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Semi – Final C: EU and European Civil Procedure

Jurisdiction over individual labour disputes in the light of the judgment of 14th September 2017 of the Court of Justice of the European Union (Cases C-168/16 and C-169/16)

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1. Preliminary Remarks

The original text of the Brussels Convention[1] contained no special provisions regarding jurisdiction over disputes arising out of individual contracts of employment. The absence of such specific provisions was due to the progress which was made at that period of time within the Committee of the European Economic Community (EEC) to harmonize the provisions of labour law in the Member States; this effort indicated that rules of jurisdiction should not be laid down before adopting rules which will determine the applicable law[2]. As a result, the general rules of the Brussels Convention would also apply to contracts of employment[3].

The first special provision regarding jurisdiction over individual contracts of employment was laid down with Lugano Convention[4]. Thus, according to Article 5 (1) of the Lugano Convention *"A person domiciled in a Contracting State may, in another Contracting State, be sued: 1. … in matters relating to individual contracts of employment, this place is that where the employee habitually carries out his work, or if the employee does not habitually carry out his work in any one country, this place shall be the place of business through which he was engaged"*. The same provision

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[1] 1968 Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters (consolidated version), Official Journal of the European Communities, L 299, 31.12.1972, P. 0032-0042 (hereinafter Brussels Convention).

[2] Jenard Report on the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters, Official Journal of the European Communities, C 59/1, 5.3.1979 (hereinafter Jenard Report), Chapter IV, Articles 5 and 6, n. 1, where it is stated that *"In matters relating to contracts of employment in the broadest sense of the term, the preliminary draft of the Convention contained a provision attributing exclusive jurisdiction to the courts of the Contracting State either in which the undertaking concerned was situated, or in which the work was to have been or had been performed. After prolonged consideration, the Committee decided not to insert in the Convention any special provisions on jurisdiction in this field"*.

[3] More specifically, in litigation between employers and employees the following courts have jurisdiction: a) the courts of the State where the defendant is domiciled (Article 2), b) the courts for the place of performance of the obligation, if that place is in a State other than that of the domicile of the defendant [Article 5 (1)], c) and any court on which the parties have expressly or impliedly agreed (Articles 17 and 18). See Jenard Report, Chapter IV, Articles 5 and 6, n. 1; Pipsou, *Jurisdiction on individual contracts of employment according to Regulation (EC) No 44/2001*, Armenopoulos, Vol. 58, No 4, Apr 2004, p. 482.

[4] Convention on jurisdiction and the enforcement of judgments in civil and commercial matters done at Lugano on 16 September 1988, Official Journal of the European Communities, L 319/9, 25.11.1988 (hereinafter Lugano Convention).

was adopted by the Donostia – San Sebastian Convention[5] (Article 4). It should be mentioned that the Court of Justice of the European Union (CJEU)[6] had ruled that due to the particularities employment contracts present the court of the place in which the characteristic obligation of such contracts is to be performed is considered best suited to resolving the disputes to which one or more obligations under such contracts may give rise[7].

Despite the abovementioned provisions on individual contracts of employment, employees' protection within the EEC continued to fall short in comparison with the protection that consumers and insured enjoy according to Brussels Convention[8]. Therefore, Regulation 44/2001[9] introduced special provisions for jurisdiction over individual contracts of employment at its Section 5, Articles 18-21[10]. Nowadays, Regulation 1215/2012[11] has also set at Section 5 (Articles 20-23) special provisions which deal with jurisdiction over individual contracts of employment and considerably limit the procedural party autonomy in favour of the employees, on the grounds that the person obliged to deliver the contracted service is an employee according to European Labour Law[12].

In this report we are discussing jurisdiction over individual contracts of employment according to Articles 20-23 of Brussels Ia Regulation, emphasizing on

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[5] Convention on the accession of the Kingdom of Spain and the Portuguese Republic to the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters e.t.c., Official Journal of the European Communities, L 285/1, 3.10.1989.

[6] For reasons of consistency, the Court of Justice of the European Union is referred to as CJEU, regardless its previous name as European Court of Justice (ECJ).

[7] Case C-266/85 Hassan Shenavai v Klaus Kreischer, ECLI:EU:C:1987:11; Case C-125/92 Mulox IBC Ltd v Hendrick Geels, ECLI:EU:C:1993:306; Case C-426/06 Glaxosmithkline v Jean-Pierre Rouard, ECLI:EU:C:2008:299.

[8] Section 3: Articles 7-12a (jurisdiction in matters relating to insurance) and Section 4: Articles 13-15 (jurisdiction over consumer contracts).

[9] Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, Official Journal of the European Communities, L 12/1, 16.01.2001 (hereinafter Brussels I Regulation).

[10] The aim of Section 5 was stipulated at recital No 13 of Brussels I.

[11] Regulation (EU) No 1215/2012 of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, Official Journal of the European Union, L 351/1, 20.12.2012 (hereinafter Brussels Ia Regulation). This Regulation replaced its predecessor Brussels I Regulation.

[12] Temming, *The case of Sandra Nogueira and Others v Crewlink Ireland Ltd and Miguel Jose' Moreno Osacar v Ryanair Designated Activity Company; Comment to Court of Justice of the European Union (Second Chamber), judgment of 14 September 2017, Case C-168/16*, European Labour Law Journal (ELLJ) XX(X), 2018, p. 2.

agreements conferring jurisdiction (Article 23) as well as on the concept of *"the place where or from the employee habitually carries out his work"* [Article 21 (1)]. Within this framework, we shall make effort to determine the scope of the provisions of Articles 21 (1) and 23 of Brussels Ia Regulation in the light of the judgment of 14th September 2017 of the CJEU in Cases C-168/16 and C-169/16.

2. Jurisdiction over individual contracts of employment according to Regulation 1215/2012 (Brussels Ia Regulation)

2.1. The scope of the provisions of Articles 20-23

Articles 20-23[13] are rather identical to Articles 18-21 of Brussels I Regulation, which also deal with jurisdiction over individual contracts of employment. According to recital No 18 of Brussels Ia Regulation *"In relation to insurance, consumers and employment contracts, the weaker party should be protected by rules of jurisdiction more favourable to his interests than the general rules"*[14]. It is now important to notice that the method of interpretation that was used by the CJEU regarding the concepts included in the Brussels Convention applies also to Brussels I Regulation, as well as to Brussels Ia Regulation. Particularly, when the provisions of the Regulations and those of the Brussels Convention are similar or equivalent, then the assumptions that the CJEU has made regarding the interpretation of the latter apply also to the former, as this ensures the continuity in the interpretation[15].

According to the provisions of Brussels Ia Regulation, the employee may sue her/his employer not only in the courts of the Member State in which the latter is domicile: Furthermore, the employer may be sued in the courts for the place where (or

[13] The mere quote of Articles indicates reference to the Articles of Brussels Ia Regulation.

[14] It is identical to recital No 13 of Brussels I Regulation. See also Case C-47/14 Holterman Ferho Exploitatie BV etc v Friedrich Leopold Freiherr Spies Von Bllesheim, ECLI:EU:C:2015:574, par. 43; Case C-1/17 Petronas Lubricants Italy SpA v Livio Guida, ECLI:EU:C:2018:478, par. 23.

[15] Case C-406/09 Realchemie Nederland BM v Bayer CropScience AG, ECLI:EU:C:2011:668, par. 38; Case C-645/11 Land Berlin v Ellen Mirjam Sapir etc, ECLI:EU:C:2013:288, par. 31; Case C-49/12 The Commissioners for her Majesty's Revenue & Customs v Sunico ApS etc, ECLI:EU:C:2013:545, par. 32; Case C-222/15 Hoszig Kft v Alstom Power Thermal Services, ECLI:EU:C:2016:525, par. 30; Cases C-168/16 and C-169/16, Sandra Nogueira etc v Crewlink Ireland Ltd and Miguel Jose' Moreno Osacar v Ryanair Designated Activity Company, ECLI:EU:C:2017:688, par, 45; Case C-603/17, Peter Bosworth, Colin Hurley v Arcadia Petroleum Limited, ECLI:EU:C:2019:310, par. 22.

from where) the employee carries out his work[16]. However, the employee may be sued by his employer only in the courts of the Member State in which the employee is domiciled. Besides, the parties may depart from the provisions of Section 5 of Brussels Ia Regulation only by jurisdiction clauses under the strict requirements of Article 23[17].

The enhanced protection of the weaker party clearly indicates that the provisions of Articles 20-23 apply exclusively. In the light of the provisions of Articles 18-21 of Brussels I Regulation, the CJEU has ruled that *"the provisions in Section 5 are not only specific, but also exhaustive"*[18]. The same interpretation is also appropriate for the provisions in Section 5 of Brussels Ia Regulation. Therefore, the provisions of Articles 20-23 prevail over any other general rule of jurisdiction, including the procedural rules of each Member State.

Last but not least, Brussels Ia Regulation requires strict adherence to the provisions of Articles 20-23. Thus, if the employee is the defendant and the court violates the provisions of the Articles 20-23 the recognition and enforcement of the judgment may be refused[19] according to Articles 45 (1) (e) (i) and 46.

2.2. The provisions of Articles 20-22 in brief

The provisions of Articles 20-23 apply only to individual contracts of employment. The legal concept of *"individual contract of employment"* must be given an independent and autonomous interpretation common to all the Member States[20]. In general and according to European Law, an employee is the individual that for a certain period of time performs services for and under the direction of

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[16] This place may also be the employee's domicile.

[17] Magnus/Mankowski/Esplugues Mota/Palao Moreno, *Brussels Ibis Regulation* (2016), Art. 23 1 pp.; Nikas / Sahpekidou, *European Civil Procedure*, Sakkoulas, 2016, p. 314.

[18] Case C-47/14 Holterman Ferho Exploitatie BV etc v Friedrich Leopold Freiherr Spies Von Bllesheim, ECLI:EU:C:2015:574, par. 44; Cases C-168/16 and C-169/16 Sandra Nogueira and others v Crewlink Ireland Ltd and Miguel Jose' Moreno Oscar v Ryanair Designated Activity Company, ECLI:EU:C:2017:688, par. 51; Case C-1/17 Petronas Lubricants Italy SpA v Livio Guida, ECLI:EU:C:2018:478, par. 25.

[19] Brussels I Regulation had no such provision.

[20] Case C-125/92 Mulox IBC Ltd v Hendrick Geels, ECLI:EU:C: 1993:306, par. 10 and 11; Case C-37/00 Herbert Weber v Universal Ogden Services Ltd, ECLI:EU:C:2002:122, par. 60; Case C-154/11 Ahmed Mahamdia v People's Democratic Republic of Algeria, ECLI:EU:C:2012:491, par. 42; Case C-47/14 Holterman Ferho Exploitatie BV etc v Friedrich Leopold Freiherr Spies Von Bllesheim, ECLI:EU:C:2015:574, par. 37.

another individual or legal entity in return for which he receives remuneration[21]. The scope of Articles 20-23 covers all disputes concerning the conclusion, progress and termination of an individual contract of employment, whereas claims based on a harmful event or arising from social security are excluded[22].

It has already been noted that the aim of Section 5 of Brussels Ia Regulation is the enhanced protection of the weaker party, which by definition is the employee, in the frame of the Regulation. That means of course, that if the the employee is the defendant and she/he *is not domiciled in a Member State*, the jurisdiction is determined by the national procedural law and not by Brussels Ia Regulation [Article 20 (1)[23]]. On the contrary, an employer who is not domiciled in a Member State but has a branch, agency or other establishment[24] in a Member State, is deemed to be domiciled in the latter Member State for all disputes arising out of the operations of the branch, agency or establishment [Article 20 (2)].

By contrast, an employer who *is* domiciled in a Member State may be sued in the courts of that Member State [Article 21 (1) (a)]. The employer's domicile is determined according to Articles 62 and 63. In addition, the employee may choose to sue the employer in the courts for the place where or from where the employee habitually carries out his work or in the courts for the last place where he did so ([Article 21 (1) (b) (i)]. This latter provision is laid down in accordance with Article 8

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[21] Case C-47/14 Holterman Ferho Exploitatie BV etc v Friedrich Leopold Freiherr Spies Von Bllesheim, ECLI:EU:C:2015:574, par. 49; Case C-603/17, Peter Bosworth, Colin Hurley v Arcadia Petroleum Limited, ECLI:EU:C:2019:310, par. 25.

[22] Magnus/Mankowski/Esplugues Mota/Palao Moreno, *Brussels Ibis Regulation* (2016), Art. 20, Nr. 1 pp.; Nikas / Sahpekidou, Ibid, p. 320-321.

[23] *"In matters relating to individual contracts of employment, jurisdiction shall be determined by this Section, without prejudice to Article 6, point 5 of Article 7 and, in the case of proceedings brought against an employer, point 1 of Article 8".* See also Article 6 (1) of Brussels Ia Regulation: *"If the defendant is not domiciled in a Member State, the jurisdiction of the courts of each Member State shall, subject to Article 18 (1), Article 21 (2) and Articles 24 and 25, be determined by the law of that Member State".*

[24] See Case C-218/1986 SAR Schotte GmbH v Parfums Rothschild SARL, ECL:EU:C:1987:536, par. 10, where it is stated that *"the concept of a branch, agency or other establishment implies a place of business which has the appearance of permanency, such as the extension of a parent body, has a management and is materially equipped to negotiate business with third parties so that the latter, although 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".* See also Case C-154/11 Ahmed Mahamdia v People's Democratic Republic of Algeria, ECLI:EU:C:2012:491, par. 48.

(2) of Regulation 593/2008[25]. The concept of *"the place where or from where the employee habitually carries out his work"* shall be interpreted in an autonomous way[26].

In case the employee does not carry out his work in performance of his employment contract only in one country, the employer may be sued in the courts for the place where the business which engaged the former is or was situated [Article 21 (1) (b) (ii)]. The concept of *"the business which engaged the employee"* is identical to that mentioned in Article 8 (3) of Rome I Regulation[27]. In the light of Article 8 (3) of Rome I Regulation the CJEU has ruled that the business which engaged the employee *"must be understood as referring exclusively to the place of business which engaged the employee and not to that which the employee is connected by his actual employment"*[28]. It has to be noticed that if the employer has no domicile or branch, agency or other establishment in a Member State he may be sued in the courts determined by Article 21 (1) (b) [Article 21 (2)].

The employee enjoys enhanced protection according to Brussels Ia Regulation not only when he is the plaintiff but also when he is the defendant. Particularly, the employee may be sued by the employer solely in the courts of the Member State where the former is domiciled [Article 22 (1)]. Employee's domicile is determined under the provisions of Article 62. Departure from the provisions of Articles 20-22 is possible only by a jurisdiction clause concluded under the requirements of Article 23.

2.3. Agreements conferring jurisdiction according to Article 23

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[25] Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable on contractual obligations, Official Journal of the European Union, L 177/6, 4.7.2008 (hereinafter Rome I Regulation). According to its Article 8 (2): *"To the extent that the law applicable to the individual employment contract has not been chosen by the parties, the contract shall be governed by the law of the country in which, or failing that, from which the employee habitually carries out his work in performance of the contract. The country where the work is habitually carried out shall not be deemed to have changed if he is temporarily employed in another country"*.

[26] See Case C-125/92 Mulox IBC Ltd v Hendrick Geels, ECLI:EU:C:1993:306, par. 10, 11 and 16; Case C-37/00 Herbert Weber v Universal Ogden Services Ltd, ECLI:EU:C:2002:122, par. 38; Case C-437/2000 Guilia Pugliese v Finmeccanica SpA, ECLI:EU:C:2003:219, par. 16; Case C-29/10 Heiko Koelzsch v 'Etat du Grand-Dutche' de Luxemburg, ECLI:EU:C:2011:151, par. 32.

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

[28] Case C-384/10 Jan Voogsgeerd v Navimer SA, ECLI:EU:C:2011:842, par. 52.

Agreements conferring jurisdiction are usually part of individual contracts of employment and are used as a means by the employer to gather all the disputes which will arise out of such contracts in the courts of his choice. In most cases, the employee has neither the knowledge nor the experience to perceive the concept of the jurisdiction clause nor the financial capability to deny the work he was offered due to that clause[29].

Article 23 provides: *"The provisions of this Section may be departed from only by an agreement: (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"*. In the light of this Article, it is clear that the agreement conferring jurisdiction which has been concluded prior to the dispute arose is not valid. Exceptionally, the jurisdiction clause is firm and valid, even if it has been concluded prior to the dispute arose, when its content is in favour of the employee, meaning that the latter has at his disposal more courts than those indicated in Articles 20 and 21 in which he may bring proceedings[30].

No matter how favourable the agreement conferring jurisdiction may be to the employee, the competent courts according to Articles 20 and 21 shall not be excluded. In other words, the jurisdiction clause may allow the employee to raise an action against the employer in courts other than those indicated in Articles 20 and 21, even if they are not situated in a Member State, only as long as these courts are not excluded[31]. In fact, the employee is entitled to bring proceedings in the courts indicated in Articles 20 and 21, although these courts are excluded by the jurisdiction clause[32].

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[29] Nikas / Sahpekidou, Ibid, p. 334; Sahpekidou, *Agreements conferring jurisdiction according to Articles 25 and 26 of Regulation (EU) No 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters*, Civil Procedure Review, Vol. 11, No 5, May 2018, p. 472. See also recital No 19 of Brussels Ia Regulation, where it is stipulated that: *"The autonomy of the parties to a contract, other than an insurance, consumer or employment contract, where only limited autonomy to determine the courts having jurisdiction is allowed, should be respected subject to the exclusive grounds of jurisdiction laid down in this Regulation"*.

[30] Traulos – Tzanetatos, *International Labour Law*, Sakkoulas, 2017, p. 472.

[31] Case C-154/11 Ahmed Mahamdia v People's Democratic Republic of Algeria, ECLI:EU:C:2012:491, par. 61, 62 and 63.

[32] Case C-154/11 Ahmed Mahamdia v People's Democratic Republic of Algeria, ECLI:EU:C:2012:491, par. 62; Cases C-168/16 and C-169/16 Sandra Nogueira and others v Crewlink Ireland Ltd and Miguel Jose' Moreno Oscar v Ryanair Designated Activity Company,

Agreement conferring jurisdiction concluded prior to the dispute arose is not compulsory for the employee, despite the fact that it provides that the courts which have jurisdiction are those indicated in Articles 20 and 21, provided that the clause contained prohibition of adding more competent courts[33]. However, if the jurisdiction clause is concluded after the dispute has arisen, it is firm and valid no matter what it provides. Under these circumstances, the employee is considered to be no longer depended on his employer and thus the former is capable of negotiating any jurisdiction clause[34].

The formal requirements of the conclusion of the agreements conferring jurisdiction are still determined by the provisions of Article 25[35], adjusted to the particularities the individual contracts of employment present. Therefore, agreements conferring jurisdiction concerning labour disputes can be validly concluded in writing or evidenced in writing, whereas formalities used in international trade or commerce are not applicable[36]. If the jurisdiction clause is firm and valid then the court or the courts indicated shall have exclusive jurisdiction, unless the parties have agreed otherwise [Article 25 (1)]. However, it has been supported that *"a jurisdiction agreement will not usually fulfill the narrow requirements set up in Article 23 taken together with Article 25"*[37]. Since agreements conferring jurisdiction exclude both

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ECLI:EU:C:2017:688, par. 52 and 53; Makridou, *Civil Procedure of Labour Disputes*, Sakkoulas, 2009, p. 77.

[33] Nikas / Sahpekidou, Ibid, p. 336.

[34] Nikas / Sahpekidou, Ibid, p. 337.

[35] See mainly par. 1 of Article 25:*"1. If the parties, regardless of their domicile, have agreed that a court or the courts of a Member State are to have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship, that court or those courts shall have jurisdiction, unless the agreement is null and void as to its substantive validity under the law of that Member State. Such jurisdiction shall be exclusive unless the parties have agreed otherwise. The agreement conferring jurisdiction shall be either: (a) in writing or evidenced in writing; (b) in a form which accords with practices which the parties have established between themselves; or (c) in international trade or commerce, in a form which accords with a usage of which the parties are or ought to have been aware and which in such trade or commerce is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade or commerce concerned"*. Brussels Ia Regulation lays down three substantial conditions for the validity of the agreements conferring jurisdiction: a) the consensus between the parties, b) the dispute which has arisen or may arise must be in connection with a particular legal relationship and c) the clear indication of the competent court or courts. See Sahpekidou, Ibid, p. 461.

[36] Nikas / Sahpekidou, Ibid, p. 335 and 404; Zaprianos, *Jurisdiction over individual contracts of employment*, Armenopoulos, Vol. 63, No 9, Sep 2009, p. 1161.

[37] Temming, Ibid, p. 3.

jurisdiction as determined by the general principle of the courts of the Member State[38] in which the defendant is domiciled laid down in Article 4 thereof and the special jurisdiction provided for in Articles 20 and 21, they must be strictly interpreted[39].

It could be highly debatable whether a court shall have jurisdiction under Article 26 (1)[40] if the employee is the defendant and enters appearance without pleading that the court has no jurisdiction under Brussels Ia Regulation. It has to be noticed that the court must of its own motion examine whether it has jurisdiction (Articles 27 and 28) but not if there is an agreement conferring jurisdiction, except for exclusive jurisdiction referred to in Article 24[41]. As appears from the provisions of Article 26 (2)[42] the court in that case shall have jurisdiction only if the employee was informed of his right to contest the jurisdiction of the court as well as of the consequences of entering or not entering an appearance.

If the agreement conferring jurisdiction is invalid, then the competent court shall be determined by the provisions of Section 5 of Brussels Ia Regulation (Articles 20-22)[43]. Furthermore, the breach of the jurisdiction clause implies the refusal of the recognition of a judgment [Article 45 (1) (e) (i)].

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[38] The court or courts which shall have jurisdiction by virtue of a jurisdiction clause must be situated in a Member State, otherwise the provisions of Brussels Ia Regulation are not applicable. Case 387/98 Coreck Maritime GmbH v Handelsveem BV and others, ECLI:EU:C:2000:606, par. 19; Sahpekidou, Ibid, p. 459; Arvanitakis, *Adjustments of Regulation (EU) No 1215/2012 concerning jurisdiction*, Armenopoulos, Vol. 67, No 11, Nov 2013, p. 2067-2068; Kaisis, *Issues concerning agreements conferring jurisdiction according to Articles 25, 29 and 31 (2) of Regulation (EU) 1215/2012*, Implements of Civil and Civil Procedure Law, Vol. 11, No 2, Feb 2017, p. 112.

[39] Case C-322/14 Jaouad El Majdoub v CarsOnTheWeb Deutchland GmbH, ECLI:EU:2015:334, par. 25. See also Case C-366/13 Profit Investment SIM SpA v Stefano Ossi and others, ECLI:EU:C:2016:282, par. 24; Recital No 19 of Brussels Ia Regulation, where it is clearly indicated that the principle of the freedom of choice of the parties shall always be respected.

[40] *"Apart from jurisdiction derived from other provisions of this Regulation, a court of a Member State before which a defendant enters an appearance shall have jurisdiction. This rule shall not apply where appearance was entered to contest the jurisdiction, or where another court has exclusive jurisdiction by virtue of Article 24"*. See also Case C-150/80 Elefanten Schuh GmbH v Pierre Jacqmain, ECLI:EU:C:1981:148; Jenard Report, Chapter IV, Section 6, Article 18.

[41] Jenard Report, Chapter IV, Section 7, Article 19; Sahpekidou, Ibid, p. 461; Kaisis, Ibid, p. 108.

[42] *"In matters referred to in Sections 3, 4 or 5 where the … the employee is the defendant, the court shall, before assuming jurisdiction under paragraph 1, ensure that the defendant is informed of his right to contest the jurisdiction of the court and of the consequences of entering or not entering an appearance"*.

[43] See Makridou, *New provisions on Lis Pendens according to Regulation (EU) No 1215/2012*, Armenopoulos, Vol. 67, No 11, Nov 2013, p. 2075-2076; Nikas / Sahpekidou, Ibid, p. 424-425. For example, if the employee raises an action before a court indicated as competent by virtue of an invalid jurisdiction clause and afterwards he raises the same action before a court which is competent

3. The cases of Sandra Nogueira and MJ Moreno Osacar (C-168 and C-169/2016)

3.1. The ruling request from the CJEU

Regarding the case C-168/16 of Sandra Nogueira and Others versus Crewlink Ltd, as well as the case C-169/16 of M.J. Moreno Osacar versus Ryanair Company, which were joined, the CJEU was asked to interpret, upon ruling request according to article 267 of TFEU, the Article 19 (2) (a) of the Regulation (EC) 44/2001 (Brussels I Regulation). The said Article, predecessor of Article 21 (1) (b) (i) of Brussels Ia Regulation, provides that an employer residing in EU may be sued before the courts of the place where the employee habitually executes his work. The Court was asked to define the content of *"the place where the employee usually executes or used to execute his work"*, in case of aviation employees, who provide their work for one employer but in more than one member states, as well as to define the abovementioned *"place of habitual work" with the "home base"*, as provided by the Regulation 3922/1991 regarding the harmonization of technical rules and administrative processes in the field aviation.

The case was brought to the CJEU upon ruling request by the Appeal Labour Court of Mons, Belgium. It all started when Sandra Nogueira, MJ Osacar and other aviation employees of multiple nationalities, working as cabin crew in Ryanair flights, filled a complaint in order to ask of labour damages. Their contracts were signed in English language and included the following terms of crucial importance: a) the contracts would be governed by Irish law and b) Irish courts would have exclusive jurisdiction for all disputes arising from the contract. Moreover, it was provided that the work offered in the aircrafts would be considered as work offered in Ireland, given that the aircrafts had an Irish nationality. However, it was further agreed that the airport of Charleroi in Belgium would be the place where the employees would start and finish their day after concluding their duties on flight and the place that they would be on call, having also the obligation to live a maximum of an hour way of it. When these employees resigned or got fired after some years of service, they sued their employers at the Employment Tribunal Court of Charleroi, given that their domicile- work seat was based in Belgium. The Tribunal of Charleroi declined its

according to Articles 20 or 21, the latter shall examine the invalidity of the jurisdiction clause and declare that the former has no jurisdiction under the parties' agreement [Article 31 (4)].

competency because of the clause providing exclusive jurisdiction to the Irish Courts. The employees appealed to the Court of Mons, which referred the case to the CJEU, asking whether the meaning of place of habitual work as provided in article 19, par. 2, element a′ of Brussels I Regulation is identical to the *"home base"*, as provided by the Regulation 3922/1991, namely the place defined by an airline company for its airwork employees where they start and return after flight.

3.2. The CJEU's preliminary ruling on the habitual place of work

In order to define the meaning of the habitual place of work, the CJEU made the following findings. First of all, the CJEU stressed that an autonomous interpretation of the habitual place of work is required. It is a term of EU Law and should be interpreted autonomously and uniformly in all EU Member States. This autonomous interpretation ensures the uniform effectiveness of EU Law[44].

Secondly, the CJEU emphasized that in order to proceed to the autonomous interpretation of the *"habitual place of work"*, the principle of employee's protection as the weaker party in the employment relationship is of crucial importance. This principle is implemented at recital 13 of Brussels I Regulation. This principle is established at Article 21 of Brussels I Regulation which forbids the agreements on jurisdiction before a dispute has arisen, thus preventing the parties from taking advantage of the jurisdictional bases of Article 19 (2) of Brussels I Regulation, as analysed in Section 2.a. This provision protects the employee as it precludes jurisdictional agreements that would force the employee to fill a lawsuit against his employer in a country he is not related to and has just been chosen by the employer. At Nogueira's case, the CJEU notices that the provision which provides exclusive jurisdiction to Irish Courts could not be valid under any circumstances with Article 21 of Brussels I Regulation. By this way, the CJEU agreed with Mons' Court of Appeal which had made a relevant notice[45].

Thirdly, the CJEU ruled that the habitual place of work is not identical to the home base provided by Regulation 3922/1991, given that the latter has different goals than Brussels I Regulation. More specifically, Regulation 3922/1991 targets at the

[44] Cases C-168/16 and C-169/16 Sandra Nogueira and others v Crewlink Ireland Ltd and Miguel Jose' Moreno Oscar v Ryanair Designated Activity Company, ECLI:EU:C:2017:688, par. 47-48.
[45] Ibid, par. 59, 51-53.

harmonisation of technical rules and administrative proceedings in the field of aviation security[46].

However, CJEU noted that in order to determine the habitual place of work, multiple criteria shall be used. The home base of Regulation 3922/1991 may be one of those but not the exclusive one. Further to this, the CJEU noted that those criteria may be found in its previous case- law when Brussels Convention was still in force, given the need of interpretational continuity concerning those legislative documents. Moreover, the interpretation of the place of habitual work as provided in Rome Convention Article 6 (2) (a) may be useful, as both documents tend to unify the legislation in EU in the field of private international law[47].

Taking into consideration its previous case- law, which will be analysed in the next chapter, the CJEU followed a broad interpretation of the place where the employee habitually works. More specifically, in cases where an employee does not perform his work duties at one and only place but in multiple ones (as it happens with on-air aviation personnel), the CJEU interprets the term of *"place of work"* as the place at which or from which the employee performs her/his main obligations and duties towards his employer. Identifying this place leads to the finding of which member state Court has jurisdiction on the case. This Court is the most suitable to solve the case as it is the closest to the employee with the least expenses[48]. Therefore, an amount of indications is required so as to determine the place which has the closest connection to the employment relationship. These indications should take into account all the employee's activities. Regarding the aviation personnel, these indications include the place from where the employee performs relative to her/his work tasks, the place she/he returns after flight, the place she/he receives instructions to perform her/his duties as well as the place where the aircrafts park. The aircraft's nationality is not an indication though as there is no European or international document that equals the aircraft's space to the state whose nationality does have the airplane[49]. However, although the *"home base"* cannot be equalized to *"the habitual place of work"*, it can still provide important evidence for the abovementioned criteria. Given that the home base defines the place where the employee starts and

[46] Ibid, par. 21 and 66.
[47] Ibid, par. 55-56, 61, 63, 69.
[48] Ibid, par. 57-64.
[49] Ibid, par. 75.

finishes her/his day, has a on call duty and stays, it can lead to the finding of place of work, except for the case where another place has a closer connection to the employment relationship[50]. Consequently, the identification of place of work in the aviation sector shall be discovered in a case by case basis and cannot be agreed beforehand. Therefore, the CJEU's negative answer to the question if *"home base"* and *"habitual place of work"* are interchangeable terms, it could under circumstances, become positive. In Nogueira and Osacar's cases, based on the existent indication, it seems that rather Belgian Courts have jurisdiction to solve the cases as Charleroi, Belgium, which is the home base, has the closest connection to the labour relationship. However, in a case with different evidence, this is unsure. For instance, an Irish flight attendant whose base seat used to be in Dublin for many years and the last year of her work was based in Paris, is not out of question that French Courts would have jurisdiction. Therefore, the CJEU's ruling was right that the home base might not always be the crucial connecting factor.

3.3. The *"habitual place of work"* in previous case- law

It was not the first time that the CJEU had to deal with the concept of habitual place of work. It had become very clear since the early 90's that although in cases where an employee has one unique and stable place to perform her/his duties, the identification of the habitual place of work does not have significant problems, a bigger attention should be paid when the employee shares his working time in more than one member states.

In *Mulox/ Geels* case (C-125/92), Geels had undertaken the task to promote products of the English company Mulox all over Europe. He constantly traveled to perform the same work but used to return in Aix les Bains in France after each trip where his job office was situated. The ECJ first ruled that an autonomous criteria of interpretation are needed in order to approach the correct jurisdictional base[51]. The CJEU ruled that competent are the courts of *"the main place of work"*, namely *"the place for where or from where the employees perform their main obligations*[52] *towards the employer"*. In *Ruten/Cross* case (C-383-95), the CJEU added that a mobile employee might not have a usual place of work, however he might have a

[50] Ibid, par. 63-64, 67-69.

[51] Case C-125/92 Mulox IBC Ltd v Hendrick Geels, ECLI:EU:C:1993:306, par. 10.

[52] Ibid, par. 21, 23-24.

main place of work[53]. Therefore, the place where the employee has created to settle his centre of interests, the place where he has an office, the place where he returns after a business trip is the place where he performs his main obligations towards the employer and represents his habitual place of work[54].

However, the abovementioned qualitative criteria of space and importance of the work performed might not always be adequate. In *Weber* case (C-37/00), a chef worked on an oil tanker platform in more than one country; nevertheless, the most of his work time was spent in the Holland's continental shelf. In the absence of qualitative criteria, the duration of the work spent on a specific place may be of crucial importance in order to identify to habitual place of work[55].

In cases deriving from transportation field, as in *Koelsch* (C-29/10) and *Voogsgeerd* (C-384/10), the CJEU made certain findings on the concept of habitual place of work under the aspect of article 6 of Rome I Convention[56]. In *Koelsch* case, a vehicle driver was engaged by a company domiciled in Denmark as an international driver in order to transport flowers and plants. Although he traveled throughout Europe, his main transportation trips were in Germany using lorries stationed in Germany. In *Voogsgeerd,* an engineer was engaged by a maritime company situated in Luxembourg, whose ships navigated to the North Sea, claiming that Antwerp in Belgium was the place where he always boarded and from where he received the instructions for each of his missions. The CJEU stated that multiple criteria should be in hierarchy in order to identify the applicable law in individual labour disputes. Given the principle of employee's protection as a weaker party, a broad interpretation of the habitual place of work is required. Only when the identification of a habitual place of work is impossible, the employee may sue his employer in the place where he was hired and the employer's business is situated. In addition, the CJEU repeated the effectiveness of qualitative criteria as for the place where or from where performs his main work duties, as well as the supplementary assistance of quantitative criteria.

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[53] Case C-383/95 Petrus Wilhelmus Rutten v Cross Medical Ltd, ECLI:EU:C:1997:7, par. 32, 33, 35.

[54] Ibid, par. 24, 27.

[55] Case C-37/00 Herbert Weber v Universal Ogden Services Ltd, ECLI:EU:C:2002:122, par. 39 al, 51 al.

[56] According to article 6 (2) (a) of Rome Convention: *"a contract of employment shall, in the absence of choice in accordance with Article 3, be governed by the law of the country in which the employee habitually carries out his work in performance of the contract, even if he is temporarily employed in another country"*.

Given however the specialty of transportation employees, important indications concerning the previous place may provide the place where the employee performs the relative to his transport tasks, the place where he receives instructions, the place where he organizes his work and the place where the instruments to execute his work, the place where the goods are unloaded and the place where the employee returns after finishing his work tasks[57].

Therefore, the CJEU enforced a system of qualitative and quantitative criteria in order to identify the habitual place of work.

3.4. Consequences arising from the CJEU's ruling – its legal impact

The CJEU's ruling on these cases has a significant importance to international labour case law in cross border situations. It is the first case where CJEU deals with aviation employees that carry out their work in more than one member states. The current case is part of EU case- law regarding employees of cross- border transportation field, assimilating their legislative protection status, since the CJEU interprets uniformly the jurisdictional base of the habitual place of work of employees in all means of transport (aviation, maritime, land) not only in terms of applicable law but also in terms of international jurisdiction. As a consequence, it could be said that the ECJ enforces the equality principle, as established in Article 21 of Charter of Fundamental Rights of the European Union[58].

Furthermore, the CJEU had the chance to make some important statements both about its methodological tools and about the substantive issues themselves. Regarding this last point, the CJEU pointed out that is going to use the method of autonomous interpretation. The concept of autonomous interpretation is not unknown in EU case law (and especially EU labour case law), as CJEU has already autonomously interpreted the meaning of an *"employee"* (article 45 TFEU) and of *"establishment"* (Directive 2002/2014). Following this kind of interpretation, EU Courts ensure that they enforce the laws according to the principle of equal treatment of all natural and legal persons in the EU[59], providing also legal certainty.

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[57] Case C-29/10 Heiko Koelzsch v 'Etat du Grand-Dutche' de Luxemburg, ECLI:EU:C:2011:151, par. 44-49; Case C-384/10 Jan Voogsgeerd v Navimer SA, ECLI:EU:C:2011:842, par. 33-40.

[58] Temming, Ibid, p. 4.

[59] Zerdelis, *Interpretational Issues of European Labour Law*, Summary of Labour Law, VoI. 77, No. 2 (1792), Feb 2018, p. 130.

Concerning the core issues of the ruling request, CJEU materialises the principle of employee's protection as described in recital 13 of Brussels I Regulation. Ruling that contractual agreements about exclusive jurisdiction of certain courts for disputes arising from the employment relationship are not permitted, as the one that Ryanair had included in the relative contracts, it is of utmost importance for the interests of the employees. It will surely affect future disputes regarding contracts that entail similar provisions. Besides, the fact that Brussels I Regulation has now been replaced by Brussels Ia Regulation is of limited importance as Article 23 of Brussels Ia Regulation is identical to Article 21 of Brussels I Regulation.

Moreover, exploring the concept of the *"place where the employee habitually carries out his work"*, the CJEU shows that in cross border situations, the answer will be found in a case by case basis. The term described in Article 19 (2) (a) has a general and abstract content and it is a judicial duty to find the right jurisdiction in cases of cross border performance of work, as in the field of aviation profession, which have the special characteristic that perform the same work in multiple countries. In addition to this, the CJEU interpreted the place where the employee habitually carries out his work broadly, considering as critical the place for the place where or from where he habitually performs his main work duties. It should also be taken into account criteria as where he received instructions by his employer, where he organized his work and where were the means of his work. The home base defined by the employer might be an important indication but not the solely decisive factor. Besides, the ruling of the CJEU is not of limited importance even after the enforcement of Brussels Ia Regulation, as the latter Regulation explicitly provides that an employer may be sued in the courts for the place where or from where the employee habitually carries out his work or in the courts for the last place where he did so [Article 21 (1) (b)]. Given the interpretational continuity between the two legislative documents, the CJEU's ruling and the interpretational criteria which provides so as to establish the habitual place of work, may be used in future cases.

Last but not least, the broad interpretation of the habitual place of work is judged as of high importance for the interests of the employees. The CJEU used methodological tools in order to establish the jurisdiction of the Courts of the employee's habitual place of work instead of applying directly Article 19 (2) (b).

These two jurisdictional bases may be used alternatively and concurrently[60].The latter provision is identical to Article 21 (1) (b) (ii) of Brussels Ia Regulation, as analysed in page 8 of the current paper. The CJEU could use this article in order to define the suitable jurisdiction. Its methodological effort to identify, using suitable indications, the place where the employee habitually works, even in cases where this place if not unique, shows the Court's tendency to undermine the jurisdictional base of Article 19 (2) (b) of Brussels I Regulation[61]. Therefore, the employees enjoy greater protection as they avoid suing their employer to the courts of the state where he is situated, where the employer might prefer as it would be the closest and the cheapest option for him.

Moreover, the choice of jurisdictional base of place of habitual work instead of the place where the employer is situated may lead to the appliance of a different substantive law, according to Article 8 (1) and (2) of Rome I Regulation[62]: Therefore, if the applicable law is the law of the place of habitual work and this is a more employee- friendly law, the employer would be unable to enforce contractual terms so as to deprive his employees from their forum. In any case, given that Article 8 of Rome I Regulation entails almost identical provisions, interpretational assistance may be derived from the latter and its case- law as the ECJ itself adopts the principle of interpretational continuity between those legislative documents with the purpose of uniformity in EU[63].

4. More issues on international jurisdiction

4.1. When the employee works in third countries

A question arises when an employee does not work in any Member State but in third countries. It is reasonably supported that the application of Article 21 of Brussela Ia Regulation presupposes that the individual employment contract in which

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[60] Nikas / Sahpekidou, Ibid, p. 324.

[61] Temming, Ibid, p. 3-4.

[62] The latter article states that: *"1. An individual employment contract shall be governed by the law chosen by the parties in accordance with Article 3. Such a choice of law may not, however, have the result of depriving the employee of the protection afforded to him by provisions that cannot be derogated from by agreement under the law that, in the absence of choice, would have been applicable pursuant to paragraphs 2, 3 and 4 of this Article".* For the provisions of Article 8 (2) see supra n. 25.

[63] Temming, Ibid, p. 7.

the employee performs his professional activities may be linked to the territory of at least one Member State. Thus, on the one hand, the application of Article 21 does not seem to be possible when the employment contract is carried out entirely outside the territory of the Member States since the employee carries out all the activities in third countries. On the other hand, when work is provided not entirely but occasionally in third countries, this extra-Community work should not be taken into account at all, since otherwise the application of Article 21 would be significantly reduced. If, therefore, the employee provides his work not only in a third State but also within the Member States of the Community, the worker's action can be brought in one of the courts of the Member States. In order to determine this court in particular, account should be taken of the above local, quality and time criteria, to find out where in EU the work is usually provided. The court of that State will then have joint jurisdiction to hear all disputes arising from the employment contract. However, if it is found that these criteria are not met, the alternative jurisdiction under Article 21 (1) (b) (ii) will apply and the employer will be sued either in the place of his domicile or at the place of establishment of his business[64].

4.2. Posting of workers (Directive 96/71/EC)

With respect to workers temporarily posted to carry out work in order to provide services in another Member State than the one in which they habitually carry out their work, Directive 96/71/EC of the European Parliament and of the Council (4) establishes a core set of clearly defined terms and conditions of employment which are required to be complied with by the service provider in the Member State to which the posting takes place to ensure the minimum protection of the posted workers concerned[65]. Especially, Article 6 of the Directive provides for the possibility of appealing to the courts of the Member State where the worker is or was posted. Despite of being argued that this modern form of work should be subject to Article 20 et seq. Brussels Ia Regulation, if the other necessary conditions are met, the rules of jurisdiction in Articles 19 and 20 apply without prejudice to the rule laid down by 96/71/EC[66]. In spite of claiming precedence over the Rules of Procedure, because of

[64] Pipsou, Ibid, p. 493 – 494.

[65] Explanatory Memorandum of DIRECTIVE 2014/67/EU OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 15 May 2014 on the enforcement of Directive 96/71/EC, recital (3).

[66] Proposal for a Council Regulation (EC) on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters /* COM/99/0348 final - CNS 99/0154 */, p. 19.

Article 67 of the aforementioned Regulation, the directive does not, in essence, sideline the Regulation, but merely complements it[67]. However, this interpretation cannot lead to any deterioration of the position of the weaker party, meaning that Article 21 (1) (b) (ii) cannot be applied, thus, the jurisdiction of the place of establishment of the employer's business cannot be established whenever the worker is posted for a short period to an undertaking established in another Member State. Otherwise, the employer would ensure that the employee would be sued at the place of establishment of his undertaking by removing him abroad once or twice a year[68].

5. Conclusion

The evolution of legislative documents concerning jurisdiction, recognition and enforcement of judgments in civil and commercial matters, namely from Brussels Convention to Brussels I Regulation and the current Brussels Ia Regulation, had led to the gradual enhanced protection of employees working in EU in cross- border situations. The latter Regulations, in contrast with Brussels Convention, entail explicit provisions regarding jurisdiction in disputes from individual labour contracts. These provisions (Articles 20 to 23 of Brussels Ia Regulation which replace articles 18 to 21 of Brussels I Regulation) are subject to a protection spirit towards the employees considering them as the weaker party in an employment relationship. The Directive 96/71/EC also entails important jurisdictional provisions.

However, not only the legislation but also the EU case law provides significant insights of the jurisdictional bases that may be used in an international labour law dispute. The concept of the *"habitual place of work"* is vastly explored by the CJEU, as derived from the recent judgments of C-168 and C-169/16, giving the chance even to mobile employees in transportation field to take advantage of it.

Finally, welcomed is also the principle of continuity that the CJEU applies when interpreting legislative provisions in individual labour disputes as well as the connection of interpretation between legislation on jurisdiction (Brussels Regulations) and legislation on applicable law (Rome Convention and Regulation), for the purpose of establishing uniformity within the EU.

[67] Nikas / Sahpekidou, Ibid, p. 317 – 320.
[68] Pipsou, Ibid, p. 495.