

Chapter 10

Remote work in private international law

Uglješa Grušić

1. Introduction

Remote work is on the rise. It is estimated that, in April 2020 (that is, just after the beginning of the Covid-19 pandemic) 33.7 per cent of employees in the European Union were working exclusively at home and 14.2 per cent were hybrid workers working in a variety of places including at home, on the employer's premises and elsewhere (Eurofound 2020: 31). Remote work is likely to continue to be an important feature of the world of work in the years ahead. As the Cambridge Econometrics report commissioned by the European Trade Union Institute shows, by 2026, 18 per cent of workers in the EU are projected to be working from home while, in some scenarios, the number of workers who are working from home is projected to increase even more (Alexandri et al. 2023: 6-7).

A common feature of remote work is that the worker is detached from the employer's premises. In some cases, the worker may even be detached from the country in which his or her employer and its premises are situated. There is some uncertainty about the legal regulation of the cross-border aspects of remote work. For example, the Cambridge Econometrics report states that 'the legality and feasibility of remote, offshored work depends on the policies of the countries where employers and workers are located', before making the following key finding:

The pandemic has rapidly changed the expectations of remote work, which could lead to a rise in remote workers being located offshore from a business's headquarters. However, laws and policies may prevent this type of work arrangement from becoming feasible in the short term. (Alexandri et al. 2023: 25)

This chapter argues that the legal regulation of the cross-border aspects of remote work is primarily the task of private international law and that therefore the following questions become crucial. Which courts have jurisdiction over disputes arising out of the employment contracts of remote workers? Which laws apply to such contracts? And can the rules of private international law deal adequately with these increasingly popular working patterns?

This chapter therefore addresses these questions from the perspective of European private international law. It is divided into three substantive sections. Section 2 explains why the legal regulation of the cross-border aspects of remote work is primarily the task of private international law and describes the special jurisdictional and choice-of-law rules applying to individual employment contracts in European private international

law whose aim is to protect the employee and the labour market in which the employee participates. Section 3 takes a closer look at the concept of remote work, particularly at its features which have relevance to private international law, while Section 4 examines whether European private international law deals adequately with the challenges presented by remote work. Section 5 concludes.

2. European private international law of employment

The legality and feasibility of remote work indeed depends on the laws and policies of the countries where employers and workers are located. This is because there is not, even within the EU, a comprehensive legal regulation of remote work at supranational level: many aspects of the legal regulation of remote work remain territorial.

In order to answer the question whether a particular cross-border working pattern is legal and feasible, two prior questions need to be addressed. First, which laws apply to that cross-border working pattern? If a particular cross-border working pattern is legal and feasible under the law of country A, but illegal and infeasible under the law of country B, whether the law of country A or the law of country B is applicable becomes a decisive question. Second, which courts have jurisdiction over disputes arising out of a particular cross-border working pattern? This question is important because the outcome of a dispute may depend on where the worker sues, or is being sued, and because the location of the competent court also influences the applicable law – for example, courts can apply the overriding mandatory rules of their own legal system, regardless of the otherwise applicable law.¹ In the EU, these questions are governed by the European private international law of employment (Grušić 2015).

The European private international law of employment refers to that part of EU law that regulates cross-border employment relationships. Its rules are set out in the Brussels I Regulation,² the Lugano Convention,³ the Rome I Regulation,⁴ the Rome II Regulation,⁵

1. 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) [2008] OJ L177/6, Art. 9(2).

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

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

4. (n 1), superseding the 1980 Rome Convention on the law applicable to contractual obligations [1980] OJ L266/1.

5. 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) [2007] OJ L199/40.

the Posted Workers Directive⁶ and the Posted Workers Enforcement Directive.⁷ The Brussels I Regulation deals with the jurisdiction of the courts of the Member States over disputes arising out of individual employment contracts and the recognition and enforcement of the judgments of those courts in employment matters. The Lugano Convention effectively extends, with some modifications, the Brussels I Regulation rules to Norway, Switzerland and Iceland. The Rome I and II Regulations deal with the law applicable to the contractual and non-contractual obligations arising out of or in relation to individual employment contracts. The Posted Workers Directive guarantees to workers posted by their employer from one Member State to another, under a service contract that the employer has obtained in the host Member State, the application of certain employment standards that are in force in that Member State. The Posted Workers Directive and the Posted Workers Enforcement Directive provide mechanisms for the enforcement of those standards.

A word should be said about the impact of Brexit on the European private international law of employment. The United Kingdom ceased to be bound by EU law following the expiry of the transition period; that is, on 1 January 2021. The status of the legal instruments that comprise the European private international law of employment following the expiry of the transition period is defined by the UK-EU Withdrawal Agreement.⁸ The Rome I and II Regulations continue to apply in the UK in respect of contracts concluded before the end of the transition period and in respect of events giving rise to damage, where such events occurred before the end of the transition period.⁹ The provisions regarding jurisdiction of the Brussels I Regulation and the Posted Workers Directive continue to apply in the UK and in the Member States in situations involving the UK in respect of legal proceedings instituted before the end of the transition period.¹⁰ The Brussels I Regulation continues to apply to the question of the recognition and enforcement of judgments and to the question of whether parallel proceedings are allowed between the UK and the Member States in respect of legal proceedings instituted before the end of the transition period.¹¹ In April 2020 the UK applied to join the Lugano Convention but, in June 2021, the EU decided that it was ‘not in a position to give its consent’ to the UK’s application.¹² The UK has unilaterally decided to retain some aspects of the European private international law of employment. The

6. Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services [1997] OJ L18/1; Directive (EU) 2018/957 of the European Parliament and of the Council of 28 June 2018 amending Directive 96/71/EC concerning the posting of workers in the framework of the provision of services [2018] OJ L173/16.
7. Directive 2014/67/EU of the European Parliament and of the Council of 15 May 2014 on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services and amending Regulation (EU) No. 1024/2012 on administrative cooperation through the Internal Market Information System (‘the IMI Regulation’) [2014] OJ L159/11.
8. 2019 Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community [2019] OJ C384/1.
9. *Ibid.* Art. 66.
10. *Ibid.* Art. 67(1).
11. *Ibid.* Art. 67(1) and 67(2).
12. The ‘note verbale’ presented to the Swiss Federal Council as depositary of the Lugano Convention is available at <https://www.eda.admin.ch/dam/eda/fr/documents/aussenpolitik/voelkerrecht/autres-conventions/Lugano2/20210701-LUG-ann-EU.pdf>.

Rome I and II Regulations have been incorporated into UK law as ‘retained EU law’.¹³ Protective jurisdictional rules for individual employment contracts, modelled after the equivalent rules of the Brussels I Regulation, have also been adopted.¹⁴

Remote work does not, without more, concern the posting of workers within the meaning of the Posted Workers Directive and the Posted Workers Enforcement Directive. Consequently, these directives are not examined further here. The Brussels I Regulation, the Lugano Convention and the Rome I Regulation contain special rules for ‘individual employment contracts’ whose main objective is the protection of employees as weaker contractual parties. These rules apply to determine the jurisdiction of the courts over disputes arising out of, and the law applicable to, individual employment contracts. The Rome II Regulation, which concerns the determination of the law applicable to non-contractual obligations, does not contain special rules for ‘individual employment contracts’ but it does provide mechanisms for subjecting non-contractual obligations arising in the context of a relationship based on contract (for example, obligations arising out of a breach of the duties of care imposed by general law, such as the law of negligence) to the law that governs the contract.¹⁵ It is for these reasons that the focus in this chapter is on the rules contained in the Brussels I and Rome I Regulations.

The Brussels I Regulation protects employees in two ways. First, it gives employees access to more forums for obtaining redress than it does employers. In general terms, an employee may commence proceedings in the EU in any of the following courts:

- in the courts of the Member State in which the employer is domiciled;¹⁶
- in the courts for the habitual place of work;¹⁷
- absent a habitual place of work, in the courts for the engaging place of business;¹⁸
- as regards a dispute arising out of the operations of the employer’s branch, agency or other establishment, in the courts for the place of that establishment;¹⁹

13. EU Withdrawal Act 2018; Law Applicable to Contractual Obligations and Non-Contractual Obligations (Amendment etc.) (EU Exit) Regulations 2019, SI 2019/83. Although UK courts continue to apply the provisions of the Rome I and II Regulations as domestic UK law, the EU Withdrawal Act 2018 has caused a number of important changes to the relationship between domestic law and EU law. The Rome I and II Regulations will continue to be interpreted in accordance with the case law and general principles of EU law as they stood at the end of the transition period: s. 6(3)(a). However, the UK Supreme Court is explicitly not bound by any such case law and can depart from it under certain conditions: s. 6(4)(a) and 6(5). UK courts are not bound by the case law of, and cannot refer cases to, the European Court of Justice after the end of the transition period: s. 6(1). However, UK courts ‘may have regard to anything done on or after exit day by the European Court, another EU entity or the EU so far as it is relevant to any matter before the court or tribunal’: s. 6(2).

14. Civil Jurisdiction and Judgments Act 1982, s. 15A, 15C, 15D, 15E.

15. Rome II, Art. 4(3), 10(1), 11(1), 12(1); cf. Art. 9.

16. Brussels I Regulation, Art. 21(1)(a).

17. *Ibid.* Art. 21(1)(b)(i).

18. *Ibid.* Art. 19(1)(b)(ii). The Court of Justice of the EU dealt with the relationship between the connecting factors of the habitual place of work and the engaging place of business, and with the interpretation of the latter connecting factor, in Case C-384/10 *Jan Voogsgaerd v Navimer SA* [2011] ECR I-13275. It is not entirely clear whether ‘engaging place of business’ refers to the conclusion of the employment contract by a particular place of business or at a particular place of business. Furthermore, the connecting factor of habitual place of work is interpreted so broadly that the connecting factor of engaging place of business is virtually deprived of relevance. I have therefore argued elsewhere that the connecting factor of engaging place of business should be abolished (Grušić 2013).

19. Brussels I Regulation, Art. 20(1) and 7(5).

- on a counter-claim, in the court in which the original claim is pending;²⁰
- where there is more than one defendant employer, in the courts of the Member State in which any one of them is domiciled.²¹

In contrast, an employer may only commence proceedings:

- in the courts of the Member State in which the employee is domiciled;²²
- on a counter-claim, in the court in which the original claim is pending.²³

Second, the Brussels I Regulation precludes employers from imposing unfavourable jurisdiction agreements on employees. A jurisdiction agreement entered into before a dispute has arisen is effective only if it increases the number of forums available to the employee.²⁴ For example, a German-domiciled employer who hires an employee domiciled in France to work habitually in France cannot agree with the employee in advance that German courts will have exclusive jurisdiction over any disputes arising out of the employment relationship. According to the Regulation, the employer can sue the employee only in France, whereas the employee may commence proceedings in either France or Germany. The parties can only agree in advance that the employee can commence proceedings in another country, such as Belgium. Submission to the court's jurisdiction by entering an appearance is also allowed.²⁵ For example, if an employee is sued in a Member State other than the one in which he is domiciled, the court which is seized of the dispute will have jurisdiction if the employee appears to defend the claim without first contesting the court's jurisdiction. Submission by an employee can confer jurisdiction only if the court, before assuming jurisdiction, has ensured that the employee is informed of the right to contest jurisdiction and of the consequences of entering or not entering an appearance.²⁶ If the court of a Member State violates these protective jurisdictional rules where the employee was the defendant, the resulting judgment will be refused recognition and enforcement in other Member States.²⁷

The special jurisdictional rules for individual employment contracts can be contrasted with the jurisdictional rules applicable to contracts in general. For contracts in general, the Brussels I Regulation allows the full application of party autonomy under which the parties are allowed to agree on the competent court with very few restrictions.²⁸ This is a key difference because the stronger party is able to impose unfavourable jurisdictional agreements on the weaker one where the protective jurisdictional rules do not apply. In the absence of a jurisdiction agreement, the parties to a contract for the provision of services are given equal access to the available bases of jurisdiction, the most important of which, for present purposes, is the rule that the claimant can sue the defendant in the courts of a Member State where, under the contract, the services were provided

20. Ibid. Art. 22(2).

21. Ibid. Art. 20(1) and 8(1).

22. Ibid. Art. 22(1).

23. Ibid. Art. 22(2).

24. Ibid. Art. 23.

25. Ibid. Art. 26(1).

26. Ibid. Art. 26(2).

27. Ibid. Art. 45(1)(e)(i).

28. Ibid. Art. 25.

or should have been provided.²⁹ A violation of the jurisdictional rules applicable to contracts in general is not a ground for refusing recognition or enforcement of the resulting judgment.³⁰

The law applicable to individual employment contracts is determined by the Rome I Regulation. The parties to an individual employment contract are allowed to choose the applicable law.³¹ But the choice cannot deprive employees of the protection afforded to them by the mandatory provisions of the law applicable in the absence of choice.³² In the absence of choice, the contract is governed by the law of the country of the habitual place of work³³ or, if there is no habitual place of work, by the law of the country of the engaging place of business.³⁴ However, where it appears from the circumstances as a whole that the contract is more closely connected with another country, that country's law applies.³⁵

Here, too, the special choice-of-law rules for individual employment contracts can be contrasted with the choice-of-law rules applicable to contracts in general. For contracts in general, the Rome I Regulation allows the full application of party autonomy under which the parties are allowed to agree on the applicable law with very few restrictions.³⁶ This is a key difference allowing the stronger party to impose unfavourable choice-of-law agreements on the weaker one. In the absence of a choice-of-law agreement, a contract for the provision of services is governed by the law of the country where the service provider habitually resides,³⁷ although, where it is clear from all the circumstances of the case that the contract is manifestly more closely connected with another country, that country's law applies.³⁸ Furthermore, there are also special choice-of-law rules for the formal and material validity of contracts,³⁹ whereas the law applicable to the legal capacity of individuals to enter a contract is determined pursuant to domestic choice-of-law rules.⁴⁰ The courts are allowed to apply the overriding mandatory provisions of the forum⁴¹ and, under certain conditions, even the overriding mandatory provisions of the country of performance.⁴²

29. Ibid. Art. 7(1)(b) second indent.

30. Ibid. Art. 45(3).

31. Rome I, Art. 8(1).

32. Ibid.

33. Ibid. Art. 8(2).

34. Ibid. Art. 8(3).

35. Ibid. Art. 8(4).

36. Ibid. Art. 3.

37. Ibid. Art. 4(1)(b).

38. Ibid. Art. 4(3).

39. Ibid. Art. 10 and 11.

40. Ibid. Art. 1(2)(a); see also Art. 13.

41. Ibid. Art. 9(2).

42. Ibid. Art. 9(3).

3. Remote work: features of relevance for private international law

Working remotely means working outside the premises of the employer. As Alan Felstead explains, there are different kinds of remote work (Felstead 2022). First, there is working at home. Historically, this kind of remote work has been done mainly by low-skilled and low-paid workers engaged in manufacturing and routine service work, for example: manufacturing toys and garments; packing boxes and envelopes; or performing routine clerical activities. Nowadays, many homeworkers are managerial, professional and administrative staff who possess higher qualifications and skills, and receive better pay. Second, there is working from home, where the home is used as a base from which work is done. Examples include some transport workers and commercial representatives who perform some of their work (usually of an administrative or preparatory nature) at home even though most of their work is done on the move. Third, there is teleworking, referring to the phenomenon of using information technology to work from anywhere and at any time. Fourth, remote work can be combined with more traditional work patterns, giving rise to hybrid working. This involves working in a variety of places, including at or from home, on the employer's premises, on the move and elsewhere.

The growth of remote work has created three trends that are of relevance for private international law.

The first is a switch from working at offices to working at home. This has enabled many employees to detach themselves from a fixed place of work and even to live and work outside the country in which their employer and its premises are situated.

The reduced importance of territorial connections has led to the second trend, which is a broadening of the labour pool. Employers now find it easier than before to hire employees based overseas. These two trends are highlighted in the Cambridge Econometrics report, which explains that 'More jobs moving to fully remote working could potentially open more jobs to the possibility of offshoring, as the work could feasibly be done from almost anywhere with a decent internet connection' (Alexandri et al. 2023: 24). But the report also explains that, in addition to 'offshoring', we are currently witnessing:

[A] new phenomenon: those who work 100% remotely moving to a different country to their place of employment. This phenomenon is difficult to understand with macro-level data because workers living abroad but working for a domestic company may still be counted as resident workers (thus, not as offshore workers). (Alexandri et al. 2023: 25)

One of the key findings of the report is that the 'pandemic has rapidly changed the expectations of remote work, which could lead to a rise in remote workers being located offshore from a business's headquarters' (Alexandri et al. 2023: 25).

These two trends are undermining the importance of a physical place of work. This presents a challenge to private international law, whose rules on individual employment

contracts are grounded in the territorial jurisdiction of the courts and the territorial application of employment laws.

The third trend is that the growth of remote work has the potential to put additional pressure on the employee/self-employed worker dichotomy. There is some indication that this is possibly already happening. The Cambridge Econometrics report states that, as a consequence of the development of working from home, ‘it is possible that employers resort to temporary workers in order to carry out specific tasks, without incurring the (higher) costs associated with hiring a permanent worker’ (Alexandri et al. 2023: 19). Furthermore, the report presents one possible scenario of the future of remote work, which it calls ‘Acceleration of WFH [work from home] with contract changes’, in which some of the workers who convert from in-person to working from home will convert from being permanent employees to self-employed contractors with the consequence that any rise in working from home will lead to a rise in the rate of self-employment workers (by 4.4 per cent in the EU) (Alexandri et al. 2023: 58). Of course, any such shift from permanent to self-employed contract positions, ‘while providing benefits to firms, could undermine workers’ power, pay, and benefits’ (Alexandri et al. 2023: 7). Any such shift from permanent to self-employed contract positions also has the potential to undermine the protection given to employees by the Brussels I and Rome I Regulations: this is because the employee/self-employed dichotomy is also at the core of the European private international law of employment.

For example, imagine again that a German-domiciled employer hires an employee domiciled in France to work habitually in France; or that an employee of a German-domiciled employer moves from Germany to France to live and habitually work in France. In line with the Brussels I Regulation, as we have seen, if a dispute arises the employee can sue the employer in either Germany or France whereas the employer can only sue the employee in France. Furthermore, the parties cannot in advance, by means of a jurisdiction agreement, deprive the employee of the right to sue the employer in either Germany or France or allow the employer to sue the employee anywhere else other than in France. Similarly, the Rome I Regulation provides that the employment contract of an employee habitually working in France will be governed by French law and that a choice-of-law agreement cannot deprive the employee of the protection afforded by the mandatory provisions of French law.

However, if the employer succeeds in re-classifying the remote worker as self-employed, the worker will be deprived of the protection afforded by the protective rules of the Brussels I and Rome I Regulations. This will allow the employer to impose onerous jurisdiction and choice-of-law agreements on the worker and, even where is no jurisdiction agreement but the worker’s services are provided, or should be provided, in the employer’s country, to sue the worker in its own country or in any other Member State whose courts are given jurisdiction by the jurisdictional rules applicable to contracts in general.

4. European private international law of employment and the challenges presented by remote work

This section assesses how the European private international law of employment deals with the three challenges presented by remote work for private international law: 1) the undermining of the territoriality principle; 2) the risk of misclassification; and 3) the risk of the misuse of dispute resolution agreements.

4.1 Undermining the territoriality principle

The main connecting factor used in both the jurisdictional rules of the Brussels I Regulation and the choice-of-law rules of the Rome I Regulation is the habitual place of work. The subsidiary connecting factor, referring to the engaging place of business, becomes relevant only if there is no habitual place of work. Some of the key cases of the Court of Justice of the EU on the concept of the habitual place of work concern remote workers. Particularly important are *Mulox*⁴³ and *Rutten*.⁴⁴ These cases concerned the determination of the habitual place of work of commercial representatives working from home; that is, using their homes as the base from which their work was carried out. The habitual place of work was held to be the place where the employees' homes were located. This interpretation of the concept was later codified in the Rome I Regulation and the 2012 Brussels I Regulation Recast, which use the formula 'the law of the country in which or, failing that, *from which* the employee habitually carries out his work'.

It is therefore clear that, when an employer hires an employee based overseas, the habitual place of work is in the country in which the employee is based. The determination of the habitual place of work of an employee who habitually worked in one country, but then moved to another to live and work there remotely, is more complicated. Whether the habitual place of work changes depends primarily on the intention of the parties. The case law of the Court of Justice of the EU, in particular the *Weber* case,⁴⁵ and Recital 36 of the Rome I Regulation confirm that work carried out in another country should be regarded as temporary if the employee is expected to resume working in the country of origin after carrying out delegated tasks abroad. Otherwise, work carried out in another country should be regarded as permanent. All the circumstances can be taken into account to determine the parties' intention, but the most important are the content of any annexes to the employment contract concluded, and any written communication exchanged, in relation to the move. The intention of the parties is not the only relevant factor, however. In particular, the duration of carrying out work abroad should be considered. Thus, if an employee has been working in a foreign country for a significant amount of time, for example 10 years, he should be regarded as habitually working in that country even though he used habitually to work in another country and the parties

43. Case C-125/92 *Mulox v Geels* [1993] ECR I-4075.

44. Case C-383/95 *Rutten v Cross Medical Ltd* [1997] ECR I-57.

45. Case C-37/00 *Weber v Universal Ogden Services Ltd* [2002] ECR I-2013.

intended the employee to return there.⁴⁶ This indicates that a temporary relocation from one country to another should not have an impact on the habitual place of work as long as the parties intend the employee to return to the former country and the duration of the relocation is not of significant length.

A special category of remote workers are teleworkers working from anywhere or nomadic workers. If such workers do not establish a habitual place of work, the subsidiary connecting factor of the engaging place of business becomes relevant. Also, the escape clause in Article 4(3) of the Rome I Regulation, which allows the court to disregard the law of the country of the habitual place of work/engaging place of business, and apply the law of the country with which the contract is more closely connected, is more likely to be used to determine the law applicable to the employment contracts of teleworkers or nomadic workers.

The hiring of employees based overseas can have two important consequences. The first is the fragmentation of the internal labour market within the firm and the subjection of the internal labour market to different jurisdictions and laws, with the concomitant creation of obstacles to collective bargaining. The second is the expansion of the labour pool to workers based in foreign, including non-EU, countries which carries the risk of undermining employment standards and creating unfair competition.

The question arises whether the jurisdictional rules of the Brussels I Regulation and the choice-of-law rules of the Rome I Regulation can be interpreted in a way that avoids, or at least mitigates, these consequences. Proposals have been made to adopt solutions that require ‘the coordination of the multiple regulatory sources that interact in a cross-border employment context, in order to take into account the dematerialized dimension of telework and the international mobility of teleworkers’ (Barreda 2022). While it is correct that the territorial solutions of European private international law struggle to accommodate the phenomenon of cross-border remote work that defies national borders, it appears unlikely that the special jurisdictional and choice-of-law rules for individual employment contracts in European private international law can be interpreted in a way that does not put the habitual place of work at the centre of the legal regulation of the cross-border aspects of remote work. Nor is it likely that the European private international law of employment can be changed in the near future by introducing tailor-made jurisdictional and choice-of-law solutions. Without persuasive evidence, which is currently lacking, that the special jurisdictional and choice-of-law rules for individual employment contracts in European private international law are causing significant problems in practice, there is unlikely to be any political appetite to change these rules.

However, the risk created by the expansion of the labour pool to workers based in other countries can be dealt with in two ways. First, if necessary, by the adoption of the substantive rules of EU employment law that would require EU-based employers of overseas employees to ensure that certain minimum standards apply to employment

46. Opinion of Advocate General Wahl in Case C-64/12 *Anton Schlecker v Melitta Josefa Boedeker* ECLI:EU:C:2013:241 [10].

relationships with such employees. Second, the risk created by the expansion of the labour pool to workers based in non-EU countries can be dealt with by the overriding application of EU employment standards to situations sufficiently closely connected with the EU.⁴⁷

Also relevant is that an employer may normally commence proceedings only in the courts of the Member State in which the employee is domiciled. Allowing employees to live and work in another country, and hiring employees based in another country, can lead to a change of the forum that is competent to hear claims brought by employers against employees. Since the rule that employers may normally commence proceedings only in the courts of the Member State in which the employee is domiciled is protective of employees, there is no need to change this rule. This rule, however, does not apply where the employee moves from a Member State to live and work in a non-EU state or where employees based in a non-EU state are hired. The jurisdiction of the Member State courts over such employees depends on the application of the traditional rules – that is, those not derived from EU law – found in the domestic laws of Member States, not all of which espouse the goal of employee protection.

Whether the protection of the Brussels I Regulation should be extended to such employees is open for debate. The Brussels I Regulation – with few exceptions – does not regulate the jurisdiction of Member State courts over persons not domiciled within the EU. This militates against extending the protection of the Brussels I Regulation to non-EU domiciled defendant employees. But, given that the Brussels I Regulation does allow employees to commence proceedings in the EU against non-domiciled EU employers who hire employees to work habitually within the EU,⁴⁸ an argument can be made that the protection of the Brussels I Regulation should further extend to encompass non-EU domiciled defendant employees by precluding employment litigation against such employees in the EU. However, given that the protection of non-EU employees who do not work in the EU is not a political priority, there is again unlikely to be any political appetite to change the Brussels I Regulation in this way.

4.2 Risk of misclassification

The protective rules of the Brussels I and Rome I Regulations apply to ‘individual employment contracts’. In *Holterman*,⁴⁹ *Bosworth*,⁵⁰ *Markt24*⁵¹ and *ROI Land Investments*,⁵² the Court of Justice of the EU confirmed the following principles concerning the interpretation of the concept of ‘individual employment contract’:

- it is autonomous; that is, not dependent on domestic law;⁵³

47. Case C-381/98 *Ingmar GB Ltd v Eaton Leonard Technologies Inc* [2000] ECR I-09305.

48. Brussels I Regulation, Art. 6(1) and 21(2).

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

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

51. Case C-804/19 *BU v Markt24 GmbH* ECLI:EU:C:2021:134.

52. Case C-604/20 *ROI Land Investments Ltd v FD* ECLI:EU:C:2022:807.

53. *Holterman* [36]-[37]; *Bosworth* [24]; *Markt24* [24]; *ROI Land Investments* [28]-[29].

- it is the same across all legal instruments that comprise the European private international law of employment;⁵⁴
- the concept of ‘individual employment contract’ in the European private international law of employment finds its inspiration in the concept of ‘worker’ used more generally in substantive EU employment law;⁵⁵
- ‘individual employment contract’ should be interpreted in light of the objective of the protection of employees;⁵⁶
- in order to determine whether a contract is an ‘individual employment contract’, the courts should take into account that individual employment contracts typically exhibit certain characteristics, such as creating a lasting bond which brings the employee, to some extent, within the organisational framework of the employer’s business, presupposing a relationship of subordination of the employee to the employer and containing the essential feature that, for a certain period of time, one person performs services for and under the direction of another in return for which he or she receives remuneration;⁵⁷
- the form of the relationship between the parties is not determinative for the purposes of its autonomous classification.⁵⁸
- it is not relevant whether the work that is the subject of an employment contract has been performed or not.⁵⁹

The autonomous and broad interpretation of the concept of ‘individual employment contract’ indicates that the Brussels I and Rome I Regulations minimise the risk of misclassification by giving the courts an adequate tool to deal with the potential of remote work to put additional pressure on the employee/self-employed worker dichotomy. Moreover, that the concept of ‘individual employment contract’ finds its inspiration in the concept of ‘worker’ used more generally in substantive EU employment law means that, where remote work is carried out through digital labour platforms, remote workers should be able to rely on the rebuttable presumption of an employment relationship, including the reversal of the burden of proof, in the proposed directive on improving working conditions in platform work,⁶⁰ once this instrument enters into force, for the purposes of invoking the application of the protective rules of the Brussels I and Rome I Regulations.

4.3 Risk of the misuse of dispute resolution agreements

That the growth of remote work has the potential to put additional pressure on the employee/self-employed worker dichotomy risks incentivising employers to try to escape

54. *Holterman* [38]; *Bosworth* [22]; *ROI Land Investments* [29], [50].

55. *Holterman* [36], [41], [46]; *Bosworth* [25], [26].

56. *Holterman* [43]; *ROI Land Investments* [25].

57. *Holterman* [39]-[41], [46]; *Bosworth* [25], [26], [28]; *Markt24* [25]; *ROI Land Investments* [31]-[32].

58. *Bosworth* [27].

59. *Markt24* [26].

60. European Commission Proposal for a Directive of the European Parliament and of the Council on improving working conditions in platform work COM(2021) 762 final.

the jurisdiction of courts and employment laws by using dispute resolution agreements. There are different kinds of dispute resolution agreements, most importantly choice-of-court and choice-of-law agreements and arbitration agreements. By a choice-of-court agreement, the parties agree to give jurisdiction to a particular court and, if the agreement is exclusive, to exclude the jurisdiction of all other courts. By a choice-of-law agreement, the parties agree that a particular law will govern their relationship. And by an arbitration agreement, the parties agree to give jurisdiction to an arbitral tribunal to resolve their dispute.

Choice-of-court and choice-of-law agreements are regulated by the Brussels I and Rome I Regulations whose rules limit the effectiveness of dispute resolution agreements with respect to individual employment contracts. That the concept of ‘individual employment contract’ is interpreted autonomously and broadly indicates that the risk of choice-of-court and choice-of-law agreements being effectively used to escape the jurisdiction of courts and employment laws is low.

With respect to arbitration agreements, however, it is unclear whether they can effectively be used to escape the jurisdiction of courts and employment laws. There are two reasons for this. The first is that arbitration is expressly excluded from the subject matter scope of European private international law instruments.⁶¹ The second is that it is unclear to what extent the principle of the effectiveness of EU law can be used to uphold the protective rules of the Brussels I and Rome I Regulations when confronted with an arbitration agreement, and to what extent the effect of arbitration agreements on the jurisdiction of courts and employment laws is exclusively a matter for domestic law. There are authorities suggesting that an arbitration agreement cannot undermine the operation of the overriding mandatory rules of EU law where the situation is closely connected with the EU.⁶² But EU employment law is not comprehensive and it is unclear whether the rules of the Brussels I and Rome I Regulations will preclude giving effect to arbitration agreements where the overriding mandatory rules of EU law are not in play. There are, however, decisions of English courts, decided while the UK was still bound by EU law, which suggest that the special jurisdictional rules for individual employment contracts of the Brussels I Regulation provide a statutory privilege that should be protected from choice-of-court agreements that do not meet the requirements of Article 23 by means of an anti-suit injunction if necessary.⁶³ If this reasoning can be transposed to the field of arbitration, it would indicate that the special jurisdictional rules for individual employment contracts of the Brussels I Regulation should be protected from arbitration agreements.

61. Brussels I, Art. 1(2)(d); Rome I, Art. 1(2)(e).

62. Case C-126/97 *Eco Swiss China Time Ltd v Benetton International NV* [1999] ECR I-3055; *Accentuate Ltd v Asigra Inc* [2009] EWHC 2655 (QB); see also *Ingmar* (n 47).

63. *Samengo-Turner v J & H March & McLennan (Services) Ltd* [2007] EWCA Civ 723; *Petter v EMC Europe Ltd* [2015] EWCA Civ 828; *Gray v Hurley* [2019] EWCA Civ 2222. See also a case involving a consumer contract and proceedings in a non-EU state: *Khalifeh v Blom Bank SAL* [2021] EWHC 1502 (QB).

5. Conclusion

That the growth of remote work has enabled employees to live and work outside the country in which their employer and its premises are situated has led to a change of domicile of many employees and thus affected the jurisdiction of the courts. Moreover, the growth of remote work has enabled employers to expand their labour pool to workers based in foreign, including non-EU, countries and this has a much bigger potential impact. Employers can more easily hire overseas employees who are subject to foreign jurisdictions and laws, increasing the risk of fragmentation of the internal labour market within the firm, the obstruction of collective bargaining, the undermining of employment standards and the creation of unfair competition.

The autonomous and broad interpretation of the concept of ‘individual employment contract’ indicates that the Brussels I and Rome I Regulations minimise the risk of misclassification by giving the courts an adequate tool to deal with the potential of remote work to put additional pressure on the employee/self-employed worker dichotomy. In other words, the protective rules of the Brussels I and Rome I Regulations are capable of covering all employees who are in genuine need of protection, regardless of how those employees are classified by domestic employment laws.

The Brussels I and Rome I Regulations preclude the use of choice-of-court and choice-of-law agreements to escape the jurisdiction of courts and employment laws. There are authorities suggesting that employers may not be able effectively to use arbitration agreements to escape jurisdiction, at least where the effect of an arbitration agreement would be to escape the application of the overriding mandatory rules of EU law.

Ultimately, this chapter shows that the rules of the European private international law of employment respond differently to the challenges presented by remote work. If one focuses exclusively on their impact on bilateral employer-employee relationships, these rules appear satisfactory. This is because they are capable of covering all employees who are in genuine need of protection, the key concepts which they use (especially the habitual place of work) are flexible enough to enable the courts to determine the competent court, as well as the applicable law in different factual scenarios created by remote working patterns, and they offer adequate protection to employees against adverse dispute resolution agreements. However, if one shifts the focus to the systemic effects created by the rules of the European private international law of employment, the picture looks different. These facilitate offshoring, which undermines the collective power of labour and employment standards and creates unfair competition.

This indicates in summary that the European private international law of employment is a source of both solutions and problems in relation to remote work.

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