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The law applicable to employment contracts under the Rome I-Regulation

Introduction

Conflict-of-law rules (private international law) determine which national law applies in a case with a connection to a foreign country[1]. This area of law is of great practical importance in the European Union, especially for the proper functioning of the internal market. Its functioning is influenced by values like the predictability of the outcome of litigation and certainty as to the law applicable. The target situation is that the same national law is applicable irrespective of the country of the court in which an action is brought, without any danger that the same set of facts may be judged differently depending on which national private law reigns[2].

The question of which national law applies in a cross-border case is often decisive with regard to employment contracts, because national substantive employment laws of the Member States remain very different. Currently, EU employment law merely covers a limited number of issues: the realization of fundamental freedoms; the principle of non-discrimination; the transparency of working conditions and protection of worker health and safety; information and consultation of workers; rules on employee participation on company boards[3]. Moreover, the most commonly used legal form for the approximation of laws is directive, which leaves leeway in the implementation process. Thus, employment laws in Member States are far from unified[4].

Conflict-of-law rules have been enacted in the form of the Rome I-Regulation. The analyzed regulation also determines to what extent the parties can make an effective choice of law applicable to a contractual relationship. The importance of these standards

1 K. Riesenhuber, *European Employment Law. A systematic Exposition*, Cambridge 2012, p. 169.
2 *V.* Recital 6 of Regulation EC No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations, 2008 OJ L 177/6.
3 *V.* K. Riesenhuber, *op. cit.,* p. 24–28.
4 *Ibidem*, p. 170.

is especially reflected in the case of employment contracts due to their social importance. The first aim of this paper is to outline the major issues relating to conflict-of-laws rules concerning the employment relationship. The second aim is to show the scope of the freedom to choose the law applicable to the employment relationship.

Background and sources of conflict-of-laws rules concerning employment contracts

Conflict-of-laws rules were initially enacted outside the Community Law system in the form of the 1980 Convention on the Law Applicable to Contractual Obligations (The Rome Convention[5]). Though the Convention was not a Community instrument provided for in the former Article 293 EC Treaty[6], it was devised as a complementary instrument to EC law with a close relationship to the Community (see Article 20 on the precedence of Community law). Only EC Member States could accede to the Rome Convention and all EC Member States were required to do so[7]. The Convention regulated the law applicable to employment contracts in Article 6 but did not impede bilateral conventions concluded by the Member States, containing conflict of laws rules regulating employment contracts (Article 21).

The Amsterdam Treaty enabled the Union to adopt measures aimed at ensuring "the compatibility of the rules applicable in the Member States concerning conflict of laws and of jurisdiction" (see today's Article 81(2)(c) TFEU[8])[9]. The Vienna Action Plan of 1998 and the Hague Programme of 2004 asserted the importance of harmonized conflict-of-laws rules for contractual obligations.

Finally, the Rome I-Regulation of 17 June 2008 replaced the Rome Convention, transforming it into a Community instrument and modernizing it[10]. The regulation entered into force on 24 July 2008, applies to contracts concluded after 17 December 2009 and establishes uniform rules for determining the law applicable to contractual obligations in the European Union. It covers individual employment contracts in article 8. It must be added that, pursuant to a Protocol of the Amsterdam Treaty, Denmark does not participate in the measures of Title IV TFEU and these include the Rome I-Regulation (the Rome Convention remained in force), however, Ireland and the United Kingdom

5 Convention on the law applicable to contractual obligations opened for signature in Rome on 19 June 1980 80/934/EEC, 1980 OJ L 266/1.

6 Consolidated version of the Treaty establishing the European Community, 1997 OJ C 340/03.

7 K. Riesenhuber, *op. cit.*, p. 170–171.

8 Consolidated version of the Treaty on the Functioning of the European Union, 2012 OJ C 326/01.

9 *V.* K. Riesenhuber, *op. cit.*, p. 171.

10 The law applicable to contractual obligations – The Rome I Regulation, Summaries of EU legislation.

have subsequently agreed to accept the Rome I-Regulation[11]. The Regulation, like the rest of EU law, must be subjected to an autonomous interpretation, which means that the terms used in EU law require an autonomous EU interpretation (the common exception with regard to the term "worker" does not apply in private international law)[12]. According to Article 23, the Regulation does not affect the "special" rules contained in particular regulations and directives.

In the area of employment law, there is also a Posting of Workers Directive[13], which takes precedence over the Rome I-Regulation. The general rule in the Rome I-Regulation is that the employment relation of a posted employee is governed by the law of his home country (see Article 8(2)-(3)), but the Posting of Workers Directive extends a host Member State's employee protection of a posted employee, and states that protection laws have the effect of "overriding mandatory provisions" within the meaning of Article 9 Rome I-Regulation.

Scope of the Rome I-Regulation in the context of employment contracts

The Rome I-Regulation applies to contractual obligations with connections to the laws of several states (Article 1(1)), although the connection can be limited only to the choice of foreign law under Article 3. Any law indicated in this Regulation should be applied, even if it is not that of a Member State. The Regulation always applies in these cases, when the contractual relationship is considered by a Court of one of the Member States[14].

The provision of Article 8 applies to "individual employment contracts", thus collective agreements are not covered. In the literature, the dominant opinion is that the law applicable to the "obligation" part of a collective agreement should be determined on the basis of the general conflict-of-law rules of the Regulation, namely Articles 3 and 4, while the law applicable to a non-contractual obligation in respect of the liability for damages caused by an industrial action - should be determined on the basis of Article 9 of the Rome II Regulation[15]. According to Article 12(1), the law applicable to employment contracts governs in particular: interpretation; performance within the limits of

11 K. Riesenhuber, *op. cit.,* p. 172.

12 *Ibidem*, p. 34 and 175.

13 Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services, 1997 OJ L 18/40.

14 K. Riesenhuber, *op. cit.,* p. 173.

15 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, 2007 OJ L 199/40; M.Zachariasiewicz, *Komentarz do art. 8 rozporządzenia Parlamentu Europejskiego i Rady WE nr 593/2008 w sprawie prawa właściwego dla zobowiązań umownych*, LEX 2013, para 3.

the powers conferred on the court by its procedural law, the consequences of a total or partial breach of obligations, including the assessment of damages in so far as it is governed by rules of law; the various ways of extinguishing obligations, and prescription and limitation of actions; the consequences of nullity of the contract. Although the Rome I-Regulation does not specifically refer to the "employment relationship", it follows from Article 12(1)[16]. All claims arising from the legal relationship created as a result of the conclusion of the individual employment contract are within the scope of the law designated by Article 8. This law also defines the working terms and conditions to be observed by the employer in the context of a given employment relationship[17].

For private international law purposes, the qualification of a legal relationship as an employment contract does not depend upon a national concept, but must follow an autonomous definition. Assuming the autonomous concept of the individual employment contract, it is a contract under which one party agrees during a specified time, for a remuneration, to perform actions for the second party, under her leadership, being incorporated into the organization of the second party's plant, without discretion with regard to making decisions in the enterprise and without incurring the risks of running this enterprise. The service rendered must involve effective and genuine activities. The amount of remuneration is not decisive[18]. The Court of Justice, in the case of *Shenavai v Kreischer,* emphasized that the contract creates a lasting bond which brings the worker to some extent within the organizational framework of the business of the undertaking or employer, and they are linked to the place where the activities are pursued[19].

When it comes to the existence and material validity of the employment contract, they are determined by the law which governs it if the contract or term is valid (Article 10(1)). However, an exception is provided for in Article 10(2): a party, in order to establish that he did not consent to, may rely upon the law of the country in which he has his habitual residence if it appears from the circumstances that it would not be reasonable to determine the effect of his conduct in accordance with the law specified above. The same applies to agreement on the choice of law (Article 3(5))[20]. The regulation does not apply to dealings that occur before a contract is concluded.

The rules concerning the formal validity of an employment contract are set out in Article 11. A contract concluded between persons who, or whose agents, are in the same country at the time of its conclusion is formally valid if it satisfies the formal requirements of the law which governs it in substance under the Regulation or of the law

16 K. Riesenhuber, *op. cit.*, p. 175.

17 M. Zachariasiewicz, *op. cit.*, para 31.

18 *Ibidem*, p. 91–92; And, for instance, ECJ Case C-94/07 *Raccanelli* 2009 ECR I-5939 para. 33; Case C-392/05 *Aevizos* 2007 ECR I-3505 para 67.

19 ECJ Case C-266/85 *Shenavai v Kreischer* 1987 ECR 239, para 16.

20 K. Riesenhuber, *op. cit.,* p. 184–184.

of the country where it is concluded. A contract concluded between persons who, or whose agents, are in different countries at the time of its conclusion is formally valid if it satisfies the formal requirements of the law which governs it in substance under the Regulation, or of the law of either of the countries where either of the parties or their agent is present at the time of conclusion, or of the law of the country where either of the parties has his habitual residence at that time. The rules are of little practical relevance with regard to employment contracts since they are not normally subject to formal requirements[21]. A unilateral act (for example, notice of termination) intended to have legal effect relating to an existing or contemplated contract is formally valid if it satisfies the formal requirements of the law which governs or would govern the contract in substance under the Regulation, or of the law of the country where the act was done, or of the law of the country where the person by whom it was done had his habitual residence at that time. But in the latter alternatives, there is a risk of circumvention of formalities required by more stringent law, when, for instance, an employer terminates the contract of a foreign employee working in the employer's state by making a phone call from the employee' state[22].

The Regulation does not apply to a natural person's status. Thus, issues of capacity are not regulated in the Rome I-Regulation though there is an exception in Article 13. In a contract concluded between persons who are in the same country, a natural person who would have capacity under the law of that country may invoke his incapacity resulting from the law of another country, only if the other party to the contract was aware of that incapacity at the time of the conclusion of the contract or was not aware thereof as a result of negligence[23].

Concerning the evidence, the relevant provisions are in Article 18(2). A contract or an act intended to have legal effect may be proved by any mode of proof recognized by the law of the forum (*lexfori*) or by any of the laws under which that contract or act is formally valid, provided that such a mode of proof can be administered by the forum. But Article 18(1) stipulates that the law governing a contractual obligation applies to the extent that, in matters of contractual obligations, it contains rules which raise presumptions of law or determine the burden of proof[24].

21 *Ibidem*, p. 185.
22 *Ibidem*.
23 *Ibidem*.
24 *Ibidem*.

Choice of law applicable to an employment contract

There are two competing principles in the area of conflict-of-laws rules with regard to employment contracts: the principle of freedom of choice (freedom of contract, private autonomy) versus the protection of the employee as the "weaker party". The first rule is located at the head of the rules in Article 3. Although the freedom of choice of laws applicable to the contractual relationship complements the principle of freedom of contract, they cannot be equated to each other. The scope of the parties' freedom to shape the content of the contractual relationship is determined by the substantive norms of individual states, while the parties' freedom of choice of laws applicable to the contractual relationship is shaped by private international law[25].

With regard to employment contracts, freedom of choice is adjusted to the principle of favorability, which allows room for mandatory legal provisions that would have been applicable in the absence of a choice (see Article 8(1) sentence 2), for the "overriding mandatory provisions" and for the *ordre public*. According to the assumption underlying employment law, the employer and the employee do not have equal bargaining power, and this is due to the fact that for the latter the existence of an employment relationship is often an issue on which the livelihood of themselves and their families depends. In turn, for the employer, the employee is often the only "person to work". For the above indicated reason, the situation of the employee under the existing law needs to be strengthened in order to reduce the actually existing inequalities between the parties. On the basis of the substantive law of individual states, protection of the weaker party in the employment relationship (employee) is realized by adjusting certain elements of this relationship using *iuscogens* and *iussemidispositivum* provisions of the law. If the choice of laws applicable to the employment relationship was unlimited, the worker protection guaranteed in the substantive law of each country would be heavily compromised. For its repeal would be enough to have indicated the law of another state as appropriate to the employment relationship.

Moreover, it may happen that the connection between the parties' contractual relationship with a particular state's legal order is so strong that the exemption in full or even partial scope of the rules of that country to such a relationship may not be appropriate and, above all, may raise the objection of the state, because the state is usually interested in the regulation of contractual relations connected with its laws.

The choice of laws is the primary factor in the determination of the applicable law for employment contracts and enables the parties to choose a national legal system as a whole and to exclude the application of another legal system as a whole, including its mandatory provisions. Article 8(1) about the choice of laws governing an employment contract, refers to Article 3.

25 *Ibidem*, p. 174.

Excluding an employment contract from the law is unacceptable. Using rules which do not comply with the law in force in a particular state (e.g. the rules of international contracts UNIDROIT or Principles of European Contract Law PECL) will have an effect limited only to substantive indication, not a choice of applicable laws. It would therefore be effective only within the restrictions of substantive freedom of contract, which are demarcated by the peremptory norm (*iuscogens*) of law applicable to the contract of employment. Thus, substantive indication of legal regulation does not remove the need to seek applicable laws[26].

Even though choice of laws is made at the same time and stipulated in the same document as an employment contract, it is still a separate contract[27]. According to article 3(1) sentence 2, the choice shall be made expressly or clearly demonstrated by the terms of the contract or the circumstances of the case (implicitly). An implicit choice requires a subjective choice, even though it may be determined using objective factors. Indication of subjective intention and an actual choice may be an agreement of jurisdiction, reference to a national law, integration of the contract into national law, the language of the contract, the place in which the contract was concluded and the nationality of the parties[28].

According to Article 3(2), parties may at any time agree to subject the contract to a law other than that which previously governed it, whether as a result of an earlier choice or of Article 8(2)-(4). Thus, a choice of laws may be made initially or subsequently, it may also be changed later, even in court proceedings (expressly or implicitly). By their choice the parties can select the laws applicable to the whole employment contract or to separable parts of the contract (it is known as *dépeçage*), although the latter choice is of little practical importance in employment law (it may be useful in a pension agreement or a non-compete provision)[29].

Article 3(3) stipulates that in the situation where all elements relevant to the situation at the time of the choice are located in a country other than the country whose law has been chosen, the choice of the parties cannon derogate mandatory provisions of the law of that country. The *ratio legis* is to prevent the circumvention of employment protection. The same applies to the provisions of EU law (regulations) where appropriate, as implemented (law implementing directive) in the Member State of the forum, which cannot be derogated from by agreement[30]. In contrast, a choice of laws applicable to the employment relationship is fully effective if, at the time of making a choice, a relation-

26 *V. 1980 on the Law Applicable to Contractual Obligations into a Community Instrument and its Modernisation COM 2002 654 final*, p. 13–14.
27 K. Riesenhuber, *op. cit.,* p. 179.
28 *Ibidem*, p. 179–180.
29 *Ibidem*, p. 180.
30 *Ibidem*.

ship is related to the laws of the different countries. Therefore, there must be an objective foreign (international) element in this relationship. Elements of the employment relationship, through which the link may be made with the laws of different countries include, in particular: the place where the employee works, the seat of the employer, the employer's place of residence, the place of residence of the employee, the worker's nationality or the employer's citizenship. The analyzed articles extend to all provisions of a state's law or EU law (also the law implementing EU law) which cannot be derogated from by agreement, not only in the category of overriding mandatory rules. In the great majority of cases, EU rules will be applicable if certain territorial conditions are met, however, it is not always clear whether a European Regulation or Directive is intended to be applied in a cross-border context[31].

The choice of law applicable to an employment contract is also subject to further restrictions. According to Article 8(1) sentence 2, such a choice 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 in the absence of choice. This area is not open to the parties' discretion. The above-mentioned protective provisions creating a minimum standard will be applied to the extent that they are more favorable for the employee than those of the law chosen by the parties (for example provisions against unfair dismissal, provisions on the protection of disabled people or mothers, the employee's right to paid leave and to a minimum daily leisure period, the employer's obligation to provide safe and healthy working conditions or to protect young workers)[32]. In this case, the law chosen continues in principle to be applicable, but it is corrected by provisions which would have been applicable in the absence of choice, providing for better protection for the employee (for example, by giving a longer period of notice). The issue of which provision is more favorable should be determined concretely in every case, by comparing groups of norms on a given issue. Thus, it is hard to determine the applicable law in advance and there is a risk that the employment relationship may become unbalanced[33]. The analyzed provision does not preclude the application of provisions of the law chosen by the parties so that the issues related to an employee's protection is regulated in a more favorable manner. The limitation in Article 8(1) sentence 2, however, is milder than the limitation under Article 3(3)-(4), because it does not allow parties to disable only those peremptory norms whose purpose is to protect the employee, not all peremptory norms of the state.

31 *V.* F. Ferrari, S. Leible, *Rome I Regulation: The Law Applicable to Contractual Obligations in Europe*, Munich 2009, p. 334–341.

32 K. Riesenhuber, *op. cit.,* p. 181.

33 *Ibidem,* p. 181–182.

Law applicable to an employment contract in the absence of choice

Where the parties did not make a choice of laws, the applicable law must be determined by reference to objective criteria. They are regulated in Article 8(2)-(4) in hierarchical order. In the first place, the contract is 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 (Article 8(2)). This provision is to be broadly construed[34]. The habitual place of work (*lex loci laboris*) is demarcated by the place of actual employment, the place where the employee received instructions, the place where he must report before discharging his tasks and other factors characterizing the employment relationship. When those places are located in the same country, the situation falls within the scope of the concept "habitual place of work"[35]. The case C-384/10 *Voogsgeerd* concerned a marine engineer residing in the Netherlands and employed by a Luxembourg ship owner. He carried out his work on board ships belonging to the ship owner which, however, began each voyage in Antwerp, where the owner also had its subsidiary. The Court held that the applicable law can be determined on the basis of Article 6(2)(a) of the Rome Convention (now Article 8(2) of the Regulation) and that there is no need to refer to the law of the country in which was located the "the place of business through which he was engaged" within the meaning of Article 6(2)(b) of the Convention (now Article 8(3) of the Regulation)[36]. The concept of "habitually carries out his work" should be interpreted with regard to the interpretation adopted by the ECJ in the light of Article 19(2)b of the Brussels I Regulation[37], which refers to the place where the employee habitually carries out his work or the last place where he did so[38]. According to the ECJ, the criterion of the country in which the work is habitually carried out must be understood as referring to the place in which or from which the employee actually carries out his working activities and, in the absence of a center of activities, to the place where he carries out the majority of his activities. In other words, in the light of Article 8(2) of the Regulation, the place in which or from which, in the light of all the factors which characterize that activity, the employee performs the greater part of his obligations towards his employer is decisive. The Court emphasized that the objective of Article 6 of the Rome Convention (Article 8 of the Regulation) is to guarantee adequate protection for the employee. This tends towards application of the law of the state in which he carries out his working activities rather than that of the State in which the employer is established. It is in the former

34 *Ibidem,* p. 176.

35 ECJ Case C-384/10 *Voogsgeerd,* 2011 ECR I-0000, para 40.

36 *Ibidem*, para 29 and opinion of Advocate General V. Trstenjak delivered on 8 September 2011 in this case, para 60.

37 Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, 2001 OJ L 12/1.

38 ECJ Case C-29/10 *Koelzsch* 2011 ECR I-1595 para 33.

State that the employee performs his economic and social duties and it is there that the business and political environment affects employment activities[39].

The second variant of Article 8(2) decrees that the place from which the employee habitually carries out his work (the so-called: "base rule", "flight-attendant clause") is the place where the employee performs the greater part of his obligation towards his employer[40].When it comes to personnel working on board aircraft or lorry drivers in the international transport sector, "a place from which the employee habitually carries out his work" could be especially a place from which the employee carries out his transport tasks, receives instructions concerning his tasks and organizes his work, the place where his work tools are situated, 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[41]. The case *Koelzsch* was about a worker residing in Germany, employed by a company from Luxembourg, who carried out his work as a truck driver, delivering goods from a supplier in Denmark to different addressees in Germany (mainly) and in other member states. The Court found that in this case it is possible to determine the country in which the employee habitually carries out work within the meaning of Article 6(2)(a)of the Rome Convention, and in this case it is Germany[42].

The country where the work is habitually carried out shall not be deemed to have changed if he is temporarily employed in another country (Article 8(2) sentence 2). The decisive factor is not time alone (depending on circumstances, it may be either a week, month or year) but rather the intention of the parties (*animus retrahendi*)[43]. Otherwise, the applicable law may be changed by sending an employee to work in another country. The situation from Article 8(2) sentence 2 takes place, when "the employee is expected to resume working in the country of origin after carrying out his tasks abroad". Moreover, "the conclusion of a new contract of employment with the original employer or an employer belonging to the same group of companies as the original employer should not preclude the employee from being regarded as carrying out his work in another country temporarily"[44]. The cited thoughts developed in Article 8(2) and expressed in recital 36 of the preamble were originally in the draft of the relevant provisions of the Rome I Regulation but they were removed in the course of legislative work. The doctrine stresses the reference to the traditional criteria, namely *animus revertendi* (employee's intention to return) and *animus retrahendi* (employer's intention to employ employee after his return). There is no specific criterion based on the number of years spent in a posting, which

39 *Ibidem*, para 42, 45 and 50; M. Zachariasiewicz, *op. cit.*, para 20 and 21.
40 ECJ Case C-29/10 *Koelzsch* 2011 ECR I-0000, para 46; K. Riesenhuber, *op. cit.,* p. 177.
41 ECJ Case C-29/10 *Koelzsch* para 49; K. Riesenhuber, *op. cit.,* p. 177.
42 M. Zachariasiewicz, *op. cit.*, para 18.
43 K. Riesenhuber, *op. cit.,* p. 177–178.
44 Recital 36 of Rome I-Regulation.

should be viewed positively, but the doctrine most often indicates a period of two years. The fact that the employment relationship between the employee and the employer began with the posting in another country does not interfere with the adoption, that it is still merely the posting which does not interrupt the essential applicable law. When the employment relationship ends with the completion of the posting, it does not determine the qualification of the posting as the work is habitually carried out in that country[45].

Article 8(3) provides a subsidiary criterion in such a way that where the law applicable cannot be determined pursuant to paragraph 2, the contract is governed by the law of the country where the place of business through which the employee was engaged is situated. This provision is to be narrowly construed. The term "place of business" covers every stable structure of an undertaking (subsidiaries, branches, offices of an undertaking and also other units). The purely transitory presence in the State of an agent of an undertaking from another State for the purpose of engaging employees cannot be regarded as constituting a place of business which connects the contract to that State. The place of business must, in principle, belong to the undertaking which engages the employee, forming an integral part of its structure[46]. Examples of application of this provision are situations of field installation workers, flights attendants, aircraft pilots, sales representatives and correspondents of news agencies and newspapers who do not perform their work at (or from) a single habitual place or who perform their work in an area outside state territories. The place of business should not denote a place which merely acts as a mail-box[47]. The relevant matters are not those relating to the performance of the work but only those relating to the procedure for concluding the contract (the place published in the recruitment notice, the place of recruitment interview)[48]. The word "engaged" in Article 8(3) is considered questionable in this context. The doctrine is unclear whether this implies the conclusion of an employment contract (which would indicate a company through which the agreement was concluded) or whether it rather implies the organizational inclusion of an employee in the structure of a particular plant. Because the first option creates more possibilities for manipulation by the employer (the possibility of setting up an enterprise in a specific country only to conclude employment contracts), we should agree with the supporters of the second option. The lack of clarification of the meaning of the "place of business" in the context of Article 8(3) to distinguish it from the term "place of business" in Article 19 of the Rome I Regulation is often criticized[49].

In article 8(4) there is an exception allowing for a deviation from the basic rules, that where it appears from the circumstances as a whole that the contract is more closely

45 M. Zachariasiewicz, *op. cit.*, para 14 and 15.
46 ECJ Case C-384/10 *Voogsgeerd*, para 53–58.
47 K. Riesenhuber, *op. cit.,* p. 178.
48 ECJ Case C-384/10 *Voogsgeerd*, para 50.
49 M. Zachariasiewicz, *op. cit.,* para 24 and 25.

connected with a country other than that indicated in paragraphs 2 or 3, the law of that other country shall apply. As in several other provisions of the Regulation, in Article 8(4) the correction rule is expressed and reserved for exceptional cases, thus courts should apply it only in special circumstances[50]. Exemplification of these circumstances is the nationality of the parties, the language of the contract, the currency in which the remuneration is to be paid, the existence of previous employment contracts subject to the law of the other country, the place representing the center of the activities of the employer, the place of residence or the seat of the employee and the seat of the employer in the same ("other") country, the existence of connected employment contracts (a contract between one employer and different workers), etc.[51]A place of residence in the same country, however, turned out to be insufficient for the repeal of the law of the country in which the employee habitually carries out his work in the English case of *Shekar v Satyam Computer Services*[52]. The provision in question does not allow the seeking of the most favorable solutions for the employee in substantive meaning[53].

Overriding mandatory provisions, reservation of public policy and exclusion of renvoi

Article 9(1) defines "overriding mandatory provisions" as provisions which are regarded as crucial by a country for safeguarding its public interests, such as its political, social or economic organization, to such an extent that they are applicable to any situation falling within their scope, irrespective of the law otherwise applicable to the contract under Regulation. The court applies overriding mandatory provisions of the law of a particular country. These provisions are different in nature than the previously analyzed more favorable provisions regulated in art. 8(1), because they are mandatory internationally and prevail over both the choice of laws and objectively determined applicable law[54]. Public law norms, provisions enforced by criminal law or by a public agency, provisions regulating economic or social policy, protecting institutions (instead of groups or individuals) may often be recognized as overriding mandatory provisions (but not always). Widely recognized are norms such as the protection of export bans, foreign exchange regulations, provisions regarding the protection of a market and competition, provisions on sick pay, the protection of pregnant workers and women, provisions on mass dismissal;

50 *Ibidem*, para 27.
51 K. Riesenhuber, *op. cit.,* p. 179.
52 *Shekar v SatyamComputer Services* 2005 ICR 737.
53 M. Zachariasiewicz, *op. cit*., para 30.
54 *Ibidem*, p. 182.

whereas the general law against unfair dismissal or the right to reduce working hours to part-time are not recognized as overriding mandatory provisions[55].

Article 9(2) stipulates that the applicable law does not restrict the application of the overriding mandatory provisions of the law of the forum. In turn, according to Article 9(3), the effect may be given to the overriding mandatory provisions of the law of the country where the obligations arising out of the contract have to be or have been performed, in so far as those overriding mandatory provisions render the performance of the contract unlawful. In this case, the decision to apply overriding mandatory provisions belongs to the discretionary power of the national court. Nevertheless, in considering whether to give effect to those provisions, their nature and purpose and the consequences of their application or non-application should be taken into account (Article 9(3) sentence 2).

In relation to the employment relationship, overriding mandatory provisions are subjected to special regulations in Directive 96/71/EC of the European Parliament and of the Council of 16.12.1996 concerning the posting of workers in the framework of the provision of services. In recital 10 of the Directive, it was indicated that: *[w]hereas Article 7 of the said Convention [currently: Rome I-Regulation] lays down, subject to certain conditions, that effect may be given, concurrently with the law declared applicable, to the mandatory rules of the law of another country, in particular the law of the Member State within whose territory the worker is temporarily posted*. According to Article 3(1) of the Directive, member States ensure that, whatever the law applicable to the employment relationship, the undertakings guarantee workers posted to their territory the minimum terms and conditions of employment covering the following matters: (a) maximum work periods and minimum rest periods; (b) minimum paid annual holidays; (c) the minimum rates of pay, including overtime rates; this point does not apply to supplementary occupational retirement pension schemes; (d) the conditions of hiring-out of workers, in particular the supply of workers by temporary employment undertakings; (e) health, safety and hygiene at work; (f) protective measures with regard to the terms and conditions of employment of pregnant women or women who have recently given birth, of children and of young people; (g) equality of treatment between men and women and other provisions on non-discrimination. The contribution of Directive 96/71 is to designate at EU level a number of mandatory rules in transnational posting situations. In order to reconcile the different objectives it pursues, Directive 96/71 coordinates the laws of the Member States in order to lay down a nucleus of mandatory rules for minimum protection to be observed in the host country by employers who post workers to perform temporary work in the territory of a Member State where the services are provided. The directive requires the Member States to apply a number of national rules setting terms and conditions of employment

55 *Ibidem*, p. 183.

to undertakings established in another Member State which posts workers to their territory in the framework of the transnational provision of services. The provisions of the Directive are closely linked with the provisions of the Rome I Regulation and are complementary. In turn, when the employee usually performs work in different countries, then the rules on posting an employee contained in the Directive will not apply.

When it comes to the public policy of the forum as a basis for refusal of the application of applicable law, Article 21 stipulates that the application of a provision of the law of any country specified by the Regulation may be refused only if such application is manifestly incompatible with the public policy (*ordre public*) of the forum. It leaves room for the protection of the fundamental values of the court of law, which reflect the collective morality of the society. However, there is no possibility to apply the norm of the court of law in place of a foreign norm. Restrictions on application of a chosen law stipulated in Article 8(1), provisions preventing circumvention of the law in Article 3(3)-(4)and overriding mandatory provisions mean that the practical importance of public policy clauses in this area of law are limited[56].

The exclusion of *renvoi* is regulated in Article 20. According to its content, the application of the law of any country specified by the Regulation means the application of the rules of law in force in that country other than its rules of private international law, unless otherwise provided for in the Regulation. Otherwise, the indicated law could refer the case back or refer to the law of a third country (*renvoi*), leading to a potentially endless line of references. The advantages of this solution are: greater legal certainty, easier enforcement of the law by the parties and greater actual freedom of choice of law[57].

Conclusion

The employment relationship, like any contractual relationship, may be subjected to the laws chosen by the parties. The choice of the laws applicable to the contractual relationship, including the employment relationship, is possible even when this relationship is connected with the law of only one state. In such a situation, the effects of the choice, however, are very limited.

If the contractual relationship is connected with the laws of different countries, the choice of the laws applicable to that relationship is fully effective (subject to any specific restrictions relating only to the employment relationship). The choice of laws cannot limit the employee's protection guaranteed to him by peremptory norms of the state whose law would be applicable if the parties had not made a choice. In addition, in case of the posting of an employee, the effects of the choice are again limited by the mini-

56 K. Riesenhuber, *op. cit.,* p. 184.
57 *Ibidem,* p. 184.

mum requirements of the law of the Member State within whose territory the worker is posted regarding the seven abovementioned conditions.

It seems that the choice of the laws applicable to the employment relationship, although it is formally possible, has, in fact, limited practical importance. In principle only the law chosen by the parties, which is more favorable to the employee in relation to the law of the state whose law would be applicable in the absence of choice (and in the case of posting in comparison with the law of the state within whose territory the worker is posted regarding the seven conditions), will apply to the employment contract. The priority is therefore the protection guaranteed to the employee under the law of the state indicated by objective hyphens, while the law chosen by the parties may be used only when the employee is protected to a greater extent than by the law indicated by objective factors.

SUMMARY

The law applicable to employment contracts under the Rome I-Regulation

Private international law is of great practical importance in the European Union, especially for the proper functioning of the internal market. It has been enacted mainly in the form of the Rome I-Regulation. The question of which national law applies in a cross-border case is often decisive with regard to employment contracts, because national substantive employment laws remain extremely diversified. The first aim of this paper is to outline the major issues relating to conflict-of-laws rules concerning the employment relationship. The second aim is to show the scope of the freedom to choose the law applicable to the employment relationship. The employment relationship, like any contractual relationship, can be subject to the law chosen by the parties but this choice has limited practical importance. The priority is therefore the protection guaranteed to the employee under the law of the state indicated by objective hyphens.

Keywords: private international law, Rome I-Regulation, employment contract, conflict-of-law rules