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INTERNATIONAL COOPERATION IN CIVIL MATTERS

REGULATION 44/2001
JURISDICTION OVER INDIVIDUAL CONTRACTS OF EMPLOYMENT

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REGULATION 44/2001

JURISDICTION OVER INDIVIDUAL CONTRACTS OF EMPLOYMENT

Regulation n. 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters is the matrix of European Judicial cooperation in civil and commercial matters. It lays down uniform rules to settle conflicts of jurisdiction and facilitate the free circulation of judgements, court settlements and authentic instruments in the European Union. The regulation now replaces in Member States' relations the Convention of 27 September 1968.

The rules of jurisdiction over individual contracts of employment contained in the Regulation differ appreciably from the rules applicable in the field under the Brussels Convention.

In the Brussels Convention the only specific rule concerning contracts of employment was introduced in 1989. That rule appeared in Section 2 of Title II of that convention, concerning special jurisdiction, and had been added in the form of a particular case of the jurisdiction rule laid down in Article 5, point 1, of the Brussels Convention in matters relating to a contract.

In the Regulation, jurisdiction over individual contracts of employment is the subject of a specific section, named Section V of Chapter II. This section, which contains Articles 18 to 21, seeks to ensure that employees are afforded the protection referred to in recital 13 of the preamble thereto and provides different rules for proceedings brought against an employee or against an employer.

As it is stated for insurance and consumers contracts, the employee can choose among grounds strictly linked with his position (so there are alternative grounds), while the employer may bring proceedings only in the court of the Member State in which the employee is domiciled. So for the employer it is laid down an exclusive ground. The autonomy of parts is limited: the agreement on jurisdiction is allowed just if it is entered into after the dispute is arisen or if it allows the employee to bring proceedings in courts other than those indicated in Section V (art. 21).

There is, indeed, a difference between insurance and consumers contracts and individual contracts of employment. Article 35(1) states that a judgment shall not be recognised if it conflicts with Sections 3, 4 or 6 of Chapter II, or in a case provided for in Article 72. There is not a corresponding provision for the conflicts with Section 5: it follows that a

judgment, which conflicts with Section 5, shall be recognised according to article 35(3)[1].

1. JURISDICTION UNDER ARTICLE 18, PARAGRAPH 2, EC REGULATION NO. 44/01: THE CONCEPT OF BRANCH, AGENCY AND OFFICE.

In outlining the workers' freedom of establishment within the European market and in order to facilitate the process of relocation of commercial firms, article 43[2] of the TEC provides the right for a company, private or public, to exercise that freedom not only as concerns the headquartes but also when alternatively moving only a portion of its business to another EU country.

As the Court stated[3], the purpose of this provision is to allow companies to exercise the right of establishment only once they are within the Community and subsequently for an indefinite number of times through the establishment and maintenance of multiple locations in different member States. The right of a secondary establishment is also recognized not only for legal persons, but also for individuals, provided that they are citizens of a Member State established in another Member State (for example a professional, a doctor, a lawyer, with a second office in another country).

Based on this provision, Art. 18, paragraph 2 of Regulation 44 is concerned with identifying the jurisdiction when the worker performs his activity in the branch of a company (or professional). Such provision exists in order to fully protect the position of the employee as the "weaker party" in case of a cross border dispute with his/her employer.

This article regulates specifically the situation where the employer engages staff in its own branch, agency or office located in differents States and the dispute concerns the exercise of the work in those places.

This also applies to employers who are not domiciled in the Community, as in the case of a company with no registered office, central administration or main centre of activity and thus with no legal personality in the host State. In such situation the employer is considered domiciled in the EU in order to determine jurisdiction and in accordance

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[1] Article 35(3): "Subject to the paragraph 1, the jurisdiction of the court of the Member State of origin may not be reviewed. The test of public policy referred to in point 1 of Article 34 may not be applied to the rules relating to jurisdiction."

[2] Article 43, Title III, Chapter II: "Within the framework of the provisions set out below, restrictions on the freedom of establishment of nationals of a Menmber State in the territory of another Member State shall be prohibited. Such prohibition shall also apply to restrictions on the setting-up of agencies, branches or subsidiaries by nationals of any Member State established in the territory of any Member State.

[3] See ruling July 12, 1984 in Case 107/83 Klopp, 2971 collection.

with the principle of the *forum loci laboris*.

Therefore the place of conclusion of an employment contract as well as the fact that it has been concluded directly with the parent company becomes irrilevant.

In all these cases, when the litigation concerns work performance, the employer can initiate legal proceedings before of the tribunal of the State where the secondary office is located and where he has exercised his duties.

However, neither the Brussels Convention[4] nor the subsequent regulation 44 have provided an exclusive legal concept of agency, branch and office. For this reason the Court of Justice set out to define the key distinctive features in order not to relegate this matter to the principle of "mutual recognition".

Firstly, in the case De Bloos[5], the Court has pointed out that one of the essential elements of the defining principle of agency and branch is both "*the subordination to the management and review by the parent*" and "*the power to negotiate and engage the head company*", and therefore the absence of decision-making and organizational autonomy.

In addition, in the case Somafer sa[6], the Court has stated that the concept of agency, branch or other establishment implies a place of business which has "*the appereance of permanency, such as the extension of a parent body, has a management and is materially equipeed to negoziate business with third parties so that the latter, althought knowing that there will if necessary be a legal link with the parent body, the head office of which is abroad, do not have to deal directly with such parent body but may transact business at the place of business constituting the extension*".

In the case Blanckaert et Willems PVBA[7] and consistent with this definition, the Court has denied the status of agency to a Belgian company, which oversaw the net sales of household furniture of a German company, even though there had been a long standing business relationship between the two corporations. In essence the Court has considered that such agent was an independent contractor of the principal, being able to freely

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[3] 27.09.68 Brussels Convention -special jurisdiction under Article 5 paragraph 5: "the defendant, domiciled in a Member State, may be sued in another Contracting State in the case of a dispute concerning the exercise of a branch, agency or other establishment in the court having territorial jurisdiction of the place."

[5] See Case 14/76, De Bloos, in which the Court denied the status of a branch to a dealer for exclusive sale, located in Belgium, compared to the lessor corporation, domiciled in France.

[6] See case 33/78, Samovar, where the Court ruled the action brought by a German company against a French one, with headquarters in France, but with the office or address given on their letter paper in Germany.

[7] See Case 139/80 Blanckeart et Willems Pva.

organize its activities and determine the time to dedicate to work for the German company.

Based on its legal situation the German company, furthermore, could not prohibit the the representative from serving multiple competitors in the same sector of production and distribution. Moreover, the Belgian company would be limited to merely transmitting orders to the German company without participating in the award or execution of the contracts.

For these reasons it was deemed that the Belgium company should not be included in the definition of branch, agency or office as defined by article 5, n. 5, of Brussels Convention.

2. APPLICATION ISSUES: ARTICLE 18, STATE JUDICIAL IMMUNITY AND DIPLOMATIC IMMUNITY.

The jurisdiction rules set out in Regulation 44 in work matters according to the link criteria laid down in Article 18, paragraph 2, as outlined above, nevertheless, encounter a limit to their applicability to disputes concerning activities that constitute an expression of the sovereignty of individual States.

According to the international principle of consuetudinary derivation "*par in parem non habet iudicium*" sovereign bodies, which represent both the characters of subjectivity that are external sovereignty or independence and internal sovereignty, cannot be sued in the courts of a foreign country. In this case, however, the immunity does not concern only central state apparatus but also all the structures and institutions which are assigned to the exercise of public functions and which are branches of the State itself in the host territory.

This raises the problem of all those labour disputes brought by employees or associates, whether citizens or foreigners, related to services performed as employees of a secondary office or a branch, located in the Community, which may be regarded as "organ" or a public expression of the sovereign State to which it belongs.

Indeed, in conformity with the principle of judicial exemption, the rule of Article 18 should not apply and therefore the judge of the host State (defendant as employer) in which the branch is located should decline jurisdiction in favor of the court of labour of the guest State.

Similarly, considering the enhancement of the immune principle laid down by the 1961

Vienna Convention on Diplomatic Relations[8], if the technical, administrative or service employee of an embassy or consulate wishes to obtain justice (for example for a demotion or a failure to pay), he/she should not apply to the court of the receiving State but rather to that of the sending State.

Both the European Court of Human Rights and the Court of Cassazione in Italy have offered different solutions to the interpretative assumptions listed above, for the purpose of reconciling the findings of the Regulation 44 with the customary rules and special immunities described.

Adhering to the doctrine of majority, the Courts has opted not for an "absolute" meaning of the immunity of States but a "restricted" meaning, considering that the exemption of foreign State's jurisdiction would operate only in respect of acts *jure imperii*, as an expression of sovereignty and the functions of public interest, not for acts *jure gestionis* that express a private character.

Based on this interpretation, in the Fogarty decision[9], the European Court for the first time has addressed the issue of jurisdiction in the exemption in labour matters, distinguishing between public and private activity of the employment relationship. The Court has recognized the immunity only for public activity since this is representative of an authoritative power and dominion of the State employer intended as a "*command and material force, both in its internal direction (towards his subjects) and in international management (national defense)."*

At the end, however, to ensure greater social justice for workers and a substantial protection in the legal defence of their rights, the Court has adopted the policy of the *petitum* sought by the worker.

When the application concerns only patrimonial issues of working (for example disputes on remunerations, compensations, indemnities, severance pay, etc) the right of action is granted without immunity for the defendant State, unlike in the other cases (for example demand of reintegration in the workplace).

Consequently, in the case Guadagnini[10], where the suitor presented a complaint for a

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[8] Article 31: a diplomatic agent shall enjoy immunity from the criminal jurisdiction of the receiving State. He/she enjoys the same immunity from civil and administrative jurisdiction, except of…unless.

[9] See case Fogarty v. United Kingdom 21.11.2001. Mary Fogarty, an Irish citizen, worked as an administrative assistant at the U.S. embassy in London. Following dismissal, she brought an action before the North London Industrial Tribunal against the U.S. government, complaining about the discriminatory nature of the dismissal, according to the British Sex Discrimination Act of 1975.

[10] See case Guadagnini c/ Italy and France 18.01.11. The applicant, an Italian citizen, worked as an service assistant to the publications at the French School. He acted before the district court in Rome as labor judge for the reconstitution of his career under the new criteria introduced by law n. 312 of 1980.

pay request of salary differentials and denounced the violation of right of access to the tribunals as provided under Article 6 of the Convention, the High Court has recognized the Italian jurisdiction in the case of an employee of the French Institute in Rome where he worked. On the contrary, attributing to the institute its character of "articulation" of the French State because dependent and controlled by of the French Ministry of Education, the Court has devolved to the French jurisdiction the question on Guadagnini's career requalification and dismissal.

The decision has also referred to Article 11 of the 2004 Convention, supplementary of consuetudinary law, that declares the immunity of the State in labour relations when "*there is an issue of public power or of security of the employer State.*" In fact, if the Italian tribunal had proceeded to the requalification of the carter, as requested by the suitor in that trial, there would undoubtedly have been "an invasion" of the sentence with French State competences in decisional and organizational matters.

In Italy, as well, the Court of Cassazione has ruled on the question in similar way. According to the Supreme Court,[11] disputes relating to employment contracts stipulated by Italian citizens with international organizations that enjoy immunity from the jurisdiction and exemption from execution are excluded from Italian jurisdiction when related to functions and duties that are not merely auxiliary, which concern public goals of the international body.

Therefore, the jurisdictional exemption is not active (as in all cases where the international subject acts as a private individual) if the labour relation involves the exercise of purely material, subsidiary and instrumental duties, not affecting directly nor indirectly the achievement of institutional goals of the international organization. And yet the Court[12] has considered the Italian jurisdiction to exist whenever the employee

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[11] See SU. Cass N. 1150/00. In this case the S.C. recognized the Italian courts competence in the litigation between the Mediterranean Agronomic Institute of Bari (articulation of the Centre International de Hautes Etudes Agronomic Méditerranéennes) and the employee, who had been assigned to custody function and so to duties not involving special fiduciary relationships had in other occasions entrusted a surveillance institution. The dispute concerned the declaration of nullity of the term applied to the work relationship and the consequential economic decisions.

[12] See Order Cass.n.1133/07, in which it is stated that the immunity guaranteed by Article 11 of the Lateran Treaty cannot be invoked by the Pontifical Gregorian University, as it is not included among the "central bodies of the Catholic Church" that are exempted from any interference by the Italian State. Therefore, the dispute concerning the labour of an employee of that university, with the duty of librarian in the specific case, does not escape the jurisdiction of the Italian courts, not being considered an expression of "*jure imperii*"power.

See also SU. n.12704/98, which underlines the lack of italian jurisdiction in the case of the claim against the British Institute of Florence, designed to achieve the declaration of illegality of the dismissal and reinstatement to his position by a professor of history of art, employed in the Institute. The school has the form of a public corporation, through which the UK pursues the aim of development in Italy of the

performed functions that did not constitute an expression of power by the country, that is, when the Italian court's decisions did not prejudice the sovereignty of the defendant State nor interfere with its decision-making and organizational autonomy of public nature.

Finally, with regard to litigations introduced by employees of foreign embassies and consulates in Italy, in the stage of preventive jurisdiction the Supreme Court[13] has reaffirmed the applicability of the criteria established in Article 18 of EC Regulation 44 against patrimonial proposals required by employees with merely executive functions. In these cases, the decision of the court would not require a merit evaluation on the exercise of organizational powers of the respondent State, and therefore the sentence would not conflict with the State's autonomy.

In essence, the Court appears to recognize the operativity of the branch criterion and the tribunal where it is located, whenever the dispute concerns aspects of economical assets claimed by the worker and when the litigation is unapt to interfere with the functions of the employer State (sending State). In contrast, the Court does not consider legitimate the decision of the *forum loci laboris* whenever the dispute involves an organizational assessment of the State (such as the reinstatement of a dismissed worker in the workplace), but distinguishes between two categories of workers: the executive staff and collaborators. For the executive staff, since there is no interference with the institutional purposes of the institution represented, there would be no limits to the Italian jurisdiction. For the others, on the contrary, the immunity would expand again for non-capital disputes[14].

Finally, the Court of Cassazione has held that the jurisdiction should be ruled out on the Italian request for the reinstatement of a job, even if the plaintiff modifies his pretence during the trial in order to obtain compensation for damages instead of the reinstatement of work which was initially claimed. Such a question even when "resized" on claims of economic content requires however an evaluation of the employer's behavior.[15]

To sum up, there is jurisdictional exemption every time the review on merit of the

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knowledge of English language and culture.

[13] See Cass Ordinance n. 1774/01. In this case Elena Malysheva sued before the court of Rome as labour judge the Korean Embassy for differences in pay and allowances for services rendered as a member of the cleaning staff.

[14] See, ex plurimis, Ordinance SU n. 14703/10. In this case Omran Mohsen sued the Saudi Arabian embassy in Rome to get differential payments, thirteenth, fourteenth, severance pay and overtime, established by the collective agreement for the sector, with duties as a translator and public relations officer.

[15] See Cass. Su. n. 9331/99

employee's application involves appraisals, inquiries or rulings that may affect the power of self-organization of the State receiving the pronunciation, thus taking into account not only the nature the duties performed by the employee, but also the type of application proposed[16]

3. INTERPRETATION OF "PLACE WHERE THE EMPLOYEE HABITUALLY CARRIES OUT HIS WORK" (art. 19)(2)(a)

As we know, article 19 of Regulation 44/2001 states: "An employer domiciled in a Member State may be sued: **1.** in the courts of the Member State where he is domiciled or **2.** in another Member State: a) in the Courts for the place where the employee habitually carries out his work or the courts for the last place where he did so, or b) if the employee does not or did not habitually carry out his work in any one country, in the courts for the place where the business which engaged the employee is or was situated". Which is the correct interpretation of article 19(2)(a)?

First of all it should be noted, as the European Commission has correctly pointed out, that the criterion must be interpreted autonomously, in the sense that the meaning and scope of that referential rule cannot be established on the basis of the law of the court seised, but must be established according to consistent and independent criteria in order to guarantee the full effectiveness of the Regulation 44/2001 now and of the Brussels Convention before.[17]

Secondly, the European Justice Court has taken the view that the rule on special jurisdiction in Article 5(1) of the Brussels Convention (now Article 19(2)(a) of Regulation 44/2001) is justified by the existence of a particularly close relationship between a dispute and the court best placed, in order to ensure the proper administration of justice and effective organisation of the proceedings, to take cognisance of the matter, and that the courts for the place in which the employee is to carry out the agreed work are best suited to resolving disputes to which the contract of employment might give rise.

Thirdly, in matters relating to contracts of employment, according to the opinion expressed by the European Justice Court, interpretation of Article 5(1) of the Brussels Convention (now Article 19(2)(a) of Regulation 44/2001) must take account of the concern to afford proper protection to the employee as the weaker of the contracting

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[16] See Ordinance Cass.n. 15626/06. Abd El Galil/c Ambascaiata del Kuwait.

[17] See Case C-125/92 *Mulox IBC* [1993] ECR I-4075, paragraphs 10 and 16 and Case C-383/95 Rutten [1997].

parties from the social point of view. Such protection is best assured if disputes relating to a contract of employment fall within the jurisdiction of the courts of the place where the employee discharges his obligations towards his employer, since that is the place where it is least expensive for the employee to commence or defend court proceedings.

It follows that Article 19(2)(a) of Regulation 44/2001 must be interpreted as meaning that, as regards contracts of employment, the place of performance of the relevant obligation, for the purposes of that provision, is the place where the employee actually performs the work covered by the contract with his employer.

Where work is performed in more than one Contracting State, it is important to avoid any multiplication of courts having jurisdiction in order to preclude the risk of irreconcilable decisions and to facilitate the recognition and enforcement of judgments in States other than those in which they were delivered and that, consequently, Article 19(2)(a) of Regulation 44/2001 cannot be interpreted as conferring concurrent jurisdiction on the courts of each Contracting State in whose territory the employee performs part of his work.

In Mulox IBC case[18] the Court has expressed the principle that in, such a case where work is performed in more than one Contracting State, the place of performance of the obligation characterising the contract of employment, within the meaning of Article 5(1) of the Brussels Convention – the same can be said about article 19(2)(a) of Regulation 44/2001 - is the place where or from which the employee principally discharges his obligations towards his employer. In that specific case it was necessary to take account of the fact that the work entrusted to the employee was carried out from an office in a Contracting State, where the employee in question had established his residence, from which he worked for his employer and to which he returned after each business trip to another country.

In Rutten case[19] the Court has expressed the principle that the place with which the dispute has the most significant link, where a contract of employment is performed in several Contracting States, is the place where the employee has established the effective centre of his working activity and where, or from which, in fact performs the essential part of his duties. In the specific dispute the Court used a quantity criterion, looking at

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[18] Case C-125/92 *Mulox IBC.*

[19] Case 383/95 Petrus Rutten c. Cross Medical Ltd: Mr Rutter carried out his duties on behalf of his two successive employers not only in Netherlands but also, for approximately one third of his working hours, in the United Kingdom, Germany, Belgium and United States of America. He carried out his work from an office established in his home at Hengelo to which returned after each business trip.

the place in which Mr. Rutten spent most of his working time, in which he also had an office where it organized his work for his employers and to which he returned after each business trip aboard.

Then in Weber case[20] the Court has explained that, when the activity carried out is always the same during the time spent in working and it has just executive feature, the relevant criterion for establishing an employee's habitual place of work is, in principle, the place where he spends most of his working time engaged on his employer's business, while any qualitative criteria relating to the nature and importance of work done in various places within the Contracting States are irrelevant. It must be remembered that Mr. Weber continuously performed the same job for his employer, namely that of cook, throughout the entire period of employment.

It would only be if, taking account of the facts of the single case, the subject-matter of the dispute were more closely connected with a different place of work that the principle set out would fail to apply. For example, weight will be given to the most recent period of work where the employee, after having worked for a certain time in one place, then takes up his work activities on a permanent basis in a different place, as suggested by article 19(2)(a) which expressly references to "the last place" where the employee habitually carried out his work.

If then in the event that the criteria just mentioned do not enable the national courts to establish the habitual place of work for the purposes of applying Article 19(2)(a) of the Regulation 44/2001, either because there are two or more places of work of equal importance or because none of the various places where the employee carries on his work activity has a sufficiently permanent and close connection with the work done to be regarded as the main link for the purposes of determining the courts with jurisdiction, it is necessary to avoid a multiplication of the courts having jurisdiction over a single legal relationship. So the employee will have the choice of bringing his action against his employer either before the courts for the place where the business which engaged him is situated, in accordance with Article 19(2)(b) of the Regulation, or before the

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[20] Case C- 37/2000 Herbert Weber c. Universal Ogden Services Ltd: Mr Weber's work for UOS was carried out on board mining vessels or on mining installations. First of all the Court established that work carried out by an employee on fixed or floating installations positioned on or above the part of the continental shelf adjacent to a Contracting State, in the context of the prospecting and/or exploitation of its natural resources, is to be regarded as work carried out in the territory of that State for the purposes of applying Article 5(1) of the Brussels Convention.
In fact, it must be remembered that, according to settled case-law, Article 5 (1) of the Brussels Convention was not applicable to contracts of employment performed entirely outside the territory of the Contracting States, since the employee carries out all his work in non-contracting countries.

courts of the Contracting State on whose territory the employer is domiciled, in accordance with article 19(1) of the Regulation, assuming those two forums are not one and the same. It must be remembered, in fact, that the rules on special jurisdiction merely give the applicant an additional option, providing alternative grounds.

The described principle have been acknowledged by the Italian Court of Cassazione[21]. In a particular proceeding[22], the Italian Supreme Court has explained that a quantitative criterion, based just on the time spent in a place, is not appreciable when the work carried out is personally organized by the employee himself, who has therefore professional or managerial duties. In that case the place in which the employee habitually carries out his work must be identified, in accordance with a qualitative criterion, with the place which represents the centre of his organizational and affective interests[23].

4. CONCRETE APPLICATION ISSUES: CRITICAL APPROACH

After describing the criteria drawn up by the European jurisprudence, it must be pointed out which would be the application problems.

As it is immediately obvious, to determine which is the place where the employee has carried out or habitually carries out his work may sometimes involve the need to conduct a long investigation, whenever the data don't emerge from the documents or it is disputed by the opposite part.

Notwithstanding it is just a preliminary issue of ritual, the Court of the Member State in which the claim is pending could deal with a complex factual assessment at the outcome of which the Court itself could uphold the lack of jurisdiction, with the risk that the issue would be repeated in any appeal, without that there will never deal with the main object of the dispute.

In short, the choice of that criterion rather than more immediately verifiable criteria such as that of domicile, involves the risk that the parties must address more sets of proceedings to see resolved exclusively a ritual issue. In the attempt, therefore, to protect the weaker party with rules of jurisdiction more favourable to his interests, it is likely to be affected interest in a rapid, sure and efficient justice.

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[21] See Cass, United Sections, ordinance n. 26089/2007 ; Cass, United Sections, sentence n. 169/2008; Cass, United Sections, order n. 18509/2009.

[22] Cass, United Sections, sentence n. 169/2008.

[23] The Italian judge has not recognised Italian jurisdiction in a proceeding in which the plaintiff, an Italian citizen, had been employed by a Swiss society, he lived in Switzerland, here he also had an office where it organized his work for his employers and to which he returned after each business trip aboard, even if he spent part of his working time in Italy.

In addition it must be pointed out that there is not an European uniform provision which regulates the passage of the dispute from the Court first seised, which declines jurisdiction, to the Court of another member State, identified as competent. To what extent, in fact, the substantive and procedural effects, which have been produced by the document instituting the proceeding lodged with the incompetent Court, are conserved before the other Court which has jurisdiction over the actions in question? For example: Italian law prescribes two short forfeiture's dates, one for challenging the dismissal deemed to be unlawful and another one for bringing action in the Court. If the seised Court had to apply Italian law (if there is not an agreement of the parties about applicable law, the seised court should be an Italian one, having regard to the identity of the criteria laid down by article 19(2)(a) of the Regulation 44/2001 and by article 6 of the Rome Convention on applicable law), should it mean that the party has forfeited the exercise of the right to impugn the dismissal in the event that the first trial has been established within the prescribed period, although the term is then expired when the action is represented before the competent court?

The judge may legitimately consider that the employee has to bear the risks associated with the choice of the court when he has opted for a ground, whose identification may involve a complex assessment, when he could have chosen the forum of the employer's domicile, as required by the article 19(1) of the Regulation, with the result that rules designed to favour the worker could produce concrete opposite results.

Not only that. It must not be taken for granted that the place where the employee habitually carries out his work necessarily guarantees jurisdiction in the place actually cheaper and more closely connected with employee's interests.

Let's consider the case of an employee who first moved in another member State for employment and after returned in his country of origin as a result of the dismissal notice from the employer company [24]. In this case, in order to challenge the unlawful dismissal, the employee should bring out the action before the Court of the place where he habitually carried out his work - which can certainly be assumed that most eligible to hear the case - even if the more comfortable and cheaper one for him would be the Court of the place in which he is domiciled. In this event the need to entrench the dispute before the most appropriate judge overrides the favour for the weaker contracting party.

[24] It's the same case settled by Italian Court of Cassation, United Sections, sentence n. 169/2008

When, on the contrary, the employee is sued, the ground, what's more exclusive, becomes just that of his domicile, not provided for cases in which he is the plaintiff.

In this case, when the domicile of the employee doesn't coincide with the place of habitual performance of his duties, the Court seised will certainly not be the best suited to resolve disputes to which the contract of employment has given rise, lacking a particularly close relationship between the dispute and the court itself, in addition with possible practical difficulties for the investigation of the case. The judge may, in fact, be forced to resort to international rogatory proceedings resulting in long delays (you can image the need to call to witness some of the employee's colleagues, domiciled in the company employer seat)[25].

Moreover, the employee himself may have interest to defend before the Court of the place where he habitually carried out his work, even if this place is different from his domicile.

Let's imagine, for example, an action brought out by the employer against more than one employees, one of whom has transferred his domicile in another Member State by his retirement. The employer should necessary bring the action before the place of the defendant's domicile, even if the employee was to demonstrate the need to defend himself in conjunction with colleagues before the same judge, giving the mandate to a single defender, perhaps through a trade union. In such a case the parties could neither departed from the provisions of Section V, since article 21(2) of the Regulation that allows this derogation only if the employee is the plaintiff[26].

Where he is one of a number of defendants, according to a previous sentence of the European Justice Court[27], neither article 6(1) of the Regulation could be applied. In Glaxosmithkline v. Jean – Pierre Rouard case, the Court has in fact established that: "*The rule of special jurisdiction provided for in Article 6, point 1, of Council Regulation 44/2001 on jurisdiction and the recognition and enforcement of judgements in civil and commercial matters cannot be applied to a dispute falling under Section 5 of Chapter II of that regulation concerning the jurisdiction rules applicable to individual contracts of employment*".

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[25] The lawgiving solution seems in this case to be in contrast with the principle of recital 12, according to which the provision of differing grounds from the one of the defendant's domicile is justified if it is based on a close link between the court and the action or in order to facilitate the sound administration of justice.

[26] Article 21 states: "The provision of this section may departed from only by an agreements on jurisdiction : 1. which is entered into after the dispute has arisen; or 2 which allows the employee to bring proceedings in courts other than those indicated in this Section."

[27] Case C-462/2006

The employee may, therefore, only hope to be sued before the judge that, according to the Regulation, would be not competent: his appearance, in any event, since what established by articles 25 and 26 of the Regulation, would avoid that the court shall declare of its own motion that it has no jurisdiction. Moreover, even if it was rendered by a court without jurisdiction, the judgement should in any case be recognized in any other Member State, because the article 35(1) of the Regulation does not include, as reasons for refusing recognition of judgments, the violation of the rules laid down in Section V.

Even in this case the rule, designed for the benefit of the worker, as well as bringing that a court less suitable than another may resolve the dispute, could also result in a disadvantage to the employee, who as defendant is bereft of the faculty to choose between several grounds.

It must also be remembered that the choice of the court could have important consequences later in the eventual enforcement step.

We can consider the following event: an employer who is not domiciled in a Member State but has a branch, agency or other establishment in one of the Member States, where the employee performs his duties. Under the provisions of article 18(2) of the Regulation, in disputes arising out of the operations of the branch, agency or establishment, the employer shall be deemed to be domiciled in that Member State. If, however, during the proceedings, the branch should be terminated or transferred to another third country, the employee, although victorious in the dispute, could be denied the opportunity to achieve the recognition or the enforcement of the judgement in the third State, not being able to enjoy the guarantees laid down in Regulation 44/2001 and operating only between Member States or in cases where persons are domiciled in a Member State, whatever their nationality.

The problematic aspects explained above make it clear that, on one hand, the criterion of the place where the employee habitually carries out his work may not be easy to interpret, in effect being to undermine the principle of legal certainty which is one of the objectives of the Regulation and which requires, in particular, that rules of jurisdiction must be interpreted in such a way as to be highly predictable, as it is stated in recital 11 in the preamble to the Regulation. On the other hand they make it clear that the need to favour the employee and the need of a particularly close relationship between a dispute and the court best placed, in order to ensure the proper administration of justice and

effective organisation of the proceedings, can prevail over one another and vice versa, making it difficult to find a unitary *ratio* between the different provisions.

5. PRACTICAL CASE.

Now we can try to answer the question referred to the European Justice Court by the Landersarbeitsgericht Mecklenburg-Vorpommern[28].

1) Must article 19(2)(a) of the Regulation 44/2001 be interpreted as meaning that, for employees engaged to work on a particular ship and exclusively working on that particular ship, the ship itself is to be considered as the place where the employee habitually carries out his work?

If the place of performance of the obligation characterising the contract of employment is the place where the employee principally discharges his obligations towards his employer, we can identify it with the ship. The employees certainly spend the most of their working time on the ship.

2) Must article 19(2)(a) be interpreted as meaning that – at least in a situation in which the ship that is to be considered as the place of work is not used exclusively or predominantly in the territorial waters of any one country, but for international transport services, such as, in the present case, for regular passenger services between Germany and Finland – the Court for the home port or for the port of registry in the country under whose flag the ship sails is to be considered as the court for the habitual place of work?

If the crew spend all its working time on the ship, the most significant link should be given by the flag under whose the ship sails. In maritime navigation weight must be given to customary principles. We know, in fact, that each ship is only subject to the State of its nationality: the flag's State has the right, in principle, to exercise the exclusive power of Government on the naval community. If so, it follows that the flag under whose the ship sails represents a strictly link with the disputes to which the contract of employment might give rise not only if the ship is used in international waters, but also if the ship is used on the territorial waters of any one country. That is true if there are not significant contacts with the other State, maybe because the ship always leaves from its home port, to which it returns after each business trip aboard or in which goods are loaded and unloaded.

Moreover, this criterion is easily verifiable and highly predictable, so it guarantees the respect of the principles both of legal certainty and economy of procedure.

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[28] Case C-413/07, 2007/C 283/29.

3) Must it be assumed that an employee who works exclusively on a particular ship used for the international transport services does not habitually carry out his work in any one country and that, therefore, Article (19)(2)(b) rather than Article (19)(2)(a) has to be applied for the purposes of determining which court – in a country other than the country where the employer is domiciled – has jurisdiction?

If we decide not to identify the ship itself with the place of performance of the relevant obligation, whatever its moving through international waters, it would be impossible for a judge verify which is the place of habitual performance, using the quantitative criterion of the working time spent in a country rather than in an another one. Let's consider a cruise ship. How can we know in which waters the ship stays more?

So we have more places of work of equal importance or better we have to admit that none of the various places where the employee carries on his work activity has a sufficiently permanent and close connection with the work to be regarded as the main link for the purposes of determining the courts with jurisdiction. So we have to apply, as alternative solution, article 19(2)(b) with the following need to understand which is the place where the business which engaged the employee is or was situated.

4) If so, must Article (19)(2)(b) be interpreted as meaning that the place where the business which engaged the employee is situated can also be an office located in one of the port regularly visited by the ship, even thought it is not operated by the employer itself but by another company entrusted by the employer - by way of a management contract – with organizing in its capacity as "operator" the commercial and technical running of its ship, and that company employs, in that office, a "crew manager" who is responsible, inter alia, for coordinating the personnel's assignments, even thought employment contracts were not concluded in that office but on the ship by the ship's captain, but where the office was used to issue duty rosters and to receive certificates of incapacity to work and by the "crew manager" working where to give notices to terminal employment?

It is difficult to say if an office located in one of the port regularly visited by the ship can be considered the place where the business which engaged the employee is situated. In this case weight should be given to the fact that employment contracts where not concluded in that office but on the ship by ship's captain.

Indeed, or the office can represents the effective centre of all working activity and so it is the place where employees habitually carry on their duties within article 19(2)(a) or it

has not any importance either with article 19(2)(b) when it's sure that employment contracts were not concluded there.

Moreover, it must be remembered that it is necessary to avoid a multiplication of the courts having jurisdiction over a single legal relationship. And, of course, if there were more than one office entrusted of organizing the commercial and technical running of the ship, there would be a multiplication of alternative grounds. Which is then the correct criterion to apply?

The solution might be different if the employment contracts had been concluded in the office, provided that the office itself has got the concrete characteristics to be considered a real social seat. It would be necessary, therefore, that the office was an operating centre and not a simple place of document's reception.

5) If question 4 is to be answered in the affirmative: a) can the purchaser of the ship whose crew members were able, pursuant to Article 19(2)(b), to sue their former employer in the court for the place in which the business which engaged the employee was situated be sued in the same country simply on the basis that the employees who were given notice claim that their contracts of employment were transferred to the purchaser in accordance with provisions on the transfer of undertakings in the national law they claim ought to be applied?; b) if an action also brought against the "operator" – identified in question 4 – who gave the notice, can this action be brought in the same court as the action against the former employer?

As we know, jurisdiction criteria must be interpreted autonomously, in the sense that the meaning and scope of that referential rule cannot be established on the basis of the law of the court seised, but must be established according to consistent and independent criteria in order to guarantee the full effectiveness of the Regulation 44/2001. It follows that the national law can not be used to identify the competent Court. So the employees may bring an action against the purchaser in the same country in which they had to be able to sue the former employer only if jurisdiction criteria (so or the place of habitual working performance or the place in which the business which engaged the employee was situated) had not changed after the transferring.

So if we consider that the habitual working performance place is the ship itself and that the most closed relationship between the disputes and the Court is represented by the ship's nationality, there will be a change in jurisdiction only if also the flag under whose the ship sails changes.

In this case, we can observe as the impossibility for the employee to choose to bring an action in the place of his domicile is a great disadvantage when, if he was sued, the exclusive ground would be right his domicile.

If we apply article 19(2)(b) and we identify the ground with the place in which the office is situated, we must verify if also the purchaser uses this office to organize his maritime activity.

If question 4 is to be answered in the affirmative, it seems strange that the former employer and the operator can be sued before different Courts. The office, in fact, should be both the place in which the business which engaged the employee was situated and the operator's domicile.

If not, we must remember what the European Justice Court[29] has already stated about art. 6(1) of the Regulation and answer in the negative: the operator and the former employers can't be sued before the same Court if there are not the necessary requirements. Each one must be sued in the place of his own domicile.

For the Court it is clear from article 18, point 1, of the Regulation, first, that any dispute concerning an individual contract of employment must be brought before a court designed in accordance with the jurisdiction rules laid down in Section 5 of Chapter II of the Regulation and, second, that those jurisdiction rules can not be amended or supplemented by other rules of jurisdiction laid down in that regulation unless specific reference is made thereto in Section 5 itself.

It is settled case law that the rules of special jurisdiction must be interpreted strictly and cannot be give an interpretation beyond the cases expressly envisaged by the Regulation. The circumstances that article 6 (1) falls not within section 5 of Chapter II but with Section 2 there of and that it is not referred to at all in Section 5, unlike article 4 and article 5(5) of the Regulation, the application of which is preserved expressly by article 18(1) thereof, make it clear that the application of article 6(1) is precluded in disputes concerning matters relating to contracts of employment.

Sound administration of justice would imply that any possibility of relying on article 6(1) of the regulation should be open, as in the case of counter claims, both to employees and employers.

Such an application of article 6(1) of the regulation, the Courts continues, could give rise to consequences contrary to the objective of protection, which the insertion in the

[29] Case C-462/2006

Regulation of a specific section for contracts of employment sought specifically to ensure.

Reliance by an employer on article 6(1) of the Regulation could thus deprive the employee of the protection afforded to him by article 20 (1) of that regulation, according to which proceedings can be brought against an employee only in the courts of the member State in which is domiciled. The possibility of interpreting article 6(1) as meaning that only should be able to rely on that provision must be denied. It must be avoided the transformation of the rules of special jurisdiction, aimed at facilitating sound administration of justice, into rules of unilateral jurisdiction. The regulation does not afford particular protection to the employees in a situation such as that described in the last question since there is not rule of jurisdiction available to them that is more favourable than the general rule laid down in article 2(1) of the Regulation.