

Summary of the doctoral dissertation

Marzeny Madrak

entitled:

Mechanisms of employee protection in a cross-border employment relationship

The freedoms of the European Union's single market, including the free movement of services and labour, give citizens the right and the opportunity to benefit from various forms of mobility, which, in effect, lead to cross-border employment relationships.

The existence of legal relationships demonstrating a connection with the law of different countries of the European Union makes it necessary to search for ways of determining the law applicable to a given legal relationship. The lack of uniformity of the substantive labour law of the Member States makes it necessary to resolve conflicts of laws in space, which requires the application of conflict of law rules. The need for uniform conflict of law rules is to eliminate the state of legal uncertainty between the parties. The application of each country's separate conflict of law rules, depending on which country the dispute would take place in, could lead to divergent results in determining the applicable law.

Divergent interests of the parties may give rise to conflicts, the resolution of which requires the intervention of the court. The resolution of conflicts of laws is a necessary element in the adjudication of litigation concerning claims arising out of transnational employment relationships. Bringing a cross-border case before a court requires determining the country whose courts have jurisdiction to decide the case. The need for uniform rules to determine the jurisdiction of the courts arose because of differences between national rules on jurisdiction and the recognition of judgments, which impeded the proper functioning of the internal market. The different provisions on the jurisdiction in the various Member States created the risk that courts in different States would be considered competent to decide the same dispute, which could result in divergent judgments.

In both of these areas indicated, there is a need to strengthen the protection of the employee as a vulnerable party to the legal relationship. Mechanisms for the protection of the employee in the context of determining the law applicable to a contract are adopted in

Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (OJ. [2008] L 177/6 (Rome I)) and, with regard to jurisdiction, in Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters - Recast version (OJ. 20.12.2012, L 351 (Brussels I bis)). In terms of applicable law, they aim to protect the employee from the consequences of a choice of law that is unfavourable to him, as well as to adopt more favourable rules than the general rules for determining the applicable law in the absence of choice. In the context of jurisdiction, the protection mechanisms adopted serve to increase the employee's chances of taking his or her claims against the employer to a court in a convenient location for the employee. At the same time, the conflict-of-law connecting factors adopted in the Rome I Regulation are the counterparts of the grounds of the jurisdiction of the courts set out in the Brussels I bis Regulation, which is intended to ensure the consistency of the solutions adopted in both areas expressed in the possibility of the court to apply its own law as applicable to the contract.

The effectiveness of the solutions to protect the employee in a cross-border employment relationship in the two areas indicated above is verified at the national level in the context of judicial redress. Procedural law is the domain of the Member States which adopt different, sometimes clearly divergent solutions. The rules of civil procedure in force in the individual Member States may contain solutions that make it easier for employees to pursue claims against their employers, e.g. in terms of exemption from court costs associated with bringing a case before a court, broadening the circle of persons who can represent the employee before a court or by the court giving appropriate instructions. The precise definition of the claims in a lawsuit is of fundamental importance for future settlement since, according to the procedural principle prevailing in the Member States, the subject matter of the dispute is determined by the scope of the demands made by the claimant. The general procedural models adopted in the Member States as well as the specific conditions for redress, have a significant impact on an employee's ability to obtain the protection to which he or she is entitled in a cross-border employment relationship.

The aim of the research is to undertake a comprehensive analysis of the mechanisms protecting the employee in terms of determining the law applicable to an employment relationship with a cross-border element and in terms of jurisdiction, and, moreover, to assess the effectiveness of these mechanisms in the practice of judicial redress.

In particular, the research aims to enable the following questions to be answered: How should the concept of an "individual employment contract" be interpreted in the context of determining the applicable law and in the context of applying the material norms of the law governing the contract? Does the possibility of making an implicit choice of law for an individual employment contract satisfy the requirement of foreseeability of working conditions? Is the mechanism for controlling the effects of the choice of law sufficient to ensure effective protection for employees? Are the connecting factors contained in the conflict of laws rules clear enough that the parties to the employment relationship can easily determine which country's law is applicable to the contract in the absence of a choice of law? Do the grounds of the jurisdiction of the courts with jurisdiction to resolve a dispute arising from a cross-border employment relationship reliably identify the competent courts, and does it eliminate the risk that cases will be brought before the wrong courts? How do the national legal and procedural solutions ensure the protection of the employee as the weaker party to the contract? Can the court resolving the dispute grant the employee more far-reaching protection than the scope of their claims if such protection arises under the applicable law?

This dissertation consists of seven chapters, preceded by an introduction and finalized by a discussion of the research results, an indication of conclusions and proposals for *de lege ferenda* changes.

Chapter I deals with general issues related to the determination of applicable law. Of importance in this respect is the presentation of the process of unification of the rules of determining the applicable law in civil and commercial matters, completed with the adoption of the Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (hereinafter referred to as Rome I) OJ [2008] L 177/6, which is of fundamental importance for resolving the conflict of laws in space and at the same time for determining the rules of protection of an employee in a cross-border employment relationship. The applicability of the conflict rules contained in Rome I is determined by its material, geographical and temporal scope, which will be further discussed in the first chapter. It will also be explained how to interpret the concept of "individual employment contract" in the context of determining the applicable law in accordance with the rules adopted in the Rome I Regulation. The first chapter furthermore includes a presentation of the principle of party autonomy and the principle of protection of the weaker party to the contract and their interaction. The final part of the chapter will discuss the notion of the 'law

applicable to the contract' of relevance for further considerations concerning the resolution of conflicts of laws.

The second chapter will discuss the whole range of issues that make up the choice of law applicable to a cross-border employment relationship. In this respect, the scope of the choice of law made by the parties, the manner in which the choice of law is externalised, and the time within which the choice can be made, as well as the question of the existence and validity of the choice of law is of importance. The scope of the applicable law will also be discussed, which is important to distinguish between matters subject to the national law of the Member States and matters subject to autonomous interpretation, independent of domestic law. Particular attention should be paid to the issue of limiting the effect of the choice of law in relation to an individual employment contract because of the need to protect the employee as the weaker party to the contract, which is one of the fundamental mechanisms for the protection of the employee in the context of determining the applicable law.

Consideration of the rules for determining the applicable law also requires a discussion of the conflict-of-law rules applicable where the parties have not made a choice of applicable law, which is the subject of Chapter Three. It will discuss the impact of the principle of protection of the employee as the weaker party to the contract on the construction of the conflict of law rules, followed by a discussion of the objective connecting factors provided for in Articles 8 (2), (3), (4) of the Rome I Regulation and the order adopted for their application. The research carried out will allow an assessment of the solutions adopted in the light of the European legislator's objective of ensuring certainty as to the applicable law and providing the weaker party to the contract with adequate protection. The fourth chapter discusses limitations on the application of the law applicable to the contract on the grounds of overriding public interest. It will focus on the rules that apply to the legal relationship irrespective of which national law governs the contract and whether this has been determined on the basis of a choice made by the parties or through the application of objective connecting factors. The considerations in this chapter will cover the mandatory rules applicable under both the Rome I Regulation and Directive 96/71/EC, as well as the public policy clause.

The next chapter presents issues concerning the determination of jurisdiction. The discussion of the mechanisms for the protection of the employee with regard to the determination of the jurisdiction of the courts will be preceded by a presentation of the process of unification of the rules of jurisdiction in civil and commercial matters, which led to the adoption of the Brussels I bis Regulation. The process of the development of the rules on the

determination of jurisdiction for an individual employment contract will also be discussed, which is important for a correct understanding of the rules as they currently stand. The scope of application of the Brussels I bis Regulation will then be presented. The discussion of the solutions protecting the employee as the weaker party to the contract is of particular importance for examining the employee's protection in the context of jurisdiction. In this respect, the grounds of jurisdiction in employee and employer actions, the limitations on the possibility of concluding a jurisdictional agreement and the specific requirements for establishing jurisdiction by the entry of an appearance by an employee defendant will be discussed. In addition, the specific basis for establishing jurisdiction for the assertion of claims arising from rights granted to posted workers in the host state will be discussed.

The sixth chapter will discuss the interdependence of jurisdiction and applicable law in typical cross-border employment relationships. The starting point for the considerations in this section is the identification of typical cross-border situations, which form the basis for the analysis of the interplay between the rules on applicable law and jurisdiction. These include the permanent provision of work on the territory of more than one country, the provision of work in a foreign branch of an employer and posting for work in another Member State under the freedom to provide services. The considerations on the model cross-border situations required a prior comprehensive discussion of the mechanisms for the protection of the employee in the context of determining the applicable law and jurisdiction in the preceding chapters of the work for the sake of consistency. The purpose of this discussion is to illustrate how the employee's choice of one of the available grounds of jurisdiction translates into the court's ability to apply its own law in the context of the European legislator's objective of consistency in these two areas.

The last chapter deals with the specificities of the judicial enforcement of employment claims. It examines the procedural rules adopted in selected Member States in two areas. The first includes the procedural measures that facilitate the employee's claim against the employer, which may be an important factor in bringing a case before a court in a particular country in the context of alternative grounds of jurisdiction. The second area covers the question of the scope of permissible court's activity towards the parties. Of particular importance in this respect is the answer to questions of whether the court may adjudicate beyond the scope of the claim made and whether it may instruct the parties on further claims. This will make it possible to demonstrate how the procedural law of the court affects the application of the conflict of laws

employee protection mechanisms in the realities of litigation, in light of the generally accepted principle that the court is bound by the scope of the claim.

The research and conclusions of the study will make it possible to assess the effectiveness of the mechanisms for protecting the employee in a cross-border employment relationship, both in the context of determining the applicable law and jurisdiction, in the light of the specifics of the litigation, and to formulate *de lege ferenda* conclusions.

Gdańsk, 1st September 2023 r.