestic courts, EU labour directives have at least two things in common: the focus of these directives and domestic implementing measures is on individual employment relationships, which contributes to the individualisation of the Member States’ labour laws; implementation tends to occur through legislation, which results in the juridification of domestic labour laws.<sup>5</sup> A corollary of these two developments is the proliferation of individual, including transnational, employment disputes.

Domestic regulation of transnational employment relationships thus remains of primary importance at both the international and EU levels. Although the legal institution of the contract of employment is almost universal, domestic labour law systems remain widely divergent in their regulatory objectives, techniques and content. Legal diversity is a reflection of the unique social, political, economic and cultural textures in different countries. In the EU, for example, Nordic countries, in particular Denmark and Sweden, represent, in many respects, one end of the spectrum. Here, most of the important issues are regulated by collective bargaining at different levels. France is at the other end with

<sup>4</sup> Consolidated versions of the Charter and TEU are published in [2012] OJ C326/391 and [2012] OJ C326/13, respectively.

<sup>5</sup> H. Collins, ‘Social Dumping’.

comprehensive and detailed regulation of the employment relationship, often backed up by public law sanctions, but also with high levels of collective bargaining coverage. The UK represents a third model, which is characterised by minimum employment standards laid down by legislation but also considerable flexibility with regard to the content of the employment relationship, with individual employment litigation being the main means of monitoring and enforcing statutory and contractual employment standards. The extent and depth of legal diversity is the main reason for the exclusion of some of the most important issues from the legislative competence of the EU and the lack of regulation of many other important issues like unfair dismissal.

A consequence of this blend of different levels and sources of regulation is that it is often difficult to determine the rules that govern a particular transnational employment relationship. Some rules pertain to the internal aspects of the employment relationship, that is, the rights and obligations of the parties. Others concern the legal environment in which such relationships are created and performed. The fundamental economic freedoms, for example, guarantee the opening up of labour and services markets within the EU, thus expanding the potential area of operation of covered workers and service providers. The multilevel system of governance that is the EU<sup>6</sup> leads to three different types of conflict of laws. First, there are ‘vertical’ conflicts between EU law and the Member States’ domestic laws, where the former trumps the latter. Second, there are ‘horizontal’ conflicts, which arise in horizontal relationships between employers and employees because of the diversity of the Member States’ labour laws. Finally, there are ‘diagonal’ conflicts that arise in situations in which the EU is competent to regulate one aspect of the problem, for example, freedom of establishment and to provide services, whereas the Member States remain competent to regulate another aspect, for example, industrial action.

The central argument of this book is that private international law matters in this multilevel system of governance. Individual transnational

<sup>6</sup> See C. Joerges, ‘European Challenges to Private Law: On False Dichotomies, True Conflicts and the Need for a New Constitutional Perspective’ (1998) 18 *Legal Studies* 146; C. Joerges, ‘The Challenges of Europeanization in the Realm of Private Law: A Plea for a New Legal Discipline’ (2004) 14 *Duke International and Comparative Law Journal* 149; C. Joerges, ‘Unity in Diversity as Europe’s Vocation and Conflicts Law as Europe’s Constitutional Form’, LEQS Paper No. 28/2010 (December 2010, revised version: April 2013), available at [www.lse.ac.uk/europeanInstitute/LEQS/LEQSPaper28.pdf](http://www.lse.ac.uk/europeanInstitute/LEQS/LEQSPaper28.pdf).

employment disputes typically raise issues of ‘horizontal’ conflicts of laws and sometimes of ‘vertical’ and ‘diagonal’ conflicts. It goes without saying that the outcome of such disputes may depend on the competent court, applicable laws and the possibility of recognition and enforcement of judgments abroad. But looking beyond its role in the resolution of individual transnational employment disputes, the European private international law of employment also has an important systemic role in coordinating and maintaining the diversity of the Member States’ labour law systems, while aiming to contribute to the enforcement of basic principles and rights of EU law and the safeguarding of the objectives and values of EU law from non-EU elements. As such, the European private international law of employment is a crucial accompaniment of key constitutional principles of EU law of subsidiarity and proportionality in the vertical allocation of regulatory (i.e. legislative and adjudicatory) authority in the social sphere, as well as the EU law principles of supremacy and effectiveness. The objectives of private international law in the EU context can, therefore, be aptly summarised as pursuing ‘unity in diversity’, which was the motto of the unsuccessful 2004 draft Treaty establishing a Constitution for Europe. Surprisingly, however, the importance of the European private international law of employment is matched by the apparent lack of interest in this legal discipline by many of those interested in the role of European private law in general in achieving social justice.<sup>7</sup>

The rules of the European private international law of employment are contained in the following legal instruments:

- Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) (Brussels I Recast),<sup>8</sup> which superseded, as of 10 January 2015, 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),<sup>9</sup> which, in turn, superseded the Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in

<sup>7</sup> For example, the Manifesto of the Study Group on Social Justice in European Private Law does not contain a single reference to either private international law or conflict of laws: Study Group on Social Justice in European Private Law, ‘Social Justice in European Contract Law: A Manifesto’ (2004) 10 *European Law Journal* 653. See also B. Bercusson and others, ‘A Manifesto for Social Europe’ (1997) 3 *European Law Journal* 189.

<sup>8</sup> [2012] OJ L351/1. <sup>9</sup> [2001] OJ L12/1.

civil and commercial matters (Brussels Convention).<sup>10</sup> Denmark is the only Member State not bound by the two regulations. It has, however, entered into an agreement with the EU, thus ensuring the application of the provisions of Brussels I in Denmark.<sup>11</sup> Closely related are the Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, done at Lugano on 30 October 2007 (2007 Lugano Convention),<sup>12</sup> superseding the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters, done at Lugano on 16 September 1988 (1988 Lugano Convention).<sup>13</sup> The two Lugano Conventions extend the European system of adjudicatory jurisdiction and recognition and enforcement of judgments to three European Free Trade Association states, namely Iceland, Norway and Switzerland.

- 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),<sup>14</sup> superseding, with regard to contracts concluded after 17 December 2009, the Convention on the law applicable to contractual obligations, opened for signature in Rome on 19 June 1980 (Rome Convention).<sup>15</sup> Denmark is not bound by Rome I, but only by the Rome Convention.
- Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II),<sup>16</sup> applicable from 11 January 2009 to events giving rise to damage after that date. Denmark is not bound by Rome II.
- Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services (Posted Workers Directive).<sup>17</sup> This directive will soon be supplemented by a directive on the enforcement

<sup>10</sup> [1972] OJ L299/32, implemented into UK law by the Civil Jurisdiction and Judgments Act 1982 (CJJA 1982).

<sup>11</sup> Agreement between the European Community and the Kingdom of Denmark on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2005] OJ L299/62.

<sup>12</sup> [2009] OJ L147/1, implemented into UK law by CJJA 1982.

<sup>13</sup> [1988] OJ L319/9, implemented into UK law by CJJA 1982.

<sup>14</sup> [2008] OJ L177/6. The UK decided to opt into Rome I: Commission Decision 2009/26/EC of 22 December 2008 on the request from the United Kingdom to accept Regulation (EC) No 593/2008 of the European Parliament and the Council on the law applicable to contractual obligations (Rome I) (notified under document number C(2008) 8554) [2009] OJ L10/22.

<sup>15</sup> [1980] OJ L266/1, implemented into UK law by the Contracts (Applicable Law) Act 1990.

<sup>16</sup> [2007] OJ L199/40. <sup>17</sup> [1997] OJ L18/1.

of the Posted Workers Directive (Posting of Workers Enforcement Directive).<sup>18</sup>

- The provisions of the TFEU concerning the fundamental economic freedoms, which are based on the principles of mutual recognition and the country of origin, also influence the choice of the applicable law and can, therefore, be regarded as ‘functional equivalents’<sup>19</sup> of the listed choice-of-law instruments in matters falling within their scope.

The European private international law instruments expressly pursue the objective of protection of employees as weaker contractual parties. Recital 18 of the Brussels I Recast states: ‘in relation to . . . employment contracts, the weaker party should be protected by rules . . . more favourable to his interests than the general rules’. In essentially identical words, Recital 23 of Rome I also endorses the objective of protection of employees.<sup>20</sup> Somewhat differently, Recital 5 of the Posted Workers Directive speaks of ‘a climate of fair competition and measures guaranteeing respect for the rights of workers’. These statements of purpose can be seen as a confirmation of the general principle of protection of weaker parties in EU private law.<sup>21</sup>

At least regarding the Brussels I Recast and Rome I, the objective seems clear. The special private international law rules concerning employment should grant protection to the employee and be more favourable to his or her interests than the general rules. This view of the objective of protection of employees, focused on the protection and benefit that individual employees should receive *vis-à-vis* their employers, is shared by the CJEU. This court has consistently held that jurisdiction in employment

<sup>18</sup> European Commission, ‘Proposal for a Directive of the European Parliament and of the Council on the Enforcement of Directive 96/71/EC concerning the Posting of Workers in the Framework of the Provision of Services’, COM(2012) 131 final. This directive is very likely to be adopted in the near future. It is definitely adopted by the European Council: European Commission, ‘Commission Welcomes Council Adoption of Posting of Workers Enforcement Directive’ (13 May 2014), available at [http://europa.eu/rapid/press-release\\_IP-14-542\\_en.htm](http://europa.eu/rapid/press-release_IP-14-542_en.htm).

<sup>19</sup> M. Fallon and J. Meeusen, ‘Private International Law in the European Union and the Exception of Mutual Recognition’ (2002) 4 *Yearbook of Private International Law* 37; R. Michaels, ‘EU Law as Private International Law? Reconceptualising the Country-of-Origin Principle as Vested-Rights Theory’ (2006) 2 *Journal of Private International Law* 195, pp. 210–13.

<sup>20</sup> See also European Commission, ‘Proposal for a Regulation of the European Parliament and the Council on the Law Applicable to Non-Contractual Obligations (Rome II): Explanatory Memorandum’, COM(2003) 427 final, p. 13.

<sup>21</sup> N. Reich, *General Principles of EU Civil Law* (Cambridge, Antwerp, Portland: Intersentia, 2014), Ch. 2.

matters should be given to the courts for the habitual place of work ‘as that is the place where it is least expensive for the employee to commence or defend court proceedings’.<sup>22</sup> Furthermore, in explaining the meaning of the objective of protection of employees, the CJEU has often cited with approval<sup>23</sup> the following part of the Giuliano-Lagarde Report on the Rome Convention:

the question was one of finding a more appropriate arrangement for matters in which the interests of one of the contracting parties are not the same as those of the other, and at the same time to secure thereby more adequate protection for the party who from the socio-economic point of view is regarded as the weaker in the contractual relationship.<sup>24</sup>

It, therefore, seems clear that the interests of employees in minimising litigation costs and maximising their welfare hold sway over the competing interests of employers. A way for employers engaged in transnational employment to achieve the greatest business efficiency is to insert clauses into employment contracts subjecting all disputes with their employees to their own courts and to their own laws. But European private international law does not permit this. To protect individual employees, the Brussels I Recast and Rome I restrict party autonomy and mandate the jurisdiction of the courts and the application of the law considered the most appropriate for the employee.

The focus of the Brussels I Recast and Rome I on individual employment relationships is in line with the mentioned trend of individualisation and juridification of the Member States’ labour laws under the influence of EU law. It also accords with the traditional conception of private international law as a field of law concerned with resolving individual private disputes and achieving private justice and fairness in individual cases. Thus, in the introductory pages of their treatises, the authors of *Dicey, Morris and Collins on the Conflict of Laws* and *Cheshire, North and Fawcett: Private International Law* find justification for private international law in that it implements ‘the reasonable and legitimate expectations of the parties to a transaction or an occurrence’,<sup>25</sup> in the

<sup>22</sup> Most recently in Case C-437/00 *Giulia Pugliese v. Finmeccanica SpA, Betriebsteil Alenia Aerospazio* [2003] ECR I-3573; [2004] All ER (EC) 154, [18].

<sup>23</sup> Most recently in Case C-64/12 *Anton Schlecker v. Melitta Josefa Boedeker*, 12 September 2013, nyr, [33].

<sup>24</sup> M. Giuliano and P. Lagarde, ‘Report on the Convention on the Law Applicable to Contractual Obligations’ [1980] OJ C282/1, p. 25.

<sup>25</sup> L. Collins (gen. ed.), *Dicey, Morris and Collins on the Conflict of Laws*, 15th edn (London: Sweet & Maxwell, 2012), [1–005].

need to avoid ‘grave injustice and inconvenience’ that would arise if English courts refused to apply foreign law and recognise and enforce foreign judgments in appropriate cases,<sup>26</sup> and in the ‘desire to do justice’ to the parties.<sup>27</sup> The statements of purpose found in the recitals to the Brussels I Recast and Rome I and in the CJEU case law disclose the intention to achieve justice and fairness in individual transnational employment cases by favouring the interests of employees over those of employers. Authors writing about the European private international law of employment also usually discuss the protection of employees in similar terms.

But such an *individualistic, bipolar view* of the objective of protection of employees oversimplifies the structure and nature of the interests involved in transnational employment relationships. By focusing on the relative positions of the parties to such relationships, this view does not sufficiently take into account the collective, public, systemic interests involved concerning the legal environment in which such relationships are created and performed. Furthermore, by focusing exclusively on the protection of employees as weaker parties, this view fails to consider other objectives of modern employment regulation such as social inclusion, greater economic efficiency and the protection of human rights in the workplace.

Several observations of importance for private international law can be made when one shifts the focus from the individualistic to the *systemic view* of the objective of protection of employees. On the one hand, states usually have an interest in safeguarding their existing regulatory objectives, techniques and employment standards, so they often apply these to anyone carrying out work within their territory, regardless of the law governing the employment contract and the regulatory claims of other states. On the other hand, the fact that the regulation of employment takes place primarily at domestic level means that labour law is one of the factors on the basis of which countries compete for attracting and retaining investments and attempt to increase the competitiveness of their economies, potentially by ‘racing to the bottom’. States thus often have an interest in the application of their employment standards to economic operators established within their territory, even when those operators operate abroad and post workers abroad to that end. Not

<sup>26</sup> Ibid., [1–006]–[1–007].

<sup>27</sup> J. J. Fawcett and J. M. Carruthers, *Cheshire, North and Fawcett: Private International Law*, 14th edn (Oxford University Press, 2008), p. 5.

infrequently, the legitimate interests of states clash. This is particularly visible in the EU, where a significant gap exists between the level of wages and other standards among Member States and where the freedoms of establishment and to provide services are guaranteed. The Posted Workers Directive, which is designed to deal with the competing regulatory claims of different Member States, is an example of an instrument that adopts the systemic perspective of the objective of protection of employees, as is clear from its Recital 5.

The following questions thus arise. What does the objective of protection of employees really entail in the European private international law of employment? Should the private interests of the parties to transnational employment relationships be the prevalent or even exclusive concern? What roles do and should the collective, public, systemic interests involved have in the process of making and interpreting private international law rules concerning employment? These questions define the first theme of this book. The argument advanced here is that the individualistic view of the objective of protection of employees, seemingly favoured by the drafters of the Brussels I Recast and the Rome Regulations, gives an incomplete picture of the European private international law of employment. The objective of this field of law should not be to unreservedly favour the interests of employees over those of employers, but to adequately allocate and safeguard the regulatory authority of states in the field of labour law, primarily in the EU context. Differences among the Member States' labour laws are not accidental. They reflect a conscious decision to refrain from complete unification of labour law in Europe, thereby respecting national peculiarities. A mechanism is needed to coordinate and maintain the diversity of domestic labour law systems existing within the EU and at the same time to safeguard the objectives and values of EU law. The European private international law of employment is that mechanism.

In identifying and contrasting the individualistic and systemic objectives of private international law, I was influenced by the work of Mills.<sup>28</sup> For the sake of clarity, I should note that I do not subscribe to Mills' view that there is a confluence of private and public international law. I am of the opinion that private international law is a domestic or, in the case of the EU, a quasi-federal law, separate from public international law. I do

<sup>28</sup> A. Mills, *The Confluence of Public and Private International Law: Justice, Pluralism and Subsidiarity in the International Constitutional Ordering of Private Law* (Cambridge University Press, 2009).